

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THETA PRODUCTS, INC.
d/b/a SPRAGUE INDUSTRIES,
Plaintiff

v.

C.A. No. 98-600ML

ZIPPO MANUFACTURING
COMPANY,
Defendant

MEMORANDUM AND DECISION

This case is before the Court on defendant's motion for summary judgment and on plaintiff's motion to amend its complaint. For the reasons stated herein, the Court partially grants defendant's motion for summary judgment and denies plaintiff's motion to amend its complaint.

I. Standard of Review

This Court properly grants a motion for summary judgment only if the pleadings, depositions, affidavits, and other evidence on record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Nat'l Amusements, Inc. v. Dedham, 43 F.3d 731, 735 (1st Cir. 1995). An issue is considered "genuine" if the relevant evidence, when taken in the light most favorable to the non-moving party, is "sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." Nat'l Amusements, 43 F.3d at 735; see Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 248 (1986). A fact is material if it “might affect the outcome of the suit under the governing law.” Anderson, 477 U.S. at 248. If the non-movant fails to demonstrate that a genuine issue exists with respect to some element of a claim on which it bears the burden of proof at trial, the Court will grant summary judgment. See Celotex Corp. v. Cartrett, 477 U.S. 317, 322-23 (1986).

II. Facts and Travel

Plaintiff Theta Products, Inc. (“Theta”), a Rhode Island corporation, manufactures a line of specialty advertizing products through its JADCO division. Defendant Zippo Manufacturing Company (“Zippo”) is a Pennsylvania corporation. In 1997, Theta’s president, Robert Terino, and Zippo’s vice president, James Baldo, discussed Zippo’s purchase of JADCO products. By November or December 1997 the discussions intensified as Zippo expressed its interest in becoming the exclusive distributor of the JADCO line. Michael Schuler, Zippo’s president, entered the negotiations at that point.

In a three-way conversation on December 26, Terino, Schuler, and Baldo worked out the preliminary terms of the proposed distributorship agreement. The conversation occurred the day after Christmas because, according to Terino, “if they [Zippo] were going to take over the company, the main trade show is in the third week of January So, if we were going to go forward with this, a lot of work would have had to be done.” Terino memorialized details of the conversation in a letter dated December 26. The letter, which was styled as a “preliminary outline” of the agreement, indicated that Zippo would be the exclusive distributor of JADCO products for a guarantee of \$2 million in sales annually for three years. During the third week of

January the parties clarified the quantity term, agreeing to \$6 million in sales cumulative over three years with a 15% guarantee for any shortfall. Terino agreed with Schuler's suggestion to put the terms in writing, and Zippo's attorney drafted the agreement.

Zippo sent Theta the first draft of the agreement on January 23, 1998. The document named Zippo the exclusive, world-wide distributor of JADCO products. It called for a three-year deal with Zippo agreeing to distribute \$2 million in JADCO products each year. Exhibit A of the contract, Theta's 1997 catalogue, identified all the JADCO products which could be subject to the distribution agreement. The purchase prices for the products would be set forth in Exhibit B, which was not attached. The first draft left a blank space for the "entered into" date of the agreement.

A second draft, prepared by Theta's attorney and dated February 3, 1998, included an expanded confidentiality section to protect Theta's customer list as proprietary information. The third draft, dated February 13, contained minor modifications.

Zippo prepared a proposed fourth draft of the agreement on March 6. This iteration altered the total sales amount of the contract; rather than requiring \$2 million in sales each year, the draft contract called for \$6 million in sales cumulative over three years, with a 15% guarantee for any shortfall – as the parties had discussed in January. The unsigned draft still had a blank "entered into" date and no Exhibit B setting the prices for JADCO products.

Although Exhibit A had been attached to all of the contract drafts, the parties had not identified specific JADCO products during the contract negotiations. It appears that during an early March meeting at Theta's offices, Zippo representatives selected approximately one hundred items from the catalogue for Theta to manufacture under the Zippo name. On March 18,

1998, Theta sent Zippo a price list for those products, but Zippo never responded to the price quotations at that time or at any point during later negotiations.

In March and April, Zippo and Theta employees communicated information by fax regarding preparations for the anticipated working relationship. A March 18, 1998, fax from Zippo discussed the conversion plan, and indicated Zippo's staff could not "give any direction until pricing is received and contract is approved." One section of this fax referred to an upcoming trade show in Atlantic City, where Zippo "would like to have [Theta employees] be with us Zippo will share expenses. All based on signed contract." Another fax sent by Zippo on April 2, 1998, discussed "the proposed plan of attack once the contract is signed and before Zippo begins the start up process."

In May 1998, Terino, Baldo and Schuler engaged in another three-way conversation. Terino expressed concern about one of the terms of the agreement, as well as the delay in signing the written contract. In his deposition, Terino admitted, "[T]his [term] was never discussed, nor would I have ever agreed to proceed and do the things I did, had this been discussed. . . . It was agreed on the phone that my terms . . . would happen, and the deal would continue to go on as we had discussed. In fact, the words were used by Jim Baldo, 'Don't worry, Bob [Terino], this is a done deal.'" At some point in June, however, Zippo informed Theta it had decided not to pursue the proposed distributorship agreement. The parties never executed a formal, written contract.

Zippo had placed several thousand dollars worth of orders in May 1998; Theta manufactured and shipped goods worth \$50,147.30 between June 10 and July 3. Duplicate copies of Theta invoices suggest that Zippo paid only \$30,552.00 and owes \$19,595.30. Schuler claims that Zippo paid in full.

On December 17, 1998, Theta filed a complaint sounding in six counts related to the \$6 million agreement. Count I alleged breach of contract partially performed; Count II anticipatory breach; Count III fraud in the inducement; Count IV reliance; Count V punitive damages; and Count VI “services rendered.” In lieu of an answer, Zippo filed a 12(b)(6) motion which was denied by this Court in a Memorandum and Order dated July 28, 1999. Thereafter, Zippo filed this motion for summary judgment. Subsequent to the filing of the motion for summary judgment, Theta moved to amend its complaint to add new factual averments and a count for equitable estoppel.

III. Choice of Law

It is axiomatic that this Court applies state substantive law when sitting pursuant to federal diversity jurisdiction. See 28 U.S.C. § 1332 (1994); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Crellin Techs., Inc. v. Equipmentlease Corp., 18 F.3d 1, 4 (1st Cir. 1994). The Court employs the choice-of-law principles of the forum state when the parties involved in the dispute express no preference to be governed by a particular state’s laws. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 491 (1941); Crellin, 18 F.3d at 4; Roy v. Star Chopper Co., 584 F.2d 1124, 1128 (1st Cir. 1978); see also R.I. Gen. Laws § 6A-1-105(1) (1992). In this action, the Court applies Rhode Island choice-of-law principles to determine if Pennsylvania or Rhode Island substantive law will control.

Rhode Island uses an interest-weighting approach to reconcile both contract and tort conflicts of law. See Gordon v. Clifford Metal Sales Co., 602 A.2d 535, 538-39 (R.I. 1992); Pardy v. Blvd. Billiard Club, 518 A.2d 1349, 1351 (R.I. 1986); Woodward v. Stewart, 243 A.2d

917, 923 (R.I. 1968); see also A.C. Beals Co. v. R.I. Hospital, 292 A.2d 865, 870-71 (R.I. 1972) (analyzing a contract conflict-of-law dispute using both loci contract and interest-weighting principles). In this case, the controlling law from both states is substantially similar, and the parties do not argue the choice-of-law issue. Consequently, because Rhode Island is the forum state and significant activity related to the dispute occurred in this state, the Court will apply Rhode Island's substantive law.

IV. Discussion

A. Counts I and II: Statute of Frauds

Count I of plaintiff's complaint alleges that Zippo breached a \$6 million contract for the sale and exclusive distributorship of its products; Count II is an action for anticipatory breach. The Court must first determine whether the parties have entered into a contractual arrangement before addressing either of Theta's breach claims.

All commercial transactions in Rhode Island, including the disputed contract for the sale of goods between Theta and Zippo, fall under the ambit of the U.C.C. See R.I. Gen. Laws § 6A-1-101 et seq. (adopting the language and numbering system of the U.C.C.). To be enforceable, the parties' agreement must conform to the statute of frauds for the sale of goods, evidencing "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." Id. § 6A-2-201(1). In this case, the defendant Zippo has not signed any written instrument confirming the contract, nor have the parties exchanged a confirmatory memorandum sufficient to give rise to a contractual arrangement. See id. § 6A-2-201(2) (reciting merchants' confirmatory memorandum rule).

The U.C.C., however, does list several exceptions to the general rule that a contract for the sale of goods must be in writing to be enforceable:

A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable,

- (a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that they goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
- (b) If the party against whom enforcement is sought admits in his or her pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
- (c) With respect to goods for which payment has been made and accepted or which have been received and accepted.

Id. § 6A-2-201(3). Plaintiff's initial burden when claiming any of these exceptions to the signed writing requirement is to establish that the oral agreement in question is "valid in other respects." Under the U.C.C., a contract is validly formed only if it conforms to the terms of section 2-204, which states: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." Id. § 6A-2-204(3)¹ (emphasis added). A party's assent to the terms of a contract must be shown objectively for the Court to find the requisite intent.

See Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 634 (R.I. 1998); UXB Sand

¹In its brief supporting the motion for summary judgment, Zippo claims that the absence of Exhibit B renders the agreement unenforceable because any damage calculation would be too speculative. See R.I. Gen. Laws § 6A-2-204(3). This Court disagrees, finding that the total price term of \$6 million and the guarantee of 15% lend enough certainty to the agreement's terms to tender a damage award, even without specific prices for particular products. See id. § 6A-2-201 cmt. 1.

& Gravel, Inc. v. Rosenfeld Concrete Corp., 641 A.2d 75, 79 (R.I. 1994); Smith v. Boyd, 553 A.2d 131, 133 (R.I. 1989).

Generally, parties' contemplation of a written memorialization of their agreement creates a strong presumption that they have no intent to be bound by their oral discussions. See Gel Sys. Inc. v. Hyundai Eng'g & Constr. Co., 902 F.2d 1024, 1027 (1st Cir. 1990); see also Heyman v. Adeak Realty Co., 228 A.2d 578, 581 (R.I. 1967) ("When a law has been enacted for the purpose of protection against the assertion of unfounded claims, it should be so construed as to effect the object of enactment.") (quoting Egan v. Pac. Southwest Trust & Sav. Bank, 267 P. 719). Ongoing negotiations and the exchange of drafts revising the original terms also suggest that the parties have no intent to be bound. See Superior Boiler, 711 A.2d at 634; UXB, 641 A.2d at 79. This rule reflects the important policy that "parties to a contract be able to negotiate without fear that they will be bound by mere discussion." Smith, 553 A.2d at 134.

The record evidence reveals that Zippo had no intent to enter into a binding agreement until that agreement had been reduced to a writing and signed by the parties. Beginning with the negotiations in January 1998, Zippo expressed its desire to memorialize any agreement in writing. Thereafter, each draft adjusted the terms of the agreement. Terms continued to be altered through May 1998. Faxed documents from Zippo in March and April communicated the company's position to Theta by conditioning the discussed plans on the execution of a written contract. The only action Theta points to which it argues demonstrates Zippo's intent to be bound is the May 1998 conversation among Terino, Schuler, and Baldo, wherein Baldo uttered the phrase "this is a done deal." However, the circumstances leading to that conversation suggest that Theta's reliance on Baldo's statement was misplaced. Terino initiated the phone call out of

concern that the formal contract had not yet been signed. He also objected to one of the terms contained in the draft contract, and renegotiated it during the conversation. Terino's actions as Theta's representative show that the deal was still in the negotiation stage, and he knew that a formal, written document was necessary to finalize it. A statement by Baldo assuring Terino that all the details of the agreement had been worked out would not contrapose Zippo's manifest intention to memorialize the final terms in writing.

The undisputed facts, taken in the light most favorable to Theta, lead this Court to conclude that Zippo had no intent to be bound by the agreement until a written document was signed by the parties. Thus, the exceptions to the rule requiring a writing do not save Theta's claim for breach of contract. Therefore, Theta's claims for breach in Count I and for anticipatory breach in Count II are dismissed.

B. Counts I and VI: Partial Performance/Services Rendered

Count I of Theta's complaint also appears to assert a claim for partial performance in order to establish the existence a binding agreement between the parties. Although the U.C.C. permits parties to plead some common law causes of action,² partial performance of an agreement for the sale of goods is subsumed by section 2-201(3)(c). See id. § 6A-2-201 cmt. 2; 4 Caroline N. Brown, Corbin on Contracts § 21.6 (rev. ed. 1997) (noting section 2-201(3)(c) is a departure from the common law because it limits a contract's enforcement only so far as goods

²Under the U.C.C., "unless displaced by the particular provisions of title 6A, the principles of law and equity, including . . . estoppel, fraud, misrepresentation . . . or other validating or invalidating cause shall supplement [the statutory] provisions." R.I. Gen. Laws § 6A-1-103.

that have actually been delivered and accepted). Theta's attempt to circumvent the writing requirement and enforce an oral agreement between the parties fails. Thus, Theta's claim for partial performance in Count I is dismissed.

Theta may, however, press its Count VI claim for goods sold and delivered, pursuant to R.I. Gen. L. § 2-201(3)(c). Comment Two to section 2-201 directly addresses this issue:

“Partial performance” as a substitute for the required memorandum can validate the contract only for the goods which have been accepted for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing.

R.I. Gen. Laws § 2-201 cmt. 2 (emphasis added); see, e.g., Scott Brass, Inc. v. C & C Metal Prods. Corp., 473 F. Supp. 1124, 1130 (D.R.I. 1979). The remedy available to Theta as the seller is that “the buyer must pay at the contract rate for any goods accepted.” R.I. Gen. Laws § 6A-2-607(1).

Where, as here, the buyer admits it ordered and accepted goods, the Court must determine only whether those goods have been paid for. See J.L. Clark Mfg. Co. v. Gold Bond Pharm. Corp., 669 F. Supp. 40, 41 (D.R.I. 1987); Tim Hennigan Co. v. Anthony A. Nunes, Inc., 437 A.2d 1355, 1357-58 (R.I. 1981). Theta claims it supplied \$50,147.30 worth of goods but received only \$30,552.00 payment in return. Zippo's president stated in his deposition that his company had paid in full. Viewing the record in the light most favorable to the plaintiff, the Court finds that a genuine issue of material fact exists as to how much Zippo actually paid. The Court therefore denies Zippo's motion for summary judgment on Count VI of the complaint.

C. Counts III, IV and V: Reliance/Fraud in the Inducement

Count IV of Theta's complaint is a claim for reliance. At first blush it appears that such claim would be properly analyzed as a promissory estoppel claim. See generally East Prov. Credit Union v. Geremia, 239 A.2d 725 (R.I. 1968). However, Theta states in its brief opposing Zippo's motion for summary judgment that "Plaintiff's claim [for reliance] is for fraud in the inducement and not promissory estoppel." Theta has explicitly waived the promissory estoppel claim; thus, the Court treats only its fraud in the inducement claim.

Count III of Theta's complaint states a claim for fraud in the inducement, and Count V is a corresponding claim for punitive damages.³ Fraud in the inducement is a "misrepresentation as to the terms, quality or other aspects of a contractual relation, venture or other transaction that leads a person to agree to enter into the transaction with a false impression or understanding of the risks, duties or obligations she has undertaken." Bourdon's, Inc. v. Ecin Indus., Inc., 704 A.2d 747, 753 (quoting Black's Law Dictionary 661 (6th ed. 1990)). Other Rhode Island cases invoke a coordinate cause of action for fraudulent misrepresentation. See Travers v. Spidell, 682 A.2d 471, 472 (R.I. 1996); Halpert v. Rosenthal, 267 A.2d 730, 733 (R.I. 1970); East Prov. Loan Co. v. Ernest, 236 A.2d 639, 642 (R.I. 1968). Although fraud normally vitiates a contract, fraudulent misrepresentation allows a plaintiff to affirm the contract and recover for any injury caused. See Travers, 682 A.2d at 472; LaFazia v. Howe, 575 A.2d 182, 184 (R.I. 1990). To prevail on a fraudulent misrepresentation claim, a plaintiff must clearly prove that defendant

³In Rhode Island, punitive damages in contract actions are awarded in only the "most egregious circumstances," and require evidence of willfulness, recklessness or wickedness on the part of the defendant. O'Coin v. Woonsocket Inst. Trust Co., 535 A.2d 1263, 1266 (R.I. 1988); Allen v. Simmons, 533 A.2d 541, 543 (R.I. 1987).

knowingly made false statements which induced the plaintiff's justifiable reliance and caused its injury. See Travers, 682 A.2d at 472-73; St. Paul Fire & Marine Ins. Co. v. Russo Bros., Inc., 641 A.2d 1297, 1300 (R.I. 1994).

Here, in its response to the motion for summary judgment, Theta utterly failed to point to any statement made on behalf of Zippo that was knowingly false. Therefore, Theta's claim for fraud fails as a matter of law. The Court grants summary judgment to Zippo on Counts III, IV, and V of Theta's complaint.

D. Theta's Motion to Amend

Theta filed a motion to amend its complaint on May 23, 2000, more than seventeen months after filing its original complaint and after Zippo filed its motion for summary judgment. The proposed amendment purports to make minor factual changes as well as to add a new, contract-based claim for equitable estoppel.

The Court recognizes that liberal pleading rules require it to afford parties the opportunity to have new claims heard on the merits. See Foman v. Davis, 371 U.S. 178, 182 (1962); e.g., Fed. R. Civ. P. 15(a). The Court nevertheless retains the discretion to deny a motion to amend for reasons such as undue delay, dilatory motive, undue prejudice to the opposing party, or futility of the amendment. See Foman, 371 U.S. at 182; Glassman v. Computervision Corp., 90 F.3d 617, 622 (1st Cir. 1996); Grant v. News Group Boston, Inc., 55 F.3d 1, 5 (1st Cir. 1995); Resolution Trust Corp. v. Gold, 30 F.3d 251, 253 (1st Cir. 1994). Last-minute motions to amend filed after motions for summary judgment are not fatal, but "[when] considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has the burden

of showing some valid reason for his neglect and delay.” Stepanischen v. Merchant’s Despatch Trans. Corp., 722 F.2d 922, 933 (1st Cir. 1983) (internal quotation omitted); Grant, 55 F.3d at 6; see also Gold, 30 F.3d at 253 (finding that when a plaintiff files a motion to amend after a defendant files a motion for summary judgment, the plaintiff must justify its amendment by substantial and convincing evidence).

In this case, Theta has moved to amend its complaint seventeen months after initiating the action. During that seventeen-month period, the parties have crossed two significant procedural thresholds. First, the parties conducted discovery, and discovery closed in accordance with the Court’s pre-trial order. Second, Zippo prepared and filed its motion for summary judgment. Only thereafter did Theta seek leave to amend its complaint. In light of this procedural history, the Court denies Theta’s motion to amend as it is both untimely and prejudicial to Zippo’s efforts to defend against the claims presented in the original complaint within the time constraints set by the Court.

The Court also finds that Theta’s proposed amendments are substantively insufficient to warrant the granting of the motion. Theta attempts to justify an amendment to the facts section by claiming it obtained additional information regarding the preparation of the draft distribution agreements during the course of discovery. Theta, however, could have and should have known details about the documents early in the proceedings because, as Theta admits, its attorney had been involved in their drafting. The Court finds no justification for Theta’s dilatory attempt to supplement the factual averments in the complaint.

Finally, Theta’s attempt to amend its complaint to add a claim for equitable estoppel is futile. See Glassman, 90 F.3d at 623 (finding new claims futile if they fail to state a claim upon

which relief can be granted). On its face, the claim suffers from precisely the same deficiency that plagued Counts III, IV, and V of the original complaint. See discussion supra, Part IV.C. Because the Court finds that the proposed addition of an equitable estoppel theory of recovery would be futile, the motion to amend is denied on that ground as well.

V. Conclusion

For the reasons outlined herein, the Court grants defendant's motion on Counts I-V, denies the motion on Count VI and denies plaintiff's motion to amend its complaint.

SO ORDERED.

Mary M. Lisi
United States District Judge
August , 2000