U.S. Engine

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UNPUBLISHED

U.S. Engine, Inc. (USEI) appeals the summary judgment order dismissing its claim for breach of contract against Tom and Jane Doe Roberts, d/b/a Alpha Engine/Eugene Engine (Alpha). Alpha cross appeals arguing that the trial court abused its discretion by refusing to consider an overlength reply brief, excluding certain documents and expert testimony, and by granting USEI's motion for reconsideration, thereby permitting judgment to be entered against the Robertses individually. Finally, Alpha contends that the trial court erred when it granted USEI's motion for a directed verdict on Alpha's consumer protection act claim.

We conclude that summary judgment was proper. USEI failed to raise a genuine issue of material fact and the U.C.C. statute of frauds bars the claim because the writing requirement of RCW 62A.2-201 is not satisfied. Alpha fails to show prejudice respecting the trial court's refusal to consider Alpha's overlength reply brief on a motion it won. Accordingly, we do not consider this claim. Nor did the court abuse its discretion by excluding Alpha's expert testimony. The trial court correctly determined that the Robertses were individually liable. The directed verdict against Alpha's CPA claim was proper because Alpha failed to prove that USEI's warranty procedures were unfair or deceptive. We do not reach the claimed evidentiary errors concerning the exclusion of documents because those documents are not in the record. We affirm.

Alpha and USEI reached an oral agreement, the precise terms of which are in dispute, for Alpha to sell USEI's remanufactured engines in Oregon. In 2000, Alpha stopped using USEI as a supplier, citing engine quality concerns and USEI's failure to honor warranties.

USEI claims in this action that the parties had formed an oral agreement obligating Alpha to buy remanufactured engines exclusively from USEI. Specifically, USEI sued for breach of contract/course of dealing, tortious interference with economic relations, misrepresentation/fraud, and CPA violations. Alpha moved for partial summary judgment on the breach of contract and misrepresentation claims. The misrepresentation claim was dismissed. The breach of contract claim was dismissed on a second motion for partial summary judgment. USEI's motion for reconsideration on the breach of contract claim was denied.

The case went to trial on USEI's claim that there was an unpaid balance owed for engines already

delivered, tortious interference, and the CPA claim. Alpha claimed an offset for USEI's failure to honor its warranties and alleged those failures constituted a CPA violation. The court did not submit either CPA claim or USEI's tortious interference claim to the jury. The jury awarded USEI $52,579.69 for the engines already delivered to Alpha, with an offset of $1,791 for Alpha's warranty claims.

USEI appeals the summary judgment dismissal of its breach of contract claim. Alpha cross appeals.

BREACH OF CONTRACT

USEI contends that the trial court erred by dismissing its breach of contract claim. Specifically, it claims its oral agreement was not a contract for the sale of goods. Moreover, it claims that the exception from RCW 19.36.010 of contracts at will applies to this transaction. In the alternative, USEI argues that if the statute of frauds is applicable, the doctrines of judicial admissions, partial performance, or unjust enrichment excuse the lack of writing. We are not persuaded by these arguments, and hold that RCW 62A.2-201 bars the claim.

We may affirm an order granting summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[1] All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party.[2] We review questions of law de novo.[3] Applicability of U.C.C. Statute of Frauds

USEI argues that the writing requirement is not applicable because the agreement was not a contract for the sale of goods under RCW 62A.2-201. USEI also contends that the contract was capable of completion within one year and under RCW 19.36.010(1) no writing is necessary. We conclude that the agreement was primarily for the sale of goods, specifically engines. Thus, the writing requirement of RCW 62A.2-201 bars this claim.

USEI argued below that RCW 62A.2-201 was not applicable because it was not a contract for the sale of goods and because it was for an indefinite period of time under RCW 19.36.010(1). The issue was preserved for appeal.

Here, USEI first contends that the agreement is not subject to RCW 62A.2-201 because it is not a contract for the sale of goods. A 'contract for sale' is both a present sale of goods and a contract to sell goods at a future time.[4] A 'sale' is the passing of title from the seller to the buyer for a price.[5] 'Goods' are all things that are movable at the time of identification to the contract for sale.[6]

The predominant factors test announced in Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc.[7] states that if the sale of goods dominates an agreement, UCC Article 2 governs.[8] The proper classification of a contract under the predominant factors test is a factual question.[9]

USEI contends that the agreement did not involve the sale of goods but was merely a distributorship

agreement for quotas, sales territory, and volume discounts. This argument is not persuasive. USEI sold engines and Alpha bought them. Engines are goods as defined in RCW 62A.2-105(1). Even assuming, without deciding, that additional terms relating to sales territory, customer account transfers, and other matters were part of this agreement, the dominant aspect of the agreement was still the sale of goods.

USEI argues in the alternative that the individual sales invoices satisfy the writing requirement of RCW 62A.2-201. USEI cites Brem-Rock, Inc. v. Warnack[10] for this proposition. The portion of Brem-Rock cited by USEI was dicta, does not support the proposition advanced, and was rejected in French v. Sabey.[11] USEI fails to cite any authority supporting its argument that invoices are sufficient to satisfy the writing requirement for the sale of goods beyond the quantity of goods actually indicated on the invoice.

Alpha's citation to W.H. Barber Co. v. McNamara-Vivant Contracting Co., Inc.,[12] a Minnesota U.C.C. case, is instructive. In Barber, the court rejected the contractor's claim that individual invoices and price quotes established an underlying sales contract beyond those items specifically noted in the invoices.[13] However, we need not decide this point, there being no authority within this jurisdiction supporting either side. RCW 62A.2-201 is applicable and USEI fails to establish a genuine issue of material fact that the agreement was not for the sale of goods.

USEI next argues that the agreement is not subject to a writing requirement because it was for an indefinite period of time and capable of termination or completion within one year under RCW 19.36.010(1). Alpha does not address this argument. We conclude that RCW 62A.2-201 controls, not an exception to the more general statute of limitations.

The plain language of RCW 62A.2-201 indicates that the simultaneous or alternative application of RCW 9.36.010(1) is not permitted in this context. RCW 62A.2-201(1) begins with '{e}xcept as otherwise provided in this section ' and goes on to state that a contract for the sale of goods for more than $500 is not enforceable unless there is a writing sufficient to indicate that a contract has been made. There is no mention in that section that the one-year exception articulated in RCW 9.36.010(1) is applicable. Had the Legislature intended for that exception to apply, it would have stated as much. It did not.

Furthermore, a rule of statutory construction is that the terms of a specific statute control over those of a general statute if there is any conflict.[14] The more specific statute applicable to goods is RCW 62A.2-201. USEI cites no authority in which RCW 19.36.010(1) was applied to a sale of goods contract controlled by RCW 62A.2-201.[15] Accordingly, the more specific statute, RCW 62A.2-201, controls.[16]

Judicial Admissions Doctrine

USEI next argues that because Alpha admitted to the existence of an oral contract, no writing is required. We conclude that the judicial admissions doctrine does not assist USEI in its breach of

contract claim because it is applicable only to the quantity of goods admitted. Because quantity is not at issue here, the statute still bars the claim. The statute of frauds for goods states:

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

(b) if the party against whom enforcement is sought admits in his 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 [17]

Alpha admits that it had an oral agreement to sell USEI engines, but it did not admit that it was precluded from buying engines from other sources or that it was obligated to buy any particular quantity of engines from USEI. In short, there is no admission by Alpha of the existence of a quantity beyond those engines actually delivered and accepted. USEI cites no case on point to support its argument that admission of part of an agreement makes its own disputed version of the agreement fully enforceable. The judicial admissions doctrine is not applicable here.

Partial Performance

USEI next argues that the partial performance exception is applicable and that summary judgment was improper on this basis. We conclude that the partial performance provision of RCW 62A.2-201 does not support USEI's contention, and the common law of partial performance is inapplicable

' 'Partial performance' as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.'[18]

A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable (c) with respect to goods for which payment has been made and accepted or which have been received and accepted.[19]

Part performance cannot be used to establish terms upon which the parties never agreed.[20]

USEI attempts to use the doctrine of part performance to bind Alpha for goods not yet received or accepted, despite the clear language of the statute. USEI's reference to course of dealing and course of performance as support for this contention is without explanation or citation to authority or the record. We will not review an argument raised in passing or unsupported by authority or persuasive argument.[21]

USEI also argues that the common law partial performance exception applies. But USEI cites no authority for why the common law should be applied rather than the specific statutory provision concerning a contract for the sale of goods found at RCW 62A.2-201. The cases USEI does cite are

distinguishable because they either do not involve the sale of goods or they address only full performance and the writing requirement.[22]

Unjust Enrichment

Finally, USEI claims that by virtue of its partial performance it is entitled under unjust enrichment to recover for damages that proximately flow from Alpha's alleged breach of the oral agreement. This argument does not support USEI's contention that the statute of frauds is inapplicable.

Three elements must be established to sustain an unjust enrichment claim: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; (3) the acceptance or retention of the benefit under circumstances that make it inequitable for the defendant to retain the benefit without the payment of its value.[23]

Unjust enrichment is not used to determine damages for benefits not yet granted. This is precisely what USEI argues. But USEI points to no benefit that it granted to Alpha under its theory of partial performance for which it was not compensated by the trial court's judgment that Alpha pay on outstanding accounts for engines already delivered by USEI. USEI's argument that it conferred a benefit on Alpha through Alpha's profits from sales to USEI customers and 'pre-credit discounts' is misplaced because it presumes that those terms have been proved and are enforceable absent a writing. USEI did not plead quantum meruit or unjust enrichment in its complaint as independent grounds for recovery. At the same time, USEI is attempting to use its theory of unjust enrichment to argue the existence and enforceability of disputed terms. USEI cannot use the theory of unjust enrichment as an independent basis for enforcing an oral contract that violates the statute of frauds.

OVERLENGTH BRIEF

Without asserting any prejudice, Alpha contends that the trial court abused its discretion when it denied its motion to file an overlength brief and refused to consider the accompanying declarations and exhibits. Because Alpha won the motion and thus fails to demonstrate prejudice, we decline to review these arguments.

INDIVIDUAL LIABILITY

Alpha argues that the trial court abused its discretion in excluding corporate documents and in granting USEI's motion for reconsideration. Alpha also asserts the court improperly entered judgment against the Robertses individually. We disagree in all respects.

A trial court's ruling on a motion in limine or a motion for reconsideration is reviewed for an abuse of discretion.[24] The complaint names only Tom Roberts and Jane Doe Roberts d/b/a Alpha Engines/Eugene Engine. In Alpha's amended answer, there is no mention of a corporate defendant,

failure to join a necessary party, or an affirmative defense related to the existence of the corporation Alpha Tires, Inc. Alpha's argument that CR 8(c) does not require the pleading of the existence of the corporate form as an affirmative defense is not persuasive. CR 8(c) does require the pleading of the existence of fault by a nonparty, which is precisely what Alpha is arguing here. Alpha's focus on the mere existence of the corporation is in error. The more pertinent question is whether the corporation was involved in the interactions between USEI and Alpha and there is no evidence that Alpha Tires, Inc., rather than the Roberts d/b/a Alpha Engine or Eugene Engine, was the proper party defendant.

Alpha's counterclaims fail to name Alpha Tires, Inc. as the aggrieved party. In only one of Alpha's counterclaims is there a cryptic reference to 'defendant and/or corporations or entities of which defendants are authorized representatives ' The meaning of this is unclear and it does not put USEI on notice that it was dealing with a corporate, rather than individual defendants, as Alpha claims. Furthermore, Alpha's contention that USEI was on notice of the corporate status because it submitted one interrogatory regarding the possible existence of a corporation is not persuasive. Alpha objected to that interrogatory, noting only that '{t}o the extent that these documents still exist, they will be produced.' This does not support Alpha's argument that USEI was on notice that Alpha Tire, Inc. was the proper defendant to this action.

USEI is correct that this is not a corporate veil piercing or a discovery violation issue because Alpha fails to prove that the corporation was in any way involved in the instant transaction with USEI. Roberts testified that there was nothing on any of the invoices, checks, or other Alpha documents exchanged with USEI to show that Alpha Tires, Inc., as opposed to Roberts d/b/a Alpha Engine, was contracting with USEI. Roberts also conceded that he would not dispute USEI's assertion that the credit application he completed for USEI was in the name of Roberts and his wife, and not in a corporate name. Roberts did not move to dismiss himself as an individual or substitute Alpha Tires, Inc. until trial.

The trial court did not abuse its discretion in granting USEI's motion for reconsideration and finding the Robertses individually liable.

We do not reach Alpha's claim that the trial court erroneously excluded corporate documents A10360 to A10377 because those documents are not in the record before us.[25]

CONSUMER PROTECTION ACT CLAIM

Alpha argues that the trial court erred when it granted USEI's motion for a directed verdict on its CPA claim. Alpha also argues that certain evidentiary rulings relating to the CPA claim were in error. We conclude that the directed verdict was proper, and that Alpha did not perfect the record for appellate review of the evidentiary challenges.

A directed verdict is appropriate if, when viewing the material evidence most favorable to the

nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.[26] Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise.'[27]

To establish a claim under the CPA, a party must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) with a public interest impact; (4) an injury to plaintiff in his or her business or property; and (5) causation.[28] The CPA should not be construed to prohibit practices reasonably related to the development and preservation of business, or which are not injurious to the public interest.[29] A plaintiff must establish all five elements to prevail.[30] To establish the unfair or deceptive act or practice element, a plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public.[31] We review the determination of whether a particular act is unfair or deceptive as a question of law.[32]

Alpha alleges that USEI's processing of warranty claims was deceptive or unfair. The trial court, in granting USEI's motion for a directed verdict, ruled that USEI's warranty and the manner in which warranty claims were processed was not deceptive or unfair.

Alpha contends that the following facts provide substantial evidence sufficient to submit this issue to a jury. But Alpha's evidence does not show USEI engaged in unfair or deceptive acts.

First, Alpha argues that there were an 'overwhelming' number of warranty claims against USEI. The mere quantity of claims says nothing about USEI's processing of these claims or the quality of the warranty guarantee. This does not establish that USEI's processing of claims was deceptive or unfair.

Second, Alpha notes that it lost customers because of their dissatisfaction with USEI's engines or the servicing of warranties. This assertion does not reasonably lead to the conclusion that USEI's denials of warranty claims, or their procedures for processing warranty claims were deceptive or unfair.

Third, Alpha contends that USEI engines had multiple problems and Alpha did not always agree with USEI's determination of whether it would cover parts or labor under its warranty. This also fails to constitute substantial evidence of a deceptive or unfair practice. The alleged poor quality of USEI engines does not reasonably lead to the conclusion that its warranty procedures are deceptive or unfair. Similarly, because Alpha disagreed with some of USEI's decisions on whether it would pay for a warranty claim does not make USEI's practices deceptive or unfair.

Fourth, Alpha contends that many customers were unable to contact USEI directly for warranty claims. The portion of the record cited by Alpha for this proposition shows that only one customer did not receive a call back from USEI. Alpha insists that this is proof that it would have been futile to contact USEI regarding warranty claims because USEI was not responding and was denying all warranty claims. This is not a reasonable inference based on the record. Indeed, Roberts goes on to

testify that USEI was still actively processing, and crediting, warranty claims after Alpha severed its relationship with USEI. Alpha failed to show that USEI engaged in unfair or deceptive acts. The directed verdict was proper.

We need not reach Alpha's assertion that the public interest was affected because the conclusion that there was no unfair or deceptive practice is dispositive.

Alpha argues that the trial court erred when it excluded the testimony of its expert regarding eight USEI engines because this testimony supported its CPA claim. The admissibility of expert testimony is in the sound discretion of the trial court and will not be overturned unless the exercise of discretion was manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.[33]

The trial court ruled:

the Court was under the impression that the eight engines were warranty issues and that's the reason I allowed Mr. Suryan {USEI's expert} to testify to eight engines, and Mr. Springstead to testify to these engines. That was my error, they were not.

They were new, remanufactured engines from U.S. Engine. As such, to allow testimony as to whether or not an engine would fail is mere speculation and it is essentially irrelevant in this case. So it was error to allow this testimony, so the jury is instructed to disregard and not consider the testimony of Mr. Suryan as to the eight engines, and Mr. Springstead's total testimony.

The trial court did not abuse its discretion when it excluded the testimony of Alpha's expert. The testimony was not pertinent to any issue in dispute in the case, and was certainly not significant to Alpha's CPA claim. By Alpha's own characterization, the testimony went to 'problems with USEI engines attributable to manufacturer error ' The existence of manufacturing defects is not an element of the CPA claim alleged by Alpha. Alpha's expert had no knowledge of, nor did he testify to, the existence of unfair or deceptive practices by USEI concerning their warranty claim procedures.

Alpha also argues that the trial court erred when it excluded evidence of prior or pending USEI litigation, and complaints to the Attorney General's Office, Consumer Affairs Division, and the Better Business Bureau as hearsay. Alpha has failed to designate the documents in question for review to this court. 'An insufficient record on appeal precludes review of the alleged errors.'[34]

We affirm the Judgment and the Order Granting in part Defendants' Motion for Partial Summary Judgment.

1. CR 56(c).

2. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

3. Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993).

4. RCW 62A.2-106(1).

5. RCW 62A.2-106(1).

6. RCW 62A.2-105(1).

7. 79 Wn. App. 250, 902 P.2d 175 (1995), review denied, 128 Wn.2d 1020 (1996).

8. Tacoma Athletic, 79 Wn. App. at 256.

9. Tacoma Athletic, 79 Wn. App. at 258.

10. 28 Wn. App. 483, 624 P.2d 220 (1981).

11. 134 Wn.2d 547, 557, 951 P.2d 260 (1998) (specifically rejecting the assertion in Brem-Rock that this jurisdiction no longer adheres to the rule that part performance is not applicable to the 'not to be performed within one year' provision of RCW 19.36.010(1)).

12. 293 N.W.2d 351 (Minn. 1979).

13. Barber, 293 N.W.2d at 355.

14. Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

15. USEI's citation to Campbell v. Webber, 29 Wn.2d 516, 188 P.2d 130 (1947) is inapposite because that case involved an oral agreement for the sale of real estate and personal property, not, as USEI argues, an agreement for the sale of gasoline.

16. A contract for no definite time and terminable at will is not within the statute of frauds. French, 134 Wn.2d at 553-54 (quoting Klinke v. Famous Recipe Fried Chicken, Inc., 24 Wn. App. 202, 600 P.2d 1034 (1979), aff'd, 94 Wn.2d 255, 616 P.2d 644 (1980)). Both Alpha and USEI concede that their agreement was indefinite and terminable at will.

17. RCW 62A.2-201(3).

18. RCW 62A.2-201 and Comment 2.

19. RCW 62A.2-201(3).

20. Kruse v. Hemp, 121 Wn.2d 715, 725, 853 P.2d 1373 (1993).

21. See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

22. Rutcosky v. Tracy, 89 Wn.2d 606, 574 P.2d 382, cert. denied, 439 U.S. 930 (1978) (full performance of oral service contract for development of a college program removed contract from statute of fraud writing requirement); Becker v. Lagerquist Bros. Inc., 55 Wn.2d 425, 348 P.2d 423 (1960) (full performance of oral service contract to pave street estopped the other party from asserting the statute of frauds as a defense); Friedl v. Benson, 25 Wn. App. 381, 609 P.2d 449 (1980) (oral contract for option to buy real property not removed from statute of fraud writing requirement because alleged part performance did not indicate unequivocally the existence of agreement).

23. Bailie Communications, Ltd. v. Trend Business Sys., Inc., 61 Wn. App. 151, 159-160, 810 P.2d 12, review denied, 117 Wn.2d 1029 (1991) (citation omitted).

24. Gammon v. Clark Equip. Co., 38 Wn. App. 274, 286, 686 P.2d 1102 (1984) (motions in limine); Weems v. North Franklin Sch. Dist., 109 Wn. App. 767, 777, 37 P.3d 354 (2002) (motion for reconsideration).

25. Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (The party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence. An insufficient record on appeal precludes review of the alleged errors.).

26. Hizey v. Carpenter, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

27. Price v. Kitsap Transit, 125 Wn.2d 456, 466, 886 P.2d 556 (1994).

28. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

29. Dwyer v. J.I. Kislak Mortgage Corp., 103 Wn. App. 542, 548, 13 P.3d 240 (2000), review denied, 143 Wn.2d 1024 (2001) (citing RCW 19.86.920).

30. Hangman Ridge, 105 Wn.2d at 784.

31. Hangman Ridge, 105 Wn.2d at 785.

32. Henery v. Robinson, 67 Wn. App. 277, 290, 834 P.2d 1091 (1992), review denied, 120 Wn.2d 1024 (1993).

33. Grigsby v. City of Seattle, 12 Wn. App. 453, 454, 529 P.2d 1167, review denied, 85 Wn.2d 1012 (1975).

34. Bulzomi, 72 Wn. App. at 525.