STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

LIGHTNING TECHNOLOGIES, LLC,
Plaintiff,

v. **Case No. 17-161090-CB**
Hon. James M. Alexander

EMC2, INC,
Defendant.
_____/

OPINION AND ORDER FOLLOWING BENCH TRIAL

This matter is before the Court on Plaintiff's Complaint. Plaintiff is in the business of manufacturing certain proprietary sprays and coatings which are used in connection with encapsulating pallets and other products. Defendant is in the business that produces automated manufacturing systems and related products for industrial uses.

In 2016, Plaintiff asked Defendant to design, engineer, and build an automated robotic low volume poly urea system for spraying pallets with Plaintiff's sprays. The original estimated cost of the system was $450,000, and on July 8, 2016, Plaintiff issued a Purchase Order for the Robotic System and made an initial $200,000 payment to Defendant in conjunction therewith.

Ultimately, the system was never completed, and this case stems from a dispute over whether Defendant is obligated to return the $200,000 payment. Plaintiff filed its present Complaint on (Count I) breach of contract and (Count II) unjust enrichment theories.

The Court conducted a three-day bench trial on July 19 and 20 and August 16, 2018. At trial, the Court heard the testimony of Roland Heiberger, Plaintiff's Senior Vice President of Engineering and Technologies; Jeffrey Owen, Plaintiff's CEO and Managing Partner; Vincent

Barbisan, Defendant's General Manager; and Ken Dargatz, Defendant's CEO. Following trial, the parties were directed to file the transcript and proposed findings of fact and conclusions of law.

The Court has considered the trial testimony and reviewed the exhibits and post-trial submissions of the parties. Based on the foregoing, the Court issues this Opinion and Order as its findings of fact and conclusions of law, pursuant to MCR 2.517.

I. Introduction

According to the parties July 12, 2018 Final Pretrial Order, Plaintiff's theory of this case is that this case involves a satisfaction contract. It claims that it contracted with Defendant to design, engineer, and build – to Plaintiff's satisfaction – the Robotic System. To this end, Plaintiff paid a $200,000 "deposit," but Defendant failed to design (much less deliver) a system that met Plaintiff's needs.

Defendant, on the other hand, claims that it is not obligated to return the $200,000 to Plaintiff because the parties' agreement was "to be completed in three stages." First, Defendant would design and engineer the Robotic System. Upon approval, Plaintiff was to pay an additional $100,000 "second payment" to Defendant, which would then fabricate the approved system. Finally, Defendant would install the system upon Plaintiff's final payment.

Defendant argues that Plaintiff approved Defendant's designs "on three separate occasions" but still refused to issue the second payment. Ultimately, Defendant argues that Plaintiff continually requested design changes and further work through February 2017 – despite soliciting a quotation for the same system from a Defendant competitor. And, Defendant argues, Plaintiff's decision to use said competitor was a first material breach of the agreement.

In the end, Defendant argues that it completed the design work that was required under the parties' agreement, and Plaintiff has no basis to recover the $200,000 deposit paid for said work.

Also according to the Final Pretrial Order, the following facts are uncontested:

1. On July 8, 2016 Plaintiff issued to Defendant a purchase order for the Robotic System.

2. On July 8, 2016 Plaintiff paid Defendant a $200,000 deposit for the Robotic System.

3. Defendant did not invoice Plaintiff for the $100,000 payment for Design Approval.

4. Defendant did not manufacture the Robotic System.

5. Defendant did not deliver to Plaintiff a completed Robotic System.

6. On March 27, 2017 Plaintiff issued a purchase order to Triton Automation Group to design, build, and deliver the Robotic System for $196,355.

7. Plaintiff requested that Defendant refund to Plaintiff the $200,000 deposit.

8. Defendant has not refunded to Plaintiff any portion of the $200,000 deposit.

9. Defendant issued a proposal to Plaintiff dated July 5, 2016 ("First Proposal").

10. In response to Plaintiff's request, Defendant issued a second proposal dated August 10, 2016 ("Second Proposal").

II. Findings of Fact

Defendant understood that its custom design for the Robotic System needed to satisfy Plaintiff's needs, which is why Plaintiff had final design approval. (TT 3, at 26-27). Defendant assumed the risk that Plaintiff may not approve Defendant's design if it did not meet Plaintiff's needs or requirements. (TT 3, at 27).

The Proposal required Defendant to provide a System that included many specific

components. (P. Ex. 3, at 3). The System had a target budget of $450,000 that was subject to change based on the final cost. (P. Exs. 1, 3; TT3, at 6).

The Proposal also provided a targeted scope review date by July 15, 2016 and a final design approval date of August 12, 2016. (P. Ex. 3, at 5). The Proposal also targeted November 18, 2016 for Defendant to have the system up and running for Plaintiff's production. (P. Ex. 3, at 5). Relying on the Proposal, Plaintiff issued a July 8, 2016 Purchase Order to EMC for the Robotic System. (TT1, at 38-39; P. Ex. 1).

The July 8, 2016 Purchase Order (P. Ex. 1) and July 5, 2016 Proposal (P. Ex. 3) constitute the original contract between the parties. (TT 1, at 162). The Purchase Order sets forth a "Payment Schedule" that requires a $200,000 payment with the Purchase Order; "$100,000 with Design Approval;" and "$150,000 – Balance Upon Installation Completion." (P. Ex. 1). Plaintiff paid the $200,000 "deposit" on July 8 (the same day as it issued the Purchase Order). (Uncontested Facts 1, 2).

On July 29, 2016, Defendant issued a second Proposal, which removed a "spray robot" from the project because Plaintiff decided to purchase the robot directly from the manufacturer. (TT1, at 41-42). This was not a big change in the scope of the project. (TT3, at 7). But this change reduced the system budget from $450,000 to $395,000. (P. Exs. 3, 4; TT3, at 7).

As a result, the terms of the contract between the parties are found in the July 5 Proposal and July 8 Purchase Order, as modified by the July 29, 2016 Proposal. These three items constitute the parties' contract.

The July 29 Proposal also modified the project's target dates to scope review by August 15, 2016 and a final design approval date of August 22, 2016. (P. Ex. 4). And the Second Proposal targeted December 12, 2016 for Defendant to have the system up and running for

Plaintiff's production. The Second Proposal also changed the second payment's terms to "$125,000 (35% at Design Approval)" with the date "August 12, 2016," with the balance due "at the beginning of installation."

Defendant presented its first design to Plaintiff in August 2016. (P. Ex. 14). With respect to this design, in its Proposed Findings of Fact and Conclusions of Law, Defendant argues that "[o]n August 17, 2016, [Plaintiff] gave [Defendant] express approval to immediately proceed with design and fabrication of the Robotic System." But Defendant does not cite to any evidence adduced at trial to support its August "express approval" argument.

To the contrary, Heiberger testified that said August design was unacceptable. (TT 1, at 49). This was so because Defendant's August design called for the mechanism that transferred the pallet to stay inside the spray booth with the pallet. As a result, this mechanism would get coated with the spray – hardening into "something like concrete,' which would render the moving parts "unusable." (TT1, at 49-50). That Plaintiff did not approve of the design was communicated to Defendant at the very same August meeting where Defendant presented the design. (TT1, at 111). Barbisan testified that Defendant understood that these were the reasons that the August design was unacceptable. (TT, at 48-50).

In September 2016, Defendant presented a second design concept for review. (TT1, at 55-56; P. Ex. 14). But, like the first design, Plaintiff found problems with the second design. Specifically, Plaintiff believed that the design called for the spray table and robot gantry to be very close to the booth wall, which would cause the booth wall to become contaminated with overspray. (TT1, at 56-57). Plaintiff communicated the issues with the second design to Defendant. (TT1, at 58). At the same time in September, Plaintiff asked Defendant for a cost breakdown and revised timing schedule on delivery of the System, but Plaintiff never received

the same. (TT1, at 59-60).

In October, the parties' relationship appeared to be souring. At this point, Defendant refused to talk to Heiberger and requested to only deal with Owen (Plaintiff's CEO). (TT1, at 60-61). Around the same time, Defendant refused to participate in a requested October 5, 2016 meeting to discuss Defendant's second design concept. (TT1, at 60; TT3, at 47).

At the end of November 2016, Defendant presented its third and final design concept to Plaintiff. (TT1, at 63; D. Ex. Q). But Plaintiff found problems with this design as well. Specifically, Plaintiff found it unacceptable that the pallets were not easily accessible, the plastic liner door could not withstand the pressure of the spray booth, and there was no window to allow for viewing into the spray booth. (TT1, at 63-64). And Defendant again failed to provide the detailed budget or time schedule for its third concept. (TT1, at 64). As a result, Plaintiff did not approve Defendant's third design concept. (TT1, at 129).

Defendant never tried to invoice Plaintiff for the second payment, which was conditioned upon Plaintiff's final approval of a Defendant design. (Uncontested Fact # 3). This is compelling evidence that Defendant understood that Plaintiff never issued any approval over any Defendant design. If Defendant had truly believed that Plaintiff gave final approval, it would have invoiced Plaintiff for the second payment.

In December 2016, the Robotic System was supposed to be installed at Plaintiff's facility under the parties' agreement. But at that point, Defendant had not even provided a satisfactory design to Plaintiff. At the same time, Plaintiff needed some system, with even minimal capabilities, to show its shareholders and potential investors. As a result, Plaintiff asked Defendant to either (1) pare down the system and provide something to Plaintiff as soon as possible and keep the deposit already paid, or (2) refund the deposit and end the project. (P. Ex.

16; TT1, at 131-136). But Defendant did not agree to either request. (TT2, at 25).

In January 2017, because Defendant failed to produce a Robotic System acceptable to Plaintiff, Plaintiff contracted with a Defendant competitor (non-party Triton Automation Group) to engineer and build a system. (TT1, at 139; P. Ex. 22). Triton delivered the same several months later. (TT1, at 72). Subtracting out the $200,000 paid to Defendant, the total cost to Plaintiff of the Triton system was $219,760 paid to Triton, plus another approximately $130,000 paid for other components utilized in the system. (TT1, at 71; TT2, at 28-29).

In mid-March 2017, Defendant delivered the following items to Plaintiff: two roller racks; a pallet gripper; and a steel plate – none of which Plaintiff has been able to use. (TT1, at 64-65).

Because Plaintiff received nothing functional from Defendant, Plaintiff asked for the $200,000 deposit back, but Defendant refused. (TT1, at 152).

The Court has had the opportunity to observe the witnesses' demeanor and assess their credibility. Based on the same, the Court specifically finds that both Defense Witnesses, Barbisan and Dargatz, were not particularly credible.

With respect to Barbisan, he first testified that Plaintiff gave final design approval on August 22. (TT3, at 21). But Barbisan inconsistently went on to testify that he understood all of the reasons why none of Defendant's designs received Plaintiff's approval. (TT3, at 26-44).

With respect to Dargatz, the Court's handwritten notes taken during trial noted that Dargatz "danced" on certain questions (specifically including, but not limited to, the question about the lack of a written request for the second payment and questions about whether there was a built system on March 1). (TT3, at 107-120). Overall, the Court finds that Mr. Dargatz was not credible.

Considering all of the testimony and other evidence, the Court finds that Plaintiff did not act in bad faith in not approving Defendant's designs. Each Defendant design was carefully contemplated by Plaintiff, which articulated specific reasons why the same was unacceptable.

Under the plain language of the same, the parties' agreement does not provide that Plaintiff is entitled to return of the entire $200,000 deposit if it fails to approve a Defendant design. The plain language of the agreement also does not provide that Defendant gets to keep the $200,000 deposit no matter the level of its performance thereunder. Because there was never any final budget produced by Defendant – despite its obligation to do so – it is difficult to attribute the actual costs to each stage of the agreement.

The Court also finds that the parties' agreement is not a satisfaction agreement. Rather, the Court's interpretation of the same is that, in the event of design approval, Plaintiff was obligated to make certain payments and Defendant was obligated to build and install the Robotic System. If Plaintiff never approved Defendants' design, however, Plaintiff was only obligated to pay for services rendered by Defendant until termination of the agreement. There are no terms otherwise, and if either party wished such a term, they could have easily negotiated such a term into the contract.

In June 2018, Plaintiff filed a motion in limine to bar evidence of Defendant's alleged expenditure of the $200,000 deposit. Defendant filed a response to said motion, and the Court entertained oral argument on the motion on June 26, 2018. On that date, for reasons stated on the record (namely that Defendant did not respond to discovery requests or produce records regarding information about how Defendant spent the $200,000), the Court granted Plaintiff's motion in part.

An order encapsulating the ruling was entered on July 2, 2018. It provided that Defendant

was precluded from offering any evidence or testimony as to how much of Plaintiff's $200,000 deposit it expended. As a result, there is no evidence as to amount Defendant expended on the services it provided to Plaintiff.

III. Conclusions of Law

Based on the above findings of fact, the Court makes the following conclusions of law.

A. Breach of Contract (Count I)

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

In this case, Plaintiff contracted with Defendant to provide design, engineering, and installation services related to the Robotic System.

Plaintiff fulfilled its obligation under the contract by paying a $200,000 deposit for the design stage of the contract.

Defendant partially performed its obligations by providing three design concepts to Plaintiff. None of these design concepts appeared to understand Plaintiff's specific needs, and none garnered Plaintiff's approval for legitimate reasons. But Defendant failed to perform other of its obligations, including failing to provide a final budget or schedule within two weeks of the initial project payment – as required under the terms of the parties' agreement. As a result, Defendant breached the parties' agreement.

Plaintiff's damages are equal to the total amount paid on deposit, $200,000, less the actual cost of design services provided by Defendant. It is undisputed the Plaintiff paid the $200,000 deposit to Defendant.

But as stated, under the Court's July 3, 2018 Order, Defendant was prohibited from introducing any evidence or testimony that relating to the amount it expended to provide said services to Plaintiff. As a result, there is no evidence tending to establish any specific amount that Defendant should be compensated for the same.

Therefore, the Court is left with no choice but to find that the only admissible evidence provided is that Plaintiff's damages equal its entire $200,000 deposit, and Plaintiff is entitled to a judgment for said amount.

B. Quantum Meruit/Unjust Enrichment (Count II).

Although unnecessary to resolve Plaintiff's alternative unjust enrichment claim since the Court has found that Plaintiff prevailed on its breach of contract claim, the Court will briefly address the same.

With respect to an unjust enrichment claim, our Supreme Court has held: "Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Michigan Educ Emples Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999), quoting Restatement Restitution, § 1, p 12.

Michigan courts have established that "The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH* (US), 202 Mich App 366, 375; 509 NW2d 791 (1993); citing *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991).

"However, a contract will be implied only if there is no express contract covering the

same subject matter." *Barber*, 202 Mich App at 375.

Assuming arguendo that the Court did not find that the parties' relationship was governed by an express contract, it would have awarded the same amount an unjust enrichment theory.

In this case, Defendant received $200,000 from Plaintiff in exchange for certain services. It would be inequitable to allow Defendant to keep the entire $200,000 when it did not present any evidence that the actual services it provided were worth said amount.

Just like in its contract conclusion, the Court would place the proper measure of damages at the total amount paid on deposit, $200,000, less the actual cost of design services provided by Defendant.

But because Defendant was barred from producing any such evidence, the Court would award the entire $200,000 to Plaintiff.

IV. Summary/Conclusion

For all of the foregoing reasons, the Court finds that Plaintiff has established its entitlement to judgment on its Count I for Breach of Contract. Based on the same, the Court enters a judgment against Defendant in the amount of $200,000.

Because it has so held, the Court DISMISSES Plaintiff's Count II as an alternative request for relief.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

February 1, 2019
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge