IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CARNES COMPANY, INC.,

Plaintiff,

v.

STONE CREEK MECHANICAL, INC.,

Defendant.

OPINION AND ORDER

02-C-208-C

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This is a civil action for monetary relief. Plaintiff Carnes Company, Inc. contends that defendant Stone Creek Mechanical, Inc. breached the parties' contract when it refused to pay for goods manufactured by plaintiff. In addition, plaintiff alleges that defendant made intentional misrepresentations of fact when it failed to disclose unilateral changes it made to the agreement. In a counterclaim, defendant contends that plaintiff breached the contract by, among other things, exceeding the agreed upon price in the contract and refusing to complete the work. Defendant seeks a declaration that its obligation under the contract is limited to $640,000. Jurisdiction is present under 28 U.S.C. § 1332, diversity of citizenship.

Presently before the court is defendant's motion for partial summary judgment.

Defendant asks the court to determine as a matter of law whether plaintiff is responsible for fulfilling defendant's entire purchase order or only a portion. I conclude that in the letter to defendant dated June 27, 2001, plaintiff accepted defendant's offer to fulfill the purchase order and that plaintiff's purported "assignment" of the obligation to a third party to fulfill portions of the order did not relieve plaintiff of its obligation to fulfill the purchase order. Therefore, I will grant defendant's motion.

Before I set forth the undisputed facts, a word is required regarding their source. In its brief, plaintiff discusses many facts that are not included in its proposed findings of fact, particularly with regard to alleged discussions that it had with defendant on their understanding of the agreement and the parties' course of conduct. Under this court's "Procedures to be Followed on Motions for Summary Judgment," a copy of which was provided to the parties with the preliminary pretrial conference order, the court will not consider facts contained only in a brief. Procedures I.B.4. Rather, a party's proposed findings of fact must include all factual propositions the party considers necessary to prevail on summary judgment. Id. at I.B.3. Accordingly, I have not considered any facts in plaintiff's brief that were not included in its proposed findings of fact.

From the parties' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Carnes Company, Inc. is a Wisconsin corporation with its principal place of business in Verona, Wisconsin. Plaintiff manufactures air movement components. Defendant Stone Creek Mechanical, Inc. is a Pennsylvania corporation with its principal place of business in Doylestown, Pennsylvania. Defendant is a mechanical contractor.

Defendant issued a purchase order to plaintiff for the purchase of energy recovery units for use at a school. After receiving the order, plaintiff had discussions with defendant and others about the requirements of the purchase order and whether they could be fulfilled. In June 2001, plaintiff determined that it could not manufacture all the items in defendant's purchase order. In a letter dated June 27, 2001, plaintiff responded to the purchase order with a letter to defendant. It stated, "This letter is to acknowledge and thank you for the above purchase order. Your purchase is made to the Carnes Company. Please be advised that we will be assigning portions of it to be billed to you directly." The letter explains that plaintiff "will be responsible for items" 1, 3, 5-9 and 11, 12, 14 and 15 of the purchase order and that Chase & Associates, Inc. "and others . . . will be responsible for items 2, 4, 10 and 13." Next to plaintiff's name was the amount, $527,000, and next to Chase's name was the amount, $113,000. The letter provides, "The orders will be billed as shown and will not exceed your purchase order amount of $640,000.00, unless authorized by you with change orders." The letter concludes by asking defendant to "sign your acceptance below so Chase

& Associates, Inc. will be able to invoice you directly."

On July 9, 2001, defendant wrote back to plaintiff, stating that it "will not accept the assigning of purchase orders. All materials shall come from Carnes Company." The following day, plaintiff explained to defendant in a letter that the "purpose of the letter of assignment is to make the flow of paperwork easier and less time consuming for customers and representatives and to establish a direct contract for the equipment that Carnes Company manufactures and warrantees." Defendant then signed and returned the assignment to plaintiff.

After a dispute arose regarding the performance of the contract, plaintiff filed this lawsuit against defendant, alleging that defendant owed plaintiff $232,000.

OPINION

The issue in dispute is the extent of plaintiff's obligation under its agreement with defendant. Defendant contends that although plaintiff delegated portions of the purchase order to a third party, under Wis. Stat. § 402.10, plaintiff remained ultimately responsible for insuring that the entire purchase order was fulfilled. Plaintiff disagrees, arguing that it never agreed to fulfill the entire purchase order and that its June 27, 2001 letter was only a "partial acceptance" and a "counteroffer" of defendant's offer to purchase plaintiff's goods. Specifically, plaintiff contends that it agreed to be responsible for items 1, 3, 5-9, 11, 12, 14

and 15 on the purchase order, totaling $527,000, and that Chase is responsible for items 2, 4, 10 and 13, totaling $113,000. Thus, the question is whether plaintiff's June 27 letter was an acceptance or "partial acceptance" of defendant's offer. (Although plaintiff argues that its contract with defendant included an acknowledgment that it sent to defendant in August 2001, plaintiff did not propose any facts about the acknowledgment or explain in its brief how the acknowledgment supports its position. Therefore, plaintiff has waived that argument. Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999).) Both parties assert that the letter is unambiguous and supports their position.

Because the parties have not briefed the issue of which state's substantive law should apply to the dispute, I will apply Wisconsin law. See FutureSource LLC v. Reuters Limited, No. 02-2060, slip op. at 1 (7th Cir. Nov. 27, 2002) ("[T]here's no discussion of choice of law issues, and so we apply the law of the forum state."); see also State Farm Mutual Auto Insurance Co. v. Gillette, 2002 WI 31, ¶ 51, 251 Wis. 2d 561, 641 N.W.2d 662 (holding that Wisconsin courts should assume that Wisconsin law applies unless it is clear that non-forum contacts are more significant).

The parties seem to agree that the transaction was a sale of goods and thus subject to the Uniform Commercial Code. See Wis. Stat. § 402.105(c). Under Wis. Stat. § 402.207(1), "a definite and seasonable expression of acceptance" of an offer creates an

enforceable contract. The June 27 letter does not use the words "acceptance," "partial acceptance" or "counteroffer." However, no "magic words" are required for an acceptance to be valid; it can be express or implied. See Hoffman v. Ralston Purina Co., 86 Wis. 2d 445, 454, 273 N.W.2d 214 (1979); Carney v. McFarlin, 249 Wis. 261, 263, 24 N.W.2d 594 (1946); see also Erving Paper Mills v. Hudson-Sharp Machine Co., 223 F. Supp. 913, 916-17 (E.D. Wis. 1963), rev'd on other grounds, 332 F.2d 674 (7th Cir. 1964). By "acknowledging" and "thanking" defendant for its order and then informing defendant that it would be "assigning" portions of the purchase order to a third party, plaintiff communicated to defendant its acceptance of defendant's offer to fulfill the whole purchase order. One cannot assign, or, to be more precise, delegate, an obligation that one has not accepted. Further, by writing that the orders "will not exceed your purchase order amount of $ 640,000," plaintiff implied that it was guaranteeing the entire order and not just a portion of it.

If plaintiff had intended to accept only part of defendant's purchase order, one would expect the letter to include language informing defendant that it would need to contract with another party, presumably Chase, to insure that the remainder of the purchase order would be fulfilled. The letter contains no such information. Instead, the letter states only that defendant's signature is required "so Chase & Associates, Inc. will be able to invoice you directly," again informing defendant that plaintiff had accepted the offer but was delegating

the responsibility of performing parts of it to a third party.

It is true that the letter states that Chase "and others" would "be responsible" for some portions of the purchase order. However, it is undisputed that neither defendant nor plaintiff entered into an agreement with Chase or "others" regarding the defendant's purchase order. Thus, to adopt plaintiff's construction of the contract would require finding that defendant had agreed to have no legal recourse if certain portions of the order were not performed.

I conclude that the only reasonable interpretation of the June 27 letter is that it manifests plaintiff's acceptance of defendant's offer in full. See Kailin v. Armstrong, 2002 WI App 70, ¶ 18, 252 Wis. 2d 676, 643 N.W.2d 132 (when contract has only one reasonable interpretation, its meaning is question of law for court). Furthermore, although plaintiff was entitled to delegate performance of the contract to a third party, such delegation did not relieve it of liability for a breach. Wis. Stat. § 402.210(1) ("No delegation of performance relieves the party delegating of any duty to perform or any liability for breach."); cf. Brooks v. Hayes, 133 Wis. 2d 228, 395 N.W.2d 167 (1986) (general contractor's delegation of work did not relieve it of liability for breach of contract when independent contractor acted negligently). To be released from liability, plaintiff would have had to arrange an agreement among all three parties by which the third party agreed to be substituted for plaintiff and defendant gave its consent. Brooks, 133 Wis. 2d

at 244-45, 395 N.W.2d at 174. This is not what plaintiff did. Therefore, defendant's motion for partial summary judgment will be granted.

ORDER

IT IS ORDERED that the motion for partial summary judgment filed by defendant Stone Creek Mechanical, Inc. is GRANTED. It is DECLARED plaintiff Carnes Company, Inc.'s letter dated June 27, 2001, did not extinguish its obligation to fulfill defendant's purchase order or its liability for any breach.

Entered this 13th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge