IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

CALBAR, INC. Plaintiff,	: OCTOBER TERM, 2002 : No. 0846
v.	: Commerce Program
ANDREWS SPRINKLER COMPANY, Defendant.	: Control No. 061289

O R D E R

AND NOW this 29th day of August, 2003, upon consideration of plaintiff, Calbar, Inc.'s, Motion for Partial Summary Judgment, defendant, Andrews Sprinkler Company's response in opposition, the memoranda in support and opposition, and all other matters of record, in accord with the contemporaneous Opinion being filed of record, it is hereby **ORDERED** that said Motion is **Denied**.

BY THE COURT:

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. …… August 29, 2003

Before the court is the Motion for Partial Summary Judgment of plaintiff, Calbar, Inc. ("Calbar"). Calbar sued Andrews Sprinkler Company ("Andrews") alleging that Andrews damaged and/or failed to fix Calbar's sprinkler system. Specifically, Calbar claims that Andrews promised to repair the sprinkler system, but failed to do so within approximately three weeks, at which point the sprinkler pipes froze and burst, Calbar's warehouse was flooded, and Calbar suffered over $800,000 in damages. Calbar requests partial summary judgment on its claim for breach of an oral contract to repair Calbar's sprinkler system.

"Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999) (citing Pa. R. Civ. P. 1035.2). Further, "in determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party." *Id*. Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." *Id*.

This court submits that it cannot find as a matter of law that an oral contract to repair the sprinkler system was formed between the parties. In support of its motion, Calbar offers the deposition testimony of Andrews' former employee, Mr. Hetrick, and that of Calbar's agent, Mr. Reynolds.[1] Generally, summary judgment may not be granted where the moving party relies exclusively upon oral testimony, through affidavits or depositions, to establish the absence of a genuine issue of material fact. This is so because, no matter how clear and indisputable that testimony may appear, it is the province of the jury to decide the credibility of the witnesses. *See* Borough of Nanty-Glo v. American Surety Co. of New York, 309 Pa. 236, 163 A. 523 (1932). However, "the Nanty-Glo rule does not apply where . . . the deposition testimony offered

[1] Calbar also offers two documents as evidence that an oral contract was formed between the parties. However, these documents do not, standing alone, establish that an oral contract was formed. In order to grant summary judgment on Calbar's breach of contract claim, this court would be required to rely heavily upon the proffered deposition testimony.

in support of summary judgment constitutes an adverse admission of a non-moving party." Commw. Dept. Environmental Resources v. Bryner, 613 A.2d 43, 46 (Pa Commw. 1992).

A statement offered against a party is an admission by the party if it constitutes "a statement by the party's agent or servant concerning a matter within the scope of [his] agency or employment, made during the existence of the relationship." Pa. R. Evid. 803(25)(D). Calbar does **not** claim that Mr. Reynolds was an agent of Andrews. Thus, his testimony is not, in and of itself, sufficient to support a finding of summary judgment.

Mr. Hetrick's statements could serve as admissions by Andrews if Mr. Hetrick was acting as an agent of Andrews when his deposition was taken, as well as when the actions about which he testified occurred, and if his statements concern matters for which he had sufficient responsibility under his agency relationship with Andrews. However, at the time of his deposition, Mr. Hetrick no longer worked for Andrews. *See* Hetrick Deposition, p. 3. attached as Exhibit B to Plaintiff's Reply Brief. Furthermore, Calbar has not demonstrated that Mr. Hetrick had sufficient authority to bind Andrews to the oral contract that Calbar alleges he agreed to on behalf of Andrews. Therefore, the court may not treat the statements Mr. Hetrick made at his deposition as admissions by Andrews. Summary Judgment cannot be granted based on his testimony.

Even if an oral contract to repair was formed between the parties, the court could not hold as a matter of law that defendant breached that contract. Calbar has not presented evidence that there was any deadline for performance set forth in the contract. "[I]t is hornbook law that where no time is specified for performance of a

contractual obligation, the courts will require the obligation be performed within a reasonable time." Hodges v. Pennsylvania Millers Mutual Ins. Co., 449 Pa. Super. 341, 673 A.2d 973, 974 (1996). *See also* Restatement (Second) Contracts § 204, Comment d (1981). Therefore, under the parties' alleged oral agreement, Andrews would be required to repair the sprinkler within a reasonable time.

> What is a reasonable time is ordinarily a question of fact to be decided by the jury and is dependent upon the numerous circumstances surrounding the transaction. . . Such circumstances as the nature of the contract, the relationship or situation of the parties and their course of dealing, and usages of the particular businesses are all relevant. . . . However, there are situations where the question of what is a reasonable time for acceptance may be decided by the court as a matter of law. . . [as in] such commercial transactions as happen in the same way, day after day, and present the question upon the same data in continually recurring instances; and where the time taken is so clearly reasonable or unreasonable that there can be no question of doubt as to the proper answer to the question.

Yaros v. Trustees of the University of Pennsylvania, 742 A.2d 1118,1124 (Pa. Super. 1999), *citing*, Vaskie v. West American Ins. Co., 383 Pa. Super. 76, 81, 556 A.2d 4346, 438-9 (1989) *and* Boyd v. Merchants' and Farmers' Peanut Co., 25 Pa. Super. 199 (1904).

Without meaningful evidence of the standards of the industry and other circumstances of the transaction, the court is not comfortable holding, as a matter of law, that three weeks is an unreasonable time within which to fix a sprinkler. Therefore, the court cannot conclude that Andrews breached the contract by failing to repair the sprinkler prior to the bursting of the pipes. Such determination is for the finder of fact.

CONCLUSION

For the foregoing reasons, plaintiff's Motion for Partial Summary Judgment is **denied**. This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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ALBERT W. SHEPPARD, JR., J.