IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

GLENN DISTRIBUTORS, CORP.,	:	
	:	DECEMBER TERM 2012
Plaintiff,	:	
v.	:	No. 1574
RECKITT BENCKISER, LLC,	:	
	:	
Defendant.	:	COMMERCE PROGRAM
	:	
	:	140 EDA 2015

APPEAL OPINION

I. **Introduction and Procedural History.**

This is an appeal taken from this Court's grant of summary judgment to defendant Reckitt Benckiser, LLC ("Reckitt"). Glenn filed this action for breach of contract on December 12, 2012. Glenn and Reckitt filed cross-motions for summary judgment on Glenn's claim for breach of contract. On December 11, 2014, after oral argument, the Court granted summary judgment to defendant Reckitt. Glenn filed the instant appeal on January 7, 2015.

Glenn and Reckitt had a business relationship between 2000 and 2012. Glenn purchased closeout goods from Reckitt, a distributor of various retail products. This is the process by which the goods were purchased: Reckitt would send an email to Glenn (and frequently to other would-be purchasers at the same time) notifying them of the availability of closeout products. Glenn would respond with a bid, including price and quantity. Reckitt would respond notifying Glenn that it won the bid, sometimes noting that the quantity available had changed. Glenn would then send a purchase order. Reckitt would then send Glenn an invoice or invoices (depending on whether the goods were to be sent in different shipments), Glenn would pay the amounts listed in the invoices, and Reckitt would ship the goods. The quantities listed on the

invoices often did not match the quantities in the purchase orders. In dispute in the instant case are forty-six transactions between 2008 and 2012, in which Glenn argues that Reckitt shorted it products that it was contractually obligated to ship.

I. Argument.

Contracts for the sale of goods are governed by the UCC. Section 1201 defines "agreement" as "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing or usage of trade as provided in section 1303 (relating to course of performance, course of dealing and usage of trade)."[1] Glenn argued that there were binding agreements to ship the goods; Reckitt argued that no such agreements existed, or alternatively that they were modified and/or waived by the parties course of dealing and course of performance.

Glenn argued that the purchase orders submitted by Glenn to Reckitt constitute memorializations of binding contracts. However, Glenn did not pay when it sent the purchase orders, but rather waited for the invoices and paid Reckitt in response to those. Some of the invoices had different quantities than the purchase orders; however, Glenn paid for those amounts and received those quantities. At times, Glenn submitted a purchase order, received less than the amount specified in that order, and paid for the amounts shipped. Glenn did not allege that it paid for product that it did not receive.

There are two general categories of agreements at issue in this matter. In some of the cases, after Reckitt offered its items for Glenn to bid on, and Glenn bid on a certain quantity at a certain price, Reckitt accepted that offer in its email to Glenn stating that Glenn has won the bid.

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[1] Pa. Stat. Ann. § 13 Pa.C.S.A. §1201 (b)(3).

There, a contract was formed with a definite price and quantity term, memorialized in the purchase order.

In the other cases, Glenn bid, and Reckitt responded by changing the quantity term. There, Reckitt's response was a counteroffer, and Glenn's purchase order constituted an acceptance.

However, in both cases, the contracts were clearly modified by the parties' course of performance. "Subject to section 2209 (relating to modification, rescission and waiver), a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance."[2] Section 2209 states that "[a]lthough an attempt at modification or rescission does not satisfy the requirements of subsection (b) or (c) it can operate as a waiver."[3] Moreover, "[a] party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver."[4]

It is undisputed that over the parties' multi-year business relationship, Reckitt would sometimes remove some products from the list of products offered to Glenn as closeouts, after Glenn submitted purchase orders but before the products were shipped.

In the transactions at issue, many of the emails between Glenn's representative and Reckitt's representative show that Glenn never raised an objection to receiving less product in the shipments than were listed on the purchase orders. It did not respond with demands for

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[2] 13 Pa. Cons. Stat. Ann. § 1303 (f).

[3] 13 Pa. Cons. Stat. Ann. § 2209 (d).

[4] 13 Pa. Cons. Stat. Ann. § 2209 (e).

fulfillment, merely with questions, acceptance, or mild expressions of disappointment. Glenn would sometimes offer to buy the same product in future bids, indicating that it did not believe it was owed the remainder listed in the purchase orders.

It is clear that this was the parties' course of performance, in which quantities may be pulled without warning to sell at retail. If Glenn were going to change the course of performance, it would have needed to give reasonable notice to Reckitt, which it did not do. Glenn's behavior constituted a modification of the agreements, and therefore it could not later maintain an action for breach of contract against Reckitt based on modifications that it agreed to.

II. Conclusion.

For the foregoing reasons, this court respectfully requests that its order of December 11, 2014, be affirmed.

BY THE COURT,

PATRICIA A. MCINERNEY, J.