

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

REGSCAN, INC.,	:	NO. 02-00,304
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION
	:	
CONWAY TRANSPORTATION	:	
SERVICES, INC.,	:	
Defendant	:	Cross-Motions for Summary Judgment

OPINION AND ORDER

Before the Court are cross-motions for summary judgment, both filed December 23, 2003. Argument was heard May 3, 2004.

In its Complaint for Declaratory Judgment and Damages, filed February 20, 2002, Plaintiff seeks to have the Court declare invalid a licensing agreement entered into by the parties on May 3, 2000, and also declare that Plaintiff's product, the HazMat Loader, is not subject to the licensing agreement because it was not created using Defendant's System Design. Plaintiff also asserts damages of \$50,000 to \$75,000, claiming Defendant's System Design was not as represented.¹ Both parties submitted numerous depositions and exhibits in support of its respective motion. After a thorough review of all of the evidence, the Court finds no issue of material fact and concludes, as a matter of law, that (1) the licensing agreement is a valid and binding contract, (2) the HazMat Loader is indeed subject to the licensing agreement, and (3) Plaintiff's claim of misrepresentation is not supported by the evidence.

In their Licensing Agreement, the parties set forth that Defendant had designed and developed a software program, that Plaintiff desired to modify Defendant's program in order to develop and market a commercial implementation of such, that Defendant was granting Plaintiff a license to do so, and that Plaintiff would pay to Defendant 32% of the gross revenues received from sale of the finished product. The agreement was executed on May 3, 2000. Plaintiff proceeded to develop and market a commercial implementation of Defendant's

¹ In discovery, Plaintiff appeared to be increasing its claim for damages, but that has not been developed further and, in any event, is not an issue herein.

program, and entitled it HazMat Loader. Plaintiff began selling HazMat Loader and made two royalty payments to Defendant, comprising 32% of the gross sale proceeds. Plaintiff experienced difficulties with the project, Defendant was not satisfied with Plaintiff's performance and communicated such to Plaintiff, the relationship broke down and the instant litigation ensued. Plaintiff now claims, in Count I of the Complaint, that the agreement is invalid because it failed to set forth the specifics of what it claims are two "essential" terms: the price at which the HazMat Loader would be sold to customers, and the endorsements which would be provided by Defendant. The Court finds neither issue is a basis for invalidating the contract.

With respect to the pricing, although the parties agreed Plaintiff would pay Defendant 32% of all gross revenues received from sale of the completed product, they did not set forth in the licensing agreement a specific price at which the product would be sold. Instead, they indicated that within fifteen days of completion of the product, they would together determine the pricing. The evidence shows such did not occur. Rather, Plaintiff proposed a certain pricing scheme and Defendant conveyed its disagreement with that pricing scheme. Whether these communications took place before or after the initial sale is unclear but in any event, sales proceeded and Defendant did not take any action to change Plaintiff's course of action. The parties continued to operate under the agreement and the Court finds this dispositive of the issue. Obviously, the pricing of the completed product was not an essential term as it did not affect the parties' ability to carry out their respective obligations under the contract. Moreover, terms of a contract which might initially be unclear may become definite as a result of partial performance. Dahar v. Grzandziel, 599 A.2d 217 (Pa. Super. 1991), citing Greene v. Oliver Realty, Inc., 526 A.2d 1192 (Pa. Super. 1987). Where, as here, the unspecified term was set by one party and acquiesced in by the other, such became definite. Plaintiff cannot now be heard to complain that the Court is reading into the contract a pricing term set by Plaintiff itself.

With respect to endorsements, the licensing agreement required Defendant to provide Plaintiff with "endorsements of both the Product and certain other RegScan Offerings as mutually agreed to by the parties". The evidence shows that Defendant did provide Plaintiff with an endorsement of HazMat Loader. Plaintiff argues that because the parties never agreed

on which other RegScan Offerings Defendant would endorse, the licensing agreement is invalid. There is no indication Plaintiff made a request for any other endorsements, however. Endorsements for products other than the HazMat Loader simply were not an issue between the parties and the Court cannot find the promise to provide such an “essential term.” In any event, the licensing agreement did not require the parties to agree on endorsements, only that endorsements had to be supplied by Defendant for those products upon which the parties did agree. While this particular term might be of little use to Plaintiff, there is actually nothing indefinite about it. Plaintiff’s request of the Court to declare the licensing agreement invalid must therefore be denied.

Plaintiff’s request of the Court “to declare that Plaintiff’s System Design is not within the definition of the alleged licensing agreement”, contained in Count III of the Complaint, must also be denied. While Plaintiff argues in support of this request that it had to design “a wholly different system in a different computer language, us[ing] different algorithms” and that its product had “no relation to” Defendant’s program, the testimony offered by Plaintiff’s own witnesses belies this argument. Plaintiff viewed Defendant’s program before entering the licensing agreement and concluded that only the concept was useful, not the language of the program itself.² Plaintiff nevertheless entered into the agreement in order (one would assume) to legally use Defendant’s concept in developing its product. Although Plaintiff did indeed use a different computer language and different algorithms, it is clear from the testimony that Plaintiff’s product was based on Defendant’s program and is within the definition of the licensing agreement, which called for Plaintiff to “use and modify” Defendant’s “System Design and the Program” for the purpose of “developing, implementing and marketing the Product”.

With respect to Plaintiff’s claim of misrepresentation, contained in Count II of the Complaint, Plaintiff specifically asserts Defendant’s program was not as represented because it did not have a labeling component, pointing to the language in the agreement that Defendant “has designed and developed a computer system design (the “System Design”), including a software program (the “Program”) that, in response to stored regulatory information and user

input, generates data corresponding to required placarding, labeling, and load segregation for the shipment of hazardous materials”. Setting aside the issue of reliance, discussed below, the Court finds no misrepresentation as a matter of law inasmuch as there is no dispute Defendant’s program did generate data corresponding to labeling; the program just did not have an application to generate a label.³

Plaintiff also asserts the program was not as represented because it lacked many other features which had to be developed in order to make the product commercially viable. Plaintiff points to no evidence that Defendant ever represented the program did have such features, however, and, in fact, the testimony of all involved makes it clear the parties understood prior to entering the agreement that (1) Defendant’s program had been developed internally by Defendant and used only in Defendant’s company for only those functions performed by Defendant, (2) the program was therefore unmarketable because it did not address functions which others would have to deal with, and (3) the whole point of the licensing agreement was for Plaintiff to take the program and modify it so it did meet the market needs. Moreover, Plaintiff’s own witnesses testified that prior to entering the agreement, they viewed and ran the program and determined that “the design objectives were fairly loosely structured”, it was “pretty unworkable as a useful program”, and “it was certainly far easier to conceptualize a solution from scratch and just use that as background information”. Furthermore, there is absolutely no evidence of any complaints or even comments to Defendant either before entering the agreement or once the work was underway, that the program was deficient in any manner. Plaintiff thus cannot possibly show reliance on any statements by Defendant that the program was more than it turned out to be, even if they were made, which the Court finds they were not. Although Plaintiff may have ended up putting more time into developing the product than had been anticipated,⁴ that does not constitute misrepresentation.⁵

² Plaintiff’s programmers felt the program was “rather poorly written” and that the code was “eucryptic to the point of confusing”.

³ While it is unclear (and irrelevant) which party drafted this particular language, the Court does note the testimony of Defendant’s hazardous materials expert that the package labels are the responsibility of the shipper, not the carrier. The Court thus does not understand why Plaintiff would find the lack of a label-generating component significant in any event, since the market at which the product was to be directed was the trucking industry.

⁴ The Court notes in this regard the testimony of Plaintiff’s Chief Operating Officer that he was highly confident that prior to entering the agreement, the programmer “hadn’t been given any direction to dig deeply, because we

Accordingly, as the Court is able to find as a matter of law that the licensing agreement is valid and enforceable, that the HazMat Loader is indeed subject to said agreement, and that Plaintiff cannot offer any evidence of misrepresentation, all claims in Plaintiff's Complaint must be dismissed, and judgment entered in Defendant's favor.

ORDER AND JUDGMENT

AND NOW, this 6th day of August 2004, for the foregoing reasons, Plaintiff's Motion for Summary Judgment is hereby DENIED and Defendant's Motion for Summary Judgment is hereby GRANTED. Judgment is hereby entered in Defendant's favor and against Plaintiff and Counts I, II and III of Plaintiff's Complaint are hereby DISMISSED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Allen E. Ertel, Esq.
J. David Smith, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

didn't have an agreement and we're a thin shop. We don't put time into things until we know we're going to be working on it."

⁵ Plaintiff also argues in its brief that the contract is void based on mutual mistake, or voidable based on unilateral mistake, contending the program did not operate as represented or required. As far as "represented", the Court has already addressed this issue. With respect to the argument the program did not operate as "required", Plaintiff's witnesses' testimony they knew from the beginning they had to "start from scratch" belies any argument Plaintiff had established any "requirements" of the program in order for it to enter the agreement.