SNB Farms, Inc. v. Swift & Co.

United States District Court for the Northern District of Iowa, Eastern Division

February 7, 2003, Decided

No. C01-2077, No. C01-2078, No. C01-2080

Reporter
2003 U.S. Dist. LEXIS 2063 *; 2003 WL 22232881

SNB FARMS, INC., Plaintiff, vs. SWIFT AND COMPANY and CONAGRA, INC., Defendants. REIS AG, LTD., Plaintiff, vs. SWIFT AND COMPANY and CONAGRA, INC., Defendants. BRUENING FARMS, INC., Plaintiff, vs. SWIFT AND COMPANY and CONAGRA, INC., Defendants.

Disposition: [*1] Defendants' motions for summary judgment granted in part and denied in part.

Case Summary

Procedural Posture
Plaintiffs, hog sellers, brought claims against the defendants, hog purchasers, for breach of contract and negligent misrepresentation, and the purchasers brought counterclaims seeking to collect the balance contained in adjustment accounts created pursuant to the hog contracts entered into between the parties. The purchasers sought summary judgment on the sellers' claims as well as their own counterclaims.

Overview
The sellers and purchaser entered into separate hog purchase contracts whereby the sellers agreed to sell and the purchaser agreed to buy an "average" number market hogs per contract year. Pursuant to each contract, an adjustment account was created, all hogs were paid at a base price, with an adjustment for market sales above or below the base price. Beginning in 1998, the hog market experienced very low prices thereby inflating the adjustment accounts and after the sellers refused to negotiate new contracts, the purchaser terminated its contracts with the sellers, and the sellers sued. The purchaser was granted summary judgment on the sellers' negligent misrepresentation claim because the sellers failed to establish that the purchaser provided false information, and as experienced hog producers, the sellers were not justified in relying any allegedly false information provided by the purchaser. However, summary judgment was not proper in the sellers' breach of contract claim where the "average" quantity term was ambiguous or as to the purchaser's counterclaim because it was uncertain whether the sellers were given the opportunity to cure the alleged defects.

Outcome
The purchaser's motions for summary judgment were granted as to the sellers' negligent misrepresentation claim and summary judgment was denied as to the sellers' breach of contract and the purchaser's claims for debit adjustment balance amounts.

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Judges: JOHN A. JARVEY, Magistrate Judge, UNITED STATES DISTRICT COURT.

Opinion by: JOHN A. JARVEY

Opinion

ORDER

This matter comes before the court pursuant to the defendants' December 6, 2002 motions for summary judgment (docket number 34 in C01-2077; docket number 33 in C01-2078; docket number 33 in C01-2080). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to *28 U.S.C. § 636(c)*. The court held oral argument on this motion on January 30, 2003. For the reasons set forth below, the defendants' motions are granted in part and denied in part.

In this case, the plaintiffs, SNB Farms, Inc., Reis Ag., Ltd., and Bruening Farms, Inc., brought claims against the defendants, Swift & Company and ConAgra Foods, Inc. **[*3]** , for breach of contract and negligent misrepresentation. The defendants brought counterclaims against the plaintiffs to collect the balance contained in adjustment accounts created pursuant to contracts entered into between the parties. The defendants move for summary judgment, arguing: (1) there is no genuine issue of material fact with respect to the plaintiffs' breach of contract claims; (2) there is no genuine issue of material fact with respect to the plaintiffs' negligent misrepresentation claims; (3) there is no genuine issue of material fact with respect to the defendants' right to recover a judgment against the plaintiffs in their counterclaim, specifically, that Swift is entitled to recover judgment for the debit balance in the adjustment account created pursuant to the contracts; and (4) there is no genuine issue of material fact with respect to the defendants' right to recover a judgment against the plaintiffs in their counterclaim, specifically, that the plaintiffs' affirmative defenses of negligent misrepresentation, force majeure, and non-integration fail as a matter of law.

Summary Judgment: The Standard

A motion for summary judgment may be granted

only **[*4]** if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986)*. Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but … must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." *Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986))*. Although "direct proof is not required to create a jury question, … to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" *Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985)* **[*5]** (quoting *Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983))*. In applying these standards, the court must give the nonmoving party the benefit of all reasonable inferences to be drawn from the evidence. *Krause v. Perryman, 827 F.2d 346, 350 (8th Cir. 1987)*.

Statement of Undisputed Material Facts

Plaintiff SNB is an Iowa corporation with its principal place of business in Hamilton County, Iowa. Plaintiff Reis is an Iowa corporation with its principal place of business in Howard County, Iowa. Plaintiff Bruening is an Iowa corporation with its principal place of business in Chickasaw County, Iowa. Defendant Swift is a Delaware corporation with its principal place of business in Greeley, Colorado. Defendant ConAgra is a Delaware corporation with its principal place of business in Omaha, Nebraska.

Plaintiffs Bruening and Reis along with Crane Creek Farms met as a group with Swift in 1997. Plaintiff SNB was not part of this group and negotiated separately with Swift. Mark Bruening, on behalf of this group, contacted Mark Halverson, the station manager of the New Hampton, Iowa hog buying station, and expressed interest in **[*6]** the possibility of entering into a long-term contract for the purchase of hogs with Swift. While employed by Swift, Halverson occasionally handled negotiations of hog supply contracts, including the negotiations of the contracts with Reis and Bruening. In December of 1997, Mr. Halverson met with the group in New Hampton, Iowa to negotiate the terms of the proposed contracts, however, Mr. Halverson did not have the authority to sign the contracts on Swift's behalf.

On February 1, 1998, Reis and Swift entered into a hog purchase contract whereby Reis agreed to sell and Swift agreed to buy "an average of 11,000 market hogs" per contract year, which ran from February 1 to January 31 of the following year. The contract was to remain in effect for five years unless earlier terminated or extended in accordance with its terms. On February 1, 1998, Bruening and Swift entered into a hog purchase contract whereby Bruening agreed to sell and Swift agreed to buy "an average of 11,000 market hogs" per contract year, which ran from February 1, 2000 to January 31 of the following year. The contract was to remain in effect for five years unless earlier terminated or extended in accordance with **[*7]** its terms. On April 1, 1998, SNB and Swift entered into a hog purchase contract whereby SNB agreed to sell and Swift agreed to buy "an average" of 25,000-35,000 market hogs per contract year, which ran from April 1 to March 31 of the following year. The contract was also to remain in effect for five years unless earlier terminated or extended in accordance with its terms.

Pursuant to each contract, an adjustment account was created. All hogs were paid at a base price of $ 40.00/cwt. When the base price to be paid for the hogs exceeded the market price, the adjustment account would be increased by the amount that the base price exceeded the market price. When the market price exceeded the base price, the adjustment account would be decreased. If there was no balance remaining in the adjustment accounts when the market price exceeded the base price, the sellers would get no credit for a market price that exceeded the base price. SNB's contract provided that "[if] at the termination of this agreement, there is a debit balance remaining in the Adjustment Account, Seller shall pay to Buyer a cash amount equal to such debit balance." The following provision was added in handwriting: **[*8]** "or has the option to renew the contract for another five years, with

a debit balance payoff at that time, if any exists." Reis and Bruening's contracts provided: "If, at the termination of this Agreement, there is a debit balance remaining in the Adjustment Account, Seller shall pay to Buyer a cash amount equal to such debit balance, provided, however, that if such a debit balance remains, Buyer shall have an option to extend the term of this Agreement until such time that such debit balance is repaid to, and/ or recovered by, Buyer in full."

The plaintiffs underdelivered market hogs to Swift in several contract years. There was an outbreak of Porcine Reproductive and Respiratory Syndrome (PRRS) which led to hog production problems. The plaintiffs sought to provide substitute hogs, but Swift did not allow them to do so. [1] Swift claimed that the contract required all hogs to be raised at the plaintiffs' facilities.

Beginning **[*9]** in 1998, the hog market experienced very low prices thereby inflating the adjustment accounts. Swift called a meeting with several of its producers, including the plaintiffs, to discuss the possibility of negotiating new contracts. The plaintiffs refused to agree to a new contract. Swift then terminated its contracts with the plaintiffs, citing the plaintiffs' failures to deliver the requisite number of hogs as the reason for the termination. The contract with Reis was terminated by Swift effective September 14, 2001. The contract with Bruening was terminated by Swift effective September 14, 2001. The contract with SNB was terminated by Swift effective December 3, 2001.

As of September 14, 2001, the effective date of termination of the contract with Reis, the debit balance in the adjustment account was $ 372,543.01. As of September 14, 2001, the effective date of termination of the contract with Bruening, the debit balance in the adjustment account was $ 402,224.85. As of December 3, 2001, the effective date of termination of the contract with SNB, the debit balance in the adjustment account was $ 1,134,384.06.

Conclusions of Law

Choice of Law-Contract Claims

The **[*10]** first issue for the court is which law to apply to the contract claims. The court looks to the choice-of-law rules of the state of Iowa, because in an action based upon diversity of citizenship jurisdiction, a federal district court must apply the substantive law of the state in which it sits, including its choice-of-law rules. *Harlan Feeders, Inc. v. Grand Labs., Inc., 881 F. Supp. 1400, 1403-04 (N.D. Iowa 1995)* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941))*. Under the Iowa choice-of-law test for contract actions, the parties may, with certain restrictions, select for themselves the law which will apply to their contract. *881 F. Supp. at 1410-11* (citing *Cole v. State Auto. & Cas. Underwriters, 296 N.W.2d 779, 781 (Iowa 1980))*. The Restatement permits parties to agree on the law to be applied to the contract in most cases as long as it does not override the public policy of another state having a materially greater interest in the transaction. *881 F. Supp. at 1412* (citing *Joseph L. Wilmotte & Co. v. Rosenman Bros., 258 N.W.2d 317, 326 (Iowa 1977))*.

In the contract **[*11]** between SNB and Swift, the parties chose Colorado law to resolve disputes arising out of the contract, presumably because Swift's principal place of business is in Colorado. In the contracts with Reis and Bruening, the parties agreed to have Nebraska law control, presumably because ConAgra's principal place of business is in Nebraska. Because the court does not find the parties' choice of law to override the public policy of a state having a materially greater interest in the transactions, the parties' choice of law provisions will be upheld.

Breach of Contract Claims

The plaintiffs commenced this action alleging that the defendants breached their hog purchase contracts when Swift prematurely terminated the contracts. The plaintiffs claim they were excused from delivering the number of market hogs required under the contracts thereby rendering Swift's termination of the contract premature. In the alternative, the plaintiffs argue that they were not in default at the time Swift terminated the contracts. The plaintiffs contend that Swift was only dissatisfied with the contracts because the record low prices for hogs caused the adjustment accounts to swell. They further contend **[*12]** that because Swift was

[1] There is a factual dispute about the plaintiffs' offer to substitute hogs.

unsecured in its debt in the adjustment accounts, it wanted the plaintiffs' principals to sign personal guarantees and to pay a portion of the debit balance. When the plaintiffs refused, Swift terminated the contracts. The plaintiffs argue that Swift's real motivation for terminating the contracts was due to the record low prices of hogs, the contract did not function as Swift had envisioned, and Swift was under economic pressure to renegotiate the contracts.

The defendants argue that they were justified in terminating the contracts with the plaintiffs because the plaintiffs failed to provide the requisite number of hogs and therefore are entitled to summary judgment on the plaintiffs' breach of contract claims. They rely on § 12.01 of the contract which states:

Failure of Buyer of Seller to insist upon strict performance of any of the terms and conditions hereof, or failure or delay to exercise any right or remedies provided herein, or by law, or to properly notify either party in the event of breach or the acceptance of payment for any goods hereunder, shall not release either party from any of the warranties or obligations of this Contract, and **[*13]** shall not be deemed a waiver of any right by either party to insist upon strict performance hereof, or any of its rights or remedies as to any such goods regardless when shipped, received or accepted, or as to any prior or subsequent default hereunder, nor shall any purported oral modification operate as a waiver of any of the Contract terms.

The plaintiffs argue that there are at least three genuine issues of material fact for trial: (1) whether Swift engaged in good faith and fair dealing; (2) whether the plaintiffs had substantially performed under the contract; and (3) the meaning of ambiguous terms within the contract.

Good Faith and Fair Dealing

The plaintiffs first argue that Swift failed to comply with the implied covenant of good faith and fair dealing. Under Colorado law, every contract contains an implied covenant of good faith and fair dealing. *See* *Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo. 1995)*. The implied covenant of good faith and fair dealing does not inject new substantive terms or conditions into a contract. *Soderlun v. Pub. Serv. Co. of Colo., 944 P.2d 616, 623 (Colo. App. Ct. 1997)*. This covenant is invoked **[*14]** only to give effect to the intentions of the parties or to honor their reasonable expectations in entering into the contract. *Bayou Land Co. v. Talley, 924 P.2d 136, 154 (Colo. 1996)*. Therefore, the doctrine is applied only "when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time." *Amoco Oil Co. v. Ervin, 908 P.2d at 498* (citing *Hubbard Chevrolet Co. v. Gen. Motors Corp., 873 F.2d 873, 876 (5th Cir. 1989)*). The doctrine will not contradict terms or conditions for which a party has bargained. *Id.* (citing *Hubbard Chevrolet Co. v. Gen. Motors Corp., 873 F.2d at 876*).

Nebraska *U.C.C. § 1-203* provides that every "contract or duty within [this act] imposes an obligation of good faith in its performance or enforcement." The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. *Cimino v. FirsTier Bank, 247 Neb. 797, 530 N.W.2d 606, 616 (Neb. 1995)*. However, "the law **[*15]** does not allow the implied covenant of good faith and fair dealing to be an overflowing cornucopia of wished-for legal duties; indeed, the covenant cannot give rise to new obligations not otherwise contained in a contract's express terms." *Comprehensive Care Corp. v. RehabCare Corp., 98 F.3d 1063, 1066 (8th Cir. 1996)*.

The plaintiffs argue that Swift decided to terminate the contracts only after the plaintiffs refused to switch to a new contract and Swift used the quantity issue only as an excuse to justify its right to terminate the contracts. Further, the plaintiffs argue that Swift's refusal to allow them the opportunity to cure their alleged defaults is further evidence that Swift was not acting in good faith and fair dealing. The defendants argue that the implied duty of good faith and fair dealing cannot, as a matter of law, be used to circumvent or negate express terms or rights provided in the contract. Specifically, the defendants point to the language of the contracts which state that either party may "insist upon strict performance" of any of the terms and conditions of the contract. Therefore, the defendants argue that they had the express right to **[*16]** insist that the plaintiffs strictly comply with the quantity term and the right to

terminate the contract if the plaintiffs defaulted in the performance of that or any other obligation under the contract.

The court agrees with the defendant that the implied duty of good faith and fair dealing cannot contradict express terms of the contract or give rise to new duties not contained within the contract. It does not require a party to act reasonably. The implied duty may be relied upon when the manner of performance allows for discretion on the part of either party. In this case, the language of the contracts expressly set forth the right of both parties to terminate the contract if the other party does not strictly perform its duties and either party may insist upon strict performance. The contracts in question did not leave such issues as quantity, price or time to the discretion of the parties. Therefore, the plaintiffs cannot rely on the implied duty of good faith and fair dealing to circumvent terms which were bargained for.

Substantial Performance

The plaintiffs next argue that another issue of material fact precluding summary judgment on the breach of contract claim **[*17]** is whether the plaintiffs substantially performed all major aspects of the hog purchase contracts. Specifically, they argue that they made good faith efforts to deliver all available hogs to Swift and Swift benefitted from getting those quality hogs.

Under Colorado law, "a party may recover on a contract when that party has performed all the major aspects of the contract but has deviated in insignificant particulars that do not detract from the benefit which the other party would derive from a literal performance." *Rohauer v. Little, 736 P.2d 403, 410 (Colo. 1987)* (citing *Newcomb v. Schaeffler, 131 Colo. 56, 279 P.2d 409 (Colo. 1955)*). Whether performance is "substantial" is generally a question of fact that depends upon the particular circumstances of the case. *Id.*

Similarly in Nebraska, to successfully bring an action on a contract, a plaintiff must first establish that it substantially performed its obligations under the contract. *See ADC-1, Ltd, v. Pan Am. Fuels, Ltd., 247 Neb. 71, 525 N.W.2d 190, 192 (Neb. 1994)*. To constitute substantial performance under a contract, any deviations from the contract must be small **[*18]** and relatively unimportant. *Lange Indus. v. Hallan Grain Co., 244 Neb. 465, 507 N.W.2d 465, 473 (Neb. 1993)*. To show substantial performance, the following circumstances must be established by the evidence: (1) the party made an honest endeavor in good faith to perform its part of the contract; (2) the results of the endeavor are beneficial to the other party; and (3) such benefits are retained by the other party. *ADC-1, Ltd, v. Pan-American Fuels, Ltd., 525 N.W.2d at 192*. Substantial performance is a relative term and whether it exists is a question to be determined in each case with reference to the existing facts and circumstances. *See First Data Res., Inc. v. Omaha Steaks Int., Inc., 209 Neb. 327, 307 N.W.2d 790, 794 (Neb. 1981)*.

This court concludes based upon a review of the record that the evidence establishes that the plaintiffs may have substantially performed under the contract. In SNB's case, it was required to deliver an "average" of 25,000-35,000 market hogs per contract year. In Reis and Bruening's case, they were required to deliver an "average" of 11,000 market hogs per contract year. The evidence presented shows **[*19]** that during the year 2000, SNB delivered 22,008 hogs, Reis delivered 7,278 hogs, and Bruening delivered 7,876 hogs. Swift received all of the plaintiffs' market hogs, however, Swift argues that the numbers were less than the contract "minimum." Nowhere in these contracts were the quantities of hogs ever called minimums. The contracts called for the delivery of averaged numbers of hogs. The contracts omit any guidance as to how many years were to be considered in determining the average. Because it is unclear how many hogs each plaintiff was to actually deliver each contract year because of the use of the word "average" in describing the quantity of hogs to be delivered, an issue of material fact exists as to whether the plaintiffs' actions constituted substantial performance.

Ambiguous Terms

Finally, the plaintiffs argue that the quantity terms contained in the contracts are ambiguous and their meaning present an issue of material fact to be determined by a jury. In Colorado, to ascertain whether certain provisions of a contract are ambiguous, "the

language used therein must be examined and construed in harmony with the plain and generally accepted meaning of the words employed **[*20]** and by reference to all the parts and provisions of the agreement and the nature of the transaction which forms its subject matter." *Christmas v. Cooley, 158 Colo. 297, 406 P.2d 333, 335 (Colo. 1965)* (citations omitted). Whether an ambiguity exists is a question of law. *Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 374 (Colo. 1990)* (citations omitted). A provision is ambiguous "when it is reasonably susceptible to more than one meaning." *N. Ins. Co. of N.Y. v. Ekstrom, 784 P.2d 320, 323 (Colo. 1989)* (citing *Harrison W. Corp. v. Gulf Oil Co., 662 F.2d 690, 695 (10th Cir. 1981))*. A court "may consider extrinsic evidence bearing upon the meaning of the written terms, such as evidence of local usage and of the circumstances surrounding the making of the contract. However, the court may not consider the parties' own extrinsic expressions of intent." *KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769, 777 (Colo. 1985)* (internal citations omitted). Once a contract is determined to be ambiguous, its interpretation becomes an issue of fact. *Union Rural Elec. Ass'n v. Pub. Utilities Comm'n, 661 P.2d 247, 251 n.5 (Colo. 1983)*. **[*21]**

Similarly in Nebraska, "where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain." *Craig v. Hastings State Bank, 221 Neb. 746, 380 N.W.2d 618, 621 (Neb. 1986)*. "Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." *Knox v. Cook, 233 Neb. 387, 446 N.W.2d 1, 4 (Neb. 1989)* (citations omitted). Whether a document is ambiguous is a question of law for the court. *Id.* (citations omitted). "When a court has determined that ambiguity exists in a document, an interpretive meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder." *Dammann v. Litty, 234 Neb. 664, 452 N.W.2d 522, 527 (Neb. 1990)* (citations omitted).

The court finds that as a matter of law the provision regarding the quantity of market hogs to be delivered is ambiguous. In Swift's contract with SNB, Section 2.01 of the contract states that the plaintiffs were **[*22]** to deliver the "average" number of market hogs per contract year as set forth in Schedule 1. An ambiguity exists as to what this provision exactly required of SNB. In Swift's contracts with Reis and Bruening, Section 2.01 stated that Reis and Bruening were to deliver an "average" of 11,000 market hogs per contract year. Again, an ambiguity exists regarding just how many hogs they were to deliver to Swift per contract year. Therefore, the court finds that a genuine issue of material fact exists regarding what the terms an "average" of 25,000-35,000 and "average" of 11,000 hogs per contract year required of the plaintiffs.

Choice of Law-Tort Claims

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As previously mentioned, to resolve the issue of which state's law applies to the plaintiffs' claims, the court looks to the choice-of-law rules of the state of Iowa, because in an action based upon diversity of citizenship jurisdiction, a federal district court must apply the substantive law of the state in which it sits, including its choice-of-law rules. *Harlan Feeders, Inc. v. Grand Labs., Inc., 881 F. Supp. at 1403-04* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941))*. However, before any choice-of-law is made, there must be a "true conflict" between the laws of the possible jurisdictions on the pertinent issue. *881 F. Supp. at 1404*. Where there is no "true conflict," the court need not engage in a choice-of-law analysis and should simply apply the law of the forum. *Id.*

All three possibly interested states, Iowa, Nebraska, and Colorado, have adopted the Restatement (Second) of

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[2] Although all parties assume Nebraska or Colorado law applies to the negligent misrepresentation claim as well as the contract claims, the court nonetheless will conduct its own choice-of-law analysis. Parties may choose the law to apply to contract claims but may not do so for tort claims. A contractual choice-of-law provision is not dispositive of the proper choice-of-law for related tort claims. *World Plan Exec. Council v. Zurich Ins. Co., 810 F. Supp. 1042, 1046 (S.D. Iowa 1992)* (citing ***United States v. Conservation Chem. Co., 653 F. Supp. 152, 176-78 (W.D.Mo. 1986))***; *see also Jones Distrib. Co., Inc. v. White Consol. Indus., Inc., 943 F. Supp. 1445, 1458 (N.D. Iowa 1996)* (holding the parties chosen law of the contract applied to contract claims but not to tort claims).

Torts elements of negligent misrepresentation. Therefore, the court finds that a "true conflict" does not exist in this case, thereby no choice-of-law analysis is necessary and the law of the forum will be applied.

[*24] *Negligent Misrepresentation*

Iowa has adopted the Restatement (Second) of Torts elements of negligent misrepresentation. *See* *Freeman v. Ernst & Young, 516 N.W.2d 835, 837 (Iowa 1994)*. The Restatement establishes the following elements:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts, § 552(1) (1976). Comment c explains that the rule only applies when the defendant has a pecuniary interest in the transaction in which the information is given. If the defendant has no pecuniary interest and the information is given gratuitously, then the defendant is under no duty to exercise reasonable care in giving the information. Comment d indicates that a defendant's pecuniary interest will normally lie in consideration paid for supplying the information **[*25]** but information given in the course of the defendant's business, profession or employment may also be sufficient indication of a pecuniary interest even if no consideration is given at the time.

In order to recover on this claim, the plaintiffs must demonstrate that Swift supplied them with false information upon which they reasonably relied and that Swift failed to exercise reasonable care or competence in communicating such information to them. The plaintiffs allege that Swift misinformed them regarding the number of market hogs they should agree to deliver under the contracts and the ramifications of not delivering that amount during each contract year. Basically, all three plaintiffs allege that Swift encouraged them to overestimate the number of hogs they could produce to prevent the plaintiffs from selling any excess market hogs to other processors. However, as indicated, in order to be held liable for negligent misrepresentation, Swift must have given the plaintiffs some false information. The court concludes that no false information was given to the plaintiffs by Swift. In fact, the plaintiffs do not even allege that any information provided to them was false, rather, **[*26]** they merely argue that Swift improperly encouraged them to overestimate the number of hogs they were to deliver each contract year. Specifically, Reis and Bruening argue that Swift had the expertise to determine what number to place in the contracts and they justifiably relied upon that number. This argument overlooks that fact that Reis and Bruening were experienced hog producers. If they felt that the number of hogs to be produced was too high, they should not have agreed to them. The plaintiffs were the ones producing the hogs. They were in a superior position to determine the number of hogs they could produce a year. Therefore, even if Swift had provided some false information, the plaintiffs were not justified in relying on that information. If the plaintiffs felt the numbers provided by Swift were unreasonable, they should have negotiated for a different number. The defendants are entitled to summary judgment on the negligent misrepresentation claim.

Defendants' Counterclaim: Right to Recover Judgment for the Balance in the Adjustment Account

Swift argues that it is entitled to recover the debit balance in the adjustment accounts created under the hog purchase contracts **[*27]** because, upon termination of the contracts, the plaintiffs were required to pay the balance remaining in the accounts to Swift. The plaintiffs contend that the damages caused to them by Swift's breach of contract offset any amount owed under the adjustment accounts. Reis and Bruening further argue that prior to executing their contracts, Mr. Bruening contacted Mark Halverson and Ed Brems of Swift to request the inclusion of a "forgiveness" provision in the contract. This provision essentially would have voided the contract term which required the plaintiffs to pay the remaining balance in the adjustment accounts to Swift upon termination of the contracts. Mr. Halverson stated that he observed a telephone call between Mr. Bruening and Mr. Brems in which Mr. Brems agreed to include such a provision. They further allege that following the telephone call, Mr. Halverson

wrote this agreement on a piece of paper and attached it to the signed contracts he forwarded to Mr. Brems. Reis and Bruening contend that this forgiveness provision relieves them of any obligation to pay the debit balance created by the adjustment accounts. The signed contracts bear no such language.

Summary judgment **[*28]** is not appropriate in favor of the defendants on their counterclaim. There is no dispute over the amounts contained in the adjustment accounts. However, there is a genuine issue of material fact as to whether the plaintiffs were given the right to cure their alleged defaults. The contracts clearly provide the plaintiffs the opportunity to cure in § 9.01 which states: "Seller defaults in the performance of any obligation hereunder and fails to cure such default within ninety (90) days following receipt of written notification of such default from Buyer." There is a factual dispute as to whether the plaintiffs actually attempted to cure their alleged default. If it is shown that they did attempt to cure and the defendants did not allow them the chance to cure, the defendants were in violation of this provision of the contract and did not have the right to terminate the contracts. Whether the plaintiffs actually could have cured their alleged defaults is also a question of fact. Further, as previously discussed, the quantity provisions are ambiguous. It is unclear how many hogs the plaintiffs were to deliver and therefore the court cannot conclude as a matter of law that the plaintiffs **[*29]** were in fact in default at the time the contracts were terminated. Summary judgment is not appropriate in the defendants' favor on their counterclaim.

Plaintiff's Affirmative Defense: Force Majeure

The plaintiffs have raised force majeure as an excuse to why they did not provide the number of requisite hogs to Swift. All three plaintiffs assert that their herds were suffering from a PRRS outbreak so they were unable to deliver the required amount of hogs and they claim this was a force majeure event pursuant to Section 10.01 of their contracts. The defendants contend that in order to provide an excuse on this basis, the plaintiffs must have given proper notice to Swift of the force majeure event. The defendants argue that the plaintiffs did not provide the proper notice and therefore cannot be excused from performance under the contract on this basis.

Section 10.01 of the hog purchase contracts provided:

Where either party claims an excuse for nonperformance under this Section, it must give prompt telephonic notice, promptly confirmed by written notice, of the occurrence and estimated duration of the Force Majeure Event to the other party; and shall give prompt **[*30]** written notice when the Force Majeure Event has been remedied and performance can recommence hereunder.

It is undisputed for the purposes of summary judgment that the outbreak of PRRS constituted a force majeure event. The issue is whether the plaintiffs complied with the notification requirements and are therefore entitled to assert the excuse of force majeure.

SNB claims that it sent a letter to Swift on March 1, 2000 informing Swift of PRRS related problems. It claims that SNB representatives also orally communicated this problem to Swift. Reis and Bruening argue that they sent Swift quarterly estimates in which they provided written notification of the PRRS problem. All three plaintiffs further argue that there is a genuine issue of material fact as to whether their alleged noncompliance with the notification requirements is considered a material breach that voids the protection of the force majeure provision. The defendants assert that the contract required the plaintiffs to give timely notice to Swift that they were invoking the force majeure provision and to inform Swift of the expected duration of the force majeure event. The defendants contend that the plaintiffs **[*31]** never notified Swift that they were invoking the force majeure provision nor did they notify Swift of the expected duration of the event. There is a conflict in the evidence as to whether SNB, by sending the letter and allegedly orally communicating the problem of PRRS to Swift, performed all of the contract terms as required, specifically, if they properly notified Swift of the force majeure event, and this is a fact question for the jury. Therefore, as to SNB, summary judgment is not appropriate on this issue. However, the quarterly estimates provided by Reis and Bruening make no mention of PRRS or that they were invoking the force majeure provision of their contracts. They are merely handwritten estimates of the numbers of hogs to be delivered. Therefore, they are precluded from asserting the excuse and summary judgment is appropriate in favor of the defendants on this issue as to Reis and Bruening.

Plaintiff's Affirmative Defense: Non-Integration

Finally, the defendants argue that they are entitled to summary judgment on the plaintiffs' affirmative defense of parol evidence and non-integration. The defendants argue that the plaintiffs do not specify which terms they contend **[*32]** were oral and even if there were oral agreements, the plaintiffs are precluded from varying the terms of a written contract. The plaintiffs argue that there are terms in the contract that are either ambiguous or not included in the written contract. Specifically, the plaintiffs assert that the quantity term is ambiguous so parol evidence is admissible on that issue. SNB further argues that because the defendants submitted two different versions of the contract, one providing for a $ 1.00 premium and no option to extend the contract and the other with no premium but with a handwritten provision allowing for the extension for another five years, it should be allowed to rely on extrinsic evidence to determine the actual agreement between the parties. Reis and Bruening argue that their contracts were silent in terms of the forgiveness provision that they understood to be part of the agreement. They therefore contend that because there is evidence that the parties negotiated and agreed upon a forgiveness provision and the written contract is silent on that issue, the parol evidence rule allows the introduction of relevant facts to determine the agreement between the parties.

Reis and **[*33]** Bruening also argue that when they met with a Swift representative to review a draft copy of the proposed contract and to negotiate the terms of the contract, the parties negotiated the essential terms of the agreement and initialed each change or addition. Reis and Bruening both contend that they understood the parties had reached an agreement and that Swift's representative would forward a draft for changes and return a final version which had incorporated the agreed upon terms. However, Reis asserts that when Mr. Halverson presented the final contract to Mr. Reis to sign, he did not give him an opportunity to read the written contract and he simply told Mr. Reis that the final contract incorporated all the agreed upon changes. Mr. Reis then signed the contract allegedly without reading it. Swift did not give Reis or Bruening a copy of the fully executed contract for almost a year later but did provide them with a "term sheet" detailing some of the essential terms of the contract.

Under Colorado law, the intent of parties should generally be determined from the language of the contract itself. *Humphrey v. O'Connor, 940 P.2d 1015, 1018 (Colo. App. Ct. 1996)* (citation **[*34]** omitted). However, where contract terms are vague or ambiguous, parol evidence may be admissible for the purpose of interpreting, explaining, or applying such terms. *Tripp v. Cotter Corp., 701 P.2d 124, 126 (Colo. Ct. App. 1985)* (citations omitted). A court should only admit parol evidence when the contract between the parties is so ambiguous that their intent is unclear. *Cheyenne Mountain Sch. Dist. # 12 v. Thompson, 861 P.2d 711, 715 (Colo. 1993)* (citation omitted). In the absence of allegations of fraud, accident, or mistake in the formation of the contract, parol evidence may not be admitted to add to, subtract from, vary, contradict, change, or modify an unambiguous integrated contract. *Tripp v. Cotter Corp., 701 P.2d at 126*. The parol evidence rule does not, however, bar the admission or oral representations which are not inconsistent with the terms of the final written instrument and are not of the type that one would necessarily expect to be incorporated into the final agreement. *See Stevens v. Vail Assocs., Inc., 28 Colo. App. 344, 472 P.2d 729 (Colo. App. Ct. 1970)*.

Similarly in Nebraska, where negotiations between parties **[*35]** result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. *Rowe v. Allely, 244 Neb. 484, 507 N.W.2d 293 (Neb. 1993)* (citations omitted). Unless a contract is ambiguous, parol evidence cannot be used to vary its terms. *Sack Bros. v. Tri-Valley Co-op, Inc., 260 Neb. 312, 616 N.W.2d 786, 791 (Neb. 2000)*. The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement. *Five Points Bank v. White, 231 Neb. 568, 437 N.W.2d 460, 462 (Neb. 1989)*.

Section 16.02 of the contract in this case provided that:

This contract contains the entire agreement between the parties and there are no oral promises, agreements, warranties, obligations, assurances, or conditions,

expressed or implied, precedent or otherwise, affecting it.

A court may allow evidence of an oral agreement despite a contract "provision reciting that it contained all the terms thereof and that all representations of the defendant were contained therein," where **[*36]** the alleged oral agreement "was inseparably interwoven in the whole transaction …." *Bill Dreiling Motor Co. v. Schultz, 168 Colo. 59, 450 P.2d 70, 73 (Colo. 1969)*. However, the presence of a merger clause is often taken as a strong sign of the parties' intent although it is not conclusive in all cases. *Sierra Diesel Injection Serv. v. Burroughs Corp., 874 F.2d 653, 657 (9th Cir. 1989)*.

In this case, it appears that the parties intended their ultimate bargain to encompass all of their agreements. The plaintiffs urge the court to look beyond the four corners of the contracts. SNB's argument that because there are two different versions of its contract, extrinsic evidence should be allowed, overlooks the point that the relevant provisions are the same in both versions of the contract. The evidence which Reis and Bruening seek to introduce directly contradicts the express, unambiguous language of their contracts. Reis' and Bruening's proposed statements indicate that prior to the execution of the contracts, the parties reached some separate understanding that a forgiveness clause would be added to the contract, thereby voiding the provision which **[*37]** requires the plaintiffs to pay the debit balance of the adjustment account to Swift upon proper termination of the contracts. These statements are contrary to the terms of the contract which provide that the plaintiffs are to pay the balance of the account to Swift upon termination of the contract. These are precisely the type of statements precluded by the parol evidence rule.

Only after a contract is deemed ambiguous may the court use extrinsic evidence to assist it in ascertaining the intent of the parties. The court has found an ambiguity in the contracts at hand. Therefore, because the court has already found the quantity terms to be ambiguous, extrinsic evidence may be admitted regarding the quantity terms contained in the contracts.

IT IS ORDERED that the defendants' motions for summary judgment (docket number 34 in C01-2077; docket number 33 in C01-2078; docket number 33 in C01-2080) is granted in part and denied in part as follows:

1. On the defendants' claim that there is no genuine issue of material fact with respect to plaintiffs' breach of contract claims, summary judgment is denied.

2. On the defendants' claim that there is no genuine issue of material **[*38]** fact with respect to the plaintiffs' negligent misrepresentation claims, summary judgment is granted.

3. On the defendants' claim that there is no genuine issue of material fact with respect to their counterclaim and their right to recover a judgment against the plaintiffs for the debit balance in the adjustment accounts, summary judgment is denied.

4. On the defendants' claim that there is no genuine issue of material fact as to the plaintiffs' counterclaims, summary judgment is denied.

2/7/03

JOHN A. JARVEY

Magistrate Judge

UNITED STATES DISTRICT COURT

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