

Gary is a grain merchant who both brokers crops, and processes food products for ultimate sale to the retail market. Gary buys wheat from farmers and either resells it to other entities, or retains the wheat for processing into various bread products that are sold to area retail food markets. In April of 1997, in a telephone conversation, Gary contracted for the sale of 60,000 bushels of wheat from farmer Fran. The price of the wheat was \$10/bushel for delivery no later than July 1, 1997. Following their April conversation, Gary resold half of the wheat to another grain merchant for \$12/bushel and planned to retain the balance of the grain for his own use. Gary sent Fran a written confirmation noting "the sale of 60,000 bushels of wheat at \$10/bushel for delivery no later than July 1, 1997."

To prepare for the processing of the wheat and its eventual conversion to end use products, Gary entered into several agreements, one of which was with Michelle for the purchase and maintenance of commercial baking equipment. Following several meetings, during which Michelle claimed she had just the ovens for Gary and they would be perfect in every respect, Gary sent Michelle an offer in which Michelle was to supply Gary with four commercial grade ovens at a cost of \$40,000. The offer further stated that Michelle would be responsible for the maintenance and service of the ovens for a five year period. Michelle responded to Gary's offer with a purchase order that provided for the sale of four commercial grade ovens at a cost of \$40,000, noting that Michelle would be responsible for the maintenance and service of the ovens for a five year period. The purchase order further added that there were "NO WARRANTIES, EXPRESS OR IMPLIED, and that acceptance is expressly made conditional on assent to these terms." The four ovens were delivered on June 1, 1997.

On June 20, 1997, with grain prices up to \$15/bushel and wanting to take advantage of the escalating price, Fran notified Gary that they had no contract and he was selling his 60 bushels of wheat to Bill. Worried about fulfilling his own obligations, Gary went into the market and bought replacement wheat for \$18/bushel on June 25, 1997. By July 1, 1997, the price of grain had risen to \$20/bushel. To make matters even worse for Gary, the ovens that had been delivered by Michelle were not working satisfactorily. Gary needed ovens that would sustain a temperature of 450°F and his tests of the ovens revealed that they could not sustain a temperature higher than 425°F. Michelle spent five days working on the ovens but had not been able to achieve the desired performance.

Assume that the Uniform Commercial Code is applicable in this jurisdiction. In view of the above noted matters, discuss whether Gary has any basis for claiming breach of any contractual obligations. As part of your discussion, note remedies that Gary might pursue as well as any defenses Gary might encounter to his claims and possible rebuttals to these defenses.

Gary v. Fran

Gary claims breach of K for failing to sell him wheat

Defense of Fran - no K - failure to comply w/ statute of frauds

- applicability of 2-201(2) - farmer as merchant
- Loeb & Co. v. Schreiner - no not in definition of merchant 2-104(1)
 - dealer
 - by his occupation holds himself out as having knowledge or skill particular to goods involved
 - employs agent who by occupation holds himself out as having knowledge
 - "Rebuttal" - unless
 - sold crops for several years
 - engaged in particular type of sale in past
- Llewellyn (as per Hillinger)
 - Llewellyn intended to exclude farmers
 - "Rebuttal" - but between merchant rules should not be limited when circumstances & underlying reason justifies extending their application
 - reasonableness, soundness & decency should justify extending merchant rules

Damages

- Gary will want difference between K price & cover price 2-712 (\$10 - &18)
 - or
 - pre-code rule of difference between K price & price when performance is due (\$10 - \$20)
 - [-discuss Cosden Oil choices
 - when performance is due under k
 - when buyer learned of breach plus commercially reasonable time
 - when buyer learned of the breach]
- Fran will say no K, or, damages are difference between K price and price at time Gary learned of breach (\$10 - \$15)
 - or
 - limited to loss on resale K of \$2/bushel for 30,000 bushels

Gary v. Michelle

breach of K for delivery of nonconforming/defective ovens

Defense of Michelle - mixed K of sales & service

- UCC not applicable for primarily service K
- [Discuss the following - also as "rebuttal"]
 - primary purpose test (main objective)
 - the % of the total K price that could be allocated to the purchase of goods
 - the intent of the parties
 - gravaman test
 - apportion K so Article 2 is applicable to the portion of K that deals with goods - divides K]

no K for not accepted -Michelle's acceptance was expressly made conditional on assent to additional terms 2-207

-no K on documents

re expressly made conditional language, 3 points of view in Diatom, Inc. v. Pennwalt

-one extreme -Roto-Lith

response stating a term materially altering the K obligations to the disadvantage of offeror constitutes conditional acceptance

-middle ground -Construction Aggregates

response "predicating" acceptance clarification, addition or modification is conditional acceptance

-other extreme -Dorton v. Collins & Aikman

conditional nature of acceptance should be so clearly expressed in a manner sufficient to notify offeror that offeree is unwilling to proceed unless additional or different terms are included in K

Rebuttal of Gary - even if no K on documents go to 2-207(3) and get conduct to establish K

-under gap filler provisions warranty provisions are applicable

Defense of Michelle -even if K, warranties are excluded

- Merchantability -language used is such that common understanding calls buyer's attention to exclusion 2-316(3)(a)

rebuttal - merchantability not mentioned

- Fitness for Particular Purpose also excluded under 2-316(3)(a) plus Michelle had no reason to know particular purpose and Gary not relying on Michelle's skill or judgment

rebuttal - Gary was relying & Michelle knew particular purpose for goods - she had "just the ovens for Gary"

- Express warranty - excluded and never made for merely offered an opinion
Sessa v. Reigle analysis

1.) did the statement constitute an affirmation of fact or promise or merely an opinion or commendation of the goods

2.) was the statement part of the basis of the bargain

3.) was it breached

rebuttal - inconsistency construed in favor of express warranty