IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GENERAL METAL HEAT TREATING, INC.	)	**CASE NUMBER CV 11 759959**
	)	
Plaintiff,	)	
vs.	)	
	)	
PRECISION GEAR LLC, *et al.*	)	
	)	
Defendants.	)	**JUDGE JOHN P. O'DONNELL**
GLOBAL AEROSPACE, INC.	)	**JOURNAL ENTRY**
	)	
Plaintiff,	)	
vs.	)	
	)	
GENERAL METAL HEAT TREATING, INC.	)	**CASE NUMBER CV 11 760036**
	)	
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

General Metal Heat Treating, Inc. filed the lawsuit in case number 759959 on July 19, 2011, then filed an amended complaint on November 10, 2011 to include Global Aerospace, Inc. as a defendant.

In the meantime, Global Aerospace filed the lawsuit in case number 760036 on July 20, 2011. An amended complaint in case number 760036 was then filed on December 9, 2011.

Now pending and fully briefed are General Metal's motion for summary declaratory judgment in case number 759959, Precision Gear, LLC and Global Aerospace's motion for summary declaratory judgment in case number 759959, and General Metal's partial motion for

summary judgment on Global Aerospace's amended complaint in case number 760036. This entry follows.

STATEMENT OF THE FACTS

The names of two of the companies here leave little mystery about what they do. Precision Gear, LLC[1] makes gears used in aircraft engines. General Metal Heat Treating, Inc. heat treats metal gears so they reach a desired level of hardness and durability. Global Aerospace, Inc. is an insurance underwriter for Precision Gear.

In February, 2002, Precision Gear solicited from General Metal a quote for heat treating 2,400 metal gears. General Metal responded with a written quote dated February 14, 2002. That quote is attached as appendix A to this entry. After listing a number of materials specifications (which presumably were originally supplied to General Metal by Precision Gear) the quote shows a price of 45 cents each to "carburize [and] heat treat" a quantity of 2,400 parts. Other charges shown on the quote include $27.00 for certification, $67.00 for a microspecimen, and a 5% gas surcharge.

Microspecimens are samples taken from a heat treated gear for testing to ensure the gears meet the metallurgical requirements for case depth, core hardness and case hardness. The certification is General Metal's assurance that the microspecimen test found the gears tested to be within the specifications.

Upon receiving the quote, Precision Gear shipped 2,420 gears to General Metal for heat treating. The gears were shipped with purchase order number 86063, attached as appendix C to this entry. The purchase order shows a quantity of 2,420 pieces at 45 cents each for a total heat treating charge of $1,089.00. It also lists one microspecimen at $67.00 and a certification

[1] The gears at issue were manufactured in 2002 by Precision Gear Co., a predecessor to Precision Gear, LLC. All references in this entry to Precision Gear are intended to cover both entities.

charge of $25.00. The front of the purchase order also notes that "four scrap pieces for heat treat samples" were included with the shipment.

The back of the purchase order recites a long list of "terms and conditions of purchase." Relevant to the motions under consideration, these include the following:

> 1. Acceptance. This Purchase Order must be accepted in writing by Seller by signing and returning promptly to Purchaser the acknowledgement copy, but if Seller should fail to do so, the performance of any work or services by Seller shall constitute acceptance by Seller of this Purchase Order and all of its terms and conditions. Acceptance of this Purchase Order is limited to the terms hereof. Any terms proposed by Seller which purport to add to, vary from or conflict with the terms herein shall be void and the terms of this Purchase Order shall govern. If this Purchase Order has been issued by the Purchaser in response to an offer, the terms of which are in addition to or different from any of the provisions of this Purchase Order, then the issuance of this Purchase Order by Purchaser shall constitute an acceptance of such offer subject to the express condition that Seller deems this Purchase Order to constitute the entire agreement between Seller and Purchaser.
>
> . . .
>
> 5. Warranty. Seller warrants that all goods and services hereunder will conform in all respects with the specifications, drawings, samples and quality control or other procedures or descriptions, and will be merchantable and free from any cracks or defects in material, design, and workmanship. Seller shall indemnify and defend Purchaser and its customers against any loss, damage, liability, cost or expense, including attorney's fees, that Purchaser and/or its customers may incur, directly or indirectly, as a result of any breach of such warranties.

There is no evidence that an agent of General Metal – the seller under Precision Gear's purchase order – signed and returned an acknowledgment copy of the purchase order. However, General Metal did heat treat the gears, but in two separate loads because all of the gears could not fit in the furnace at the same time.

After heat treating all of the gears, and performing two microspecimen tests, one for each batch of gears, General Metal shipped the gears back to Precision Gear with a delivery receipt. The delivery receipt, attached as Appendix B to this entry, shows a shipping date of February 26, 2002. It also includes a total charge of $134.00 for two microspecimen tests at $67.00 each.

On the front side of the delivery receipt, at the bottom, is a notation that says "MTI STATEMENT OF LIMITED LIABILITIES (Please Read Carefully as Shown on Reverse Side)." The following language appears on the reverse side of the delivery receipt:

> ALL WORK IS ACCEPTED SUBJECT TO THE FOLLOWING CONDITIONS:
>
> It is recognized that even after employing all the scientific methods known to us, hazards still remain in metal treating. THEREFORE, OUR LIABILITY SHALL NOT EXCEED TWICE THE AMOUNT OF OUR CHARGES FOR THE WORK DONE ON ANY MATERIAL (FIRST TO REIMBURSE FOR THE CHARGES AND SECOND TO COMPENSATE IN THE AMONT OF THE CHARGES), EXCEPT BY WRITTEN AGREEMENT SIGNED BY THE METAL TREATER.
>
> THE CUSTOMER, BY CONTRACTING FOR METAL TREATMENT, AGREES TO ACCEPT THE LIMIT OF LIABILITY AS EXPRESSED IN THIS STATEMENT TO THE EXCLUSIONS OF ANY AND ALL PROVISIONS AS TO LIABILITY ON THE CUSTOMER'S OWN INVOICES, PURCHASE ORDERS OR OTHER DOCUMENTS. IF THE CUSTOMER DESIRES HIS OWN PROVISIONS AS TO LIABILITY TO REMAIN IN FORCE AND EFFECT, THIS MUST BE AGREED TO IN WRITING SIGNED BY AN OFFICER OF THE TREATER. IN SUCH EVENT, A DIFFERENT CHARGE FOR OUR SERVICES, REPRESENTING THE HIGHER RISK TO TREATER, SHALL BE DETERMINED BY TREATER AND CUSTOMER.
>
> THE TREATER MAKES NO EXPRESS OR IMPLIED WARRANTIES AND SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY AS TO THE PERFORMANCE OF CAPABILITIES OF THE MATERIAL AS HEAT TREATED OR THE HEAT TREATMENT. THE AFOREMENTIONED LIMITATION OF LIABILITY STATED ABOVE IS SPECIFICALLY IN LIEU OF ANY EXPRESS OR IMPLIED WARRANTY, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS, AND OF ANY OTHER SUCH OBLIGATION ON THE PART OF THE TREATER.
>
> . . .
>
> Customer agrees there will be no liability on the treater in contract or tort for any special, indirect or consequential damages arising from any reason whatsoever, including but not limited to personal injury, property damage, loss of profits, loss of production, recall or any other losses, expenses or liabilities allegedly occasioned by the work performed on the part of the treater.
>
> . . .
>
> OUR LIABILITY TO OUR CUSTOMERS SHALL CEASE ONCE ANY FURTHER PROCESSING, ASSEMBLING OR ANY OTHER WORK HAS BEEN UNDERTAKEN ON SAID MATERIAL.
>
> No agent or representative is authorized to alter the above conditions, except by writing duly signed by an officer of treater.

The heat treated gears were accepted, and the delivery receipt signed, by Bill Sherwood, Precision Gear's loading dock manager. The next day, General Metal sent an invoice to Precision Gear. The invoice shows a charge of $1,089.00 for heat treating 2,420 parts, a $27.00 certification charge, and a $134.00 charge for two microspecimen tests. On top of those charges (which total $1,250.00) is a $62.50 fuel surcharge. Precision Gear paid the invoice without any changes.

The heat treated gears were eventually sold by Precision Gear to Teledyne International and incorporated into aircraft engines. On July 24, 2005, a Cessna airplane with one of the engines crashed, killing the three people on board. An investigation by the National Transportation Safety Board determined that a crankshaft gear – one of the 2,420 made by Precision Gear and heat treated by General Metal – failed. The investigation revealed that the gear did not meet the heat treatment specifications for case depth and core hardness included on Precision Gear's purchase order.

On July 23, 2007, the decedents' family members filed a wrongful death lawsuit alleging, among other things, that the plane crash was caused by a defective gear made by Precision Gear and heat treated by General Metal. The claims in that lawsuit against Precision Gear were eventually settled by Global Aerospace for Precision Gear.[2] Precision

[2] Global Aerospace, Inc. is described in paragraph 3 of the amended complaint as follows: Global is a Delaware Corporation with its principal place of business in Parsippany, New Jersey. Five insurers, National Indemnity Company, Converium Insurance (North America) Inc., American Alternative Insurance Corporation, Tokio Marine & Fire Insurance Company, Ltd. (US Branch) and Mitsui Sumitomo Insurance Company of America, issued a policy of insurance through Global to Precision Gear and PGC covering certain potential liability and losses described herein. The five insurers share the risk under the insurance policy as per their agreed-upon proportions. Global is the exclusive agent for the five insurers with respect to the policy. Global managed the policy, adjusted the underlying loss for all the insurers, and paid the settlement amount and other costs and expenses described herein. The five insurers are fully subrogated to any and all rights of Precision Gear against General Metal to recover the amounts paid by Global for the settlement and other costs and expenses described herein. Global is the authorized agent for the five insurers, with full authority to prosecute this action on behalf of the insurers and to be bound by the outcome of this action on behalf of the insurers.

Gear is still a third-party defendant on a claim by the engine manufacturer of indemnity for whatever it may have to pay by settlement or judgment.

After settling the wrongful death lawsuit, Precision Gear and Global sought indemnification from General Metal, which was denied. These lawsuits ensued.

THE AMENDED COMPLAINTS

General Metal's amended complaint includes a single cause of action for declaratory judgment. General Metal asks that this court declare that the language contained in the delivery receipt's statement of limited liabilities is part of the contract between General Metal and Precision Gear and that therefore any recovery against General Metal by Precision Gear or Global Aerospace is limited to twice the amount of General Metal's charge for the work.

Global Aerospace's counterclaim for declaratory judgment in case number 759959 seeks a declaration by this court that the warranty provisions of the terms and conditions section of the purchase order are part of the contract between General Metal and Precision Gear, and that the warranty included General Metal's promise to heat treat all 2,420 gears to the specifications shown on the purchase order.

Global Aerospace's amended complaint in case number 760036 includes five causes of action. First, Global Aerospace claims that General Metal breached its contract with Precision Gear by not treating the gears to the required specifications. Second is a cause of action for breach of warranty under section 5 of the purchase order's terms and conditions. Third is a claim for express indemnification under the same part of the purchase order. Fourth is a claim for common law indemnification, and last is a claim by Global Aerospace that General Metal negligently misrepresented that the failed gear met all required heat treatment specifications.

As damages for these causes of action Global Aerospace seeks the money paid to settle and defend the lawsuits against Precision Gear because of the plane crash.

LAW AND ANALYSIS

Summary of the parties' arguments

General Metal characterizes Precision Gear's purchase order as an offer that it rejected and replaced with a counteroffer consisting of all of the terms of the delivery receipt, including the limitation of liabilities. General Metal argues that the evidence would allow reasonable minds to conclude only that Precision Gear agreed to the counteroffer when it accepted return of the heat-treated gears without objecting to the terms on the delivery receipt and then paid the invoice.

Precision Gear[3], on the other hand, argues that its offer, consisting of the terms of the purchase order, was accepted by General Metal when it performed the heat treatment in accordance with the purchase order's specifications, hence the contract terms are those contained in the purchase order. Because of that, Precision Gear asserts that General Metal's post-performance proposal to add terms – including the limitation of liability – was ineffective to modify a completed contract.

Is General Metal's statement of limited liabilities part of the contract?

A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration. *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 2002-Ohio-2985, ¶15-16. There are no contentions in this case that the parties lacked

[3] The motion for summary judgment is by both Precision Gear and Global Aerospace. For ease, this entry will refer to those two movants as Precision Gear.

contractual capacity, that there was no consideration,[4] or that the subject of the contract was illegal. The dispute centers on when, and by whom, an offer was accepted and the identity of the offer's essential terms.

A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. *Kostelnik*, supra. But a contract cannot be enforced unless its essential terms are definite and certain. *Nilavar v. Osborn*, 137 Ohio App.3d 469, 484 (2d Dist. 2000). Both parties treat Precision Gear's purchase order as an offer and both parties concede that certain terms from the purchase order became part of their contract: the quantity of gears (2,420); the price per gear (45 cents); and the heat treat specifications.[5] They also agree that microspecimen testing and certification were terms of the contract, but dispute the number of tests that were required. So there is no question that a contract existed and there is no question that there was a meeting of minds about many of its terms. Because of that, the rest of the essential terms must be those that existed at the time of acceptance. The pertinent inquiry, then, is when did acceptance occur?

A writing signed by the offeree is, of course, a preferred mode of acceptance because it is most likely to avoid lawsuits like this one. However, simply because a party does not signify acceptance by executing an agreement does not necessarily result in the unenforceability of an agreement. *Berjian v. Telephone Co.*, 54 Ohio St.2d 147, 150 (1978). Conduct sufficient to show agreement, including performance, is a reasonable mode of acceptance. *G. Herschman Architects v. Ringco Mfg. Co.*, 8th Dist. No. 67758 (May 11, 1995). General Metal began performing the undisputed terms of the contract on February 15,

[4] Except Precision Gear does argue, in the alternative, that General Metal's limitation of liability is not part of the contract due to want of consideration.

[5] Carburize & harden per MHS-TCM-C6C rev 4-24-96 except temper @ 350 deg. F; case depth at gear pitch dia. .035/.040; case hardness RC 58-62; and core hardness RC 30-45.

when it accepted the 2,420 untreated gears, and finished performance no later than February 26, before it returned the treated gears to Precision Gear.[6] Since General Metal's performance was complete by February 26, prior to return shipping of the gears, acceptance was also complete by then. It was only after formation – which occurred when General Metal accepted the offer by beginning performance – and completion of the contract that General Metal proposed its limitation of liabilities. As a matter of law, therefore, that term was not part of the contract.

General Metal's asseertion that it never accepted Precision Gear's offer, and the delivery receipt was a counteroffer accepted by Precision Gear, is not convincing. That proposition requires that General Metal's 1) taking possession of the gears, 2) heat treating them to the same specifications listed in the purchase order, 3) testing and certifying them and 4) shipping them back to Precision Gear be considered not as a manifestation of acceptance of Precision Gear's terms but merely as components of a counteroffer. It makes no sense from either side's perspective for a provider of services to complete all of its work and then make a counteroffer. The seller risks doing its work for nothing if the "counteroffer" is rejected, and the buyer has no incentive to agree to terms less favorable than its offer after the job is done.

General Metal's reliance on the common law "mirror image rule" is also unpersuasive. That rule provides that, generally, an offer and an acceptance constitute a contract if no material variance exists between them. *Karas v. Brogan*, 55 Ohio St.2d 128, 129 (1978). But General Metal accepted by completing performance. It was only after the contract was fully performed and the heat-treated parts dropped back at Precision Gear that General Metal

[6] Exhibit 3 to General Metal's motion for summary judgment is the typewritten certification and the handwritten laboratory reports. These are dated February 26, 2002, suggesting that the tests were done, and the results certified, on that date, but obviously before being shipped back to Precision Gear. But no matter the exact date, performance of the undisputed material terms was complete once the tests were done and the results certified.

proposed a "material variance" to the contract in the form of the statement of limited liability. By then it was too late. Of course, the analysis – and outcome – would be quite different if General Metal communicated the proposed statement of limited liability before beginning the work. In that event the parties would have reached an explicit agreement or had no contract at all, in which case General Metal could have returned the gears untreated, leaving both parties in their pre-negotiation position. But those are not the facts here.

The contract was formed when General Metal manifested assent to its terms by beginning performance. General Metal's obligations were complete upon return of the treated parts to Precision Gear. There is no genuine issue of material fact that the statement of limited liability had never been communicated to Precision Gear by then and it was not part of the contract between the parties. Additionally, there is no evidence, viewing all of the evidence in the light most favorable to General Metal, that the statement of limited liability was an agreed modification to the contract.

Are Precision Gear's "boilerplate" terms on the purchase order part of the contract?

Having decided that the contract was formed when General Metal accepted Precision Gear's offer by beginning performance, and having concluded that the terms of the contract included, at a minimum, the quantity of gears, the price per gear and the heat-treat specifications, the next question is whether the boilerplate "terms and conditions" of Precision Gear's purchase order are enforceable terms of the contract. More specifically, are section 5's warranty and indemnity provisions part of the contract? Precision Gear says yes, because General Metal's acceptance through performance covered all the terms of its offer. General Metal's answer – no – is based on its position that the purchase order was rejected when it split the gears into two separate loads for heating.

Unlike General Metal's statement of limited liability, Precision Gear's "terms and conditions" were presented before work started and with ample opportunity for General Metal to decline them or negotiate additional terms (a higher price, for example) in exchange. Yet there is no evidence that General Metal did refuse the terms. Instead, the only evidence is that General Metal performed according to the custom terms – quantity, price and heat specifications – of the purchase order. Moreover, General Metal was on notice from the purchase order itself that "the performance of any work or services by Seller shall constitute acceptance by Seller of this Purchase Order and all of its terms and conditions."[7] Because there is no countervailing evidence suggesting that, *at the time of acceptance*, General Metal did not assent to the terms and conditions there is no genuine issue of material fact to prevent declaratory judgment in Precision Gear's favor.

Precision Gear's request for declaratory judgment on General Metal's contract obligations

For its final request for declaratory judgment, Precision Gear seeks a declaration that "General Metal was required to heat treat all 2,420 crankshaft gears to the specifications set forth in and referenced on the Purchase Order."[8] While pointing out that the declaration sought is not the same as saying that General Metal agreed that "each heat treated gear will have the case depth, case hardness and core hardness listed on the specification,"[9] General Metal concedes that it agreed "to heat treat all 2,420 gears per the specifications provided on Purchase Order No. 86063."[10] That stipulation is enough to warrant granting this part of Precision Gear's motion for summary declaratory judgment.

[7] Appendix C, purchase order terms and conditions, section 1.
[8] Precision Gear's motion for summary judgment, page 14.
[9] General Metal's brief in opposition to summary judgment, p. 14.
[10] *Id.*

CONCLUSION

By performing according to the specifications of the purchase order General Metal accepted Precision Gear's offer and a contract was formed. There is no genuine issue of material fact that the accepted contract did not include General Metal's statement of limited liability that was presented to Precision Gear well after General Metal's contract obligations were fully performed. Therefore, the court finds, and declares as a matter of law, that the statement of limited liability is not part of the contract between General Metal and Precision Gear, and that Precision Gear's recovery, if any, from General Metal on its substantive claims is not limited to twice the amount of General Metal's charge for the work performed.

Furthermore, the only evidence is that General Metal performed according to the purchase order without objecting to the standard terms and conditions printed on the purchase order. There is therefore no genuine issue of material fact to prevent the conclusion, as a matter of law, that General Metal assented to the standard terms and conditions. As a result, the court finds, and declares as a matter of law, that the standard terms and conditions, including the warranty provision at section 5, are an enforceable part of the contract between General Metal and Precision Gear.

Finally, based on the parties' stipulation, the court finds, and declares as a matter of law, that the contract required General Metal to heat treat all 2,420 crankshaft gears to the specifications set forth in and referenced on the Purchase Order.[11]

[11] The specifications are set forth in footnote 3 above.

Accordingly, Precision Gear and Global Aerospace's motion for summary judgment, filed February 17, 2012, is granted and General Metal's motion for summary judgment, also filed February 17, 2012, is denied.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this _____ day of February 2013, to the following:

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Judge John P. O'Donnell