

weeks from the date of the order to delivery. BRC hoped that PC could reduce that lead time to 1 to 4 weeks.

[3] Part of the lead time delay is caused by the need for PC to order raw materials for its forgings after an order is placed. Accordingly, PC says that BRC proposed an arrangement whereby PC would pre-order (and pay for) raw materials and build an inventory of forgings upon BRC's agreement that it would pay the full amount of all purchase orders placed with PC even though BRC would only request delivery and be invoiced as and when it actually required the orders to be filled.

[4] PC says that the parties agreed to this arrangement, that PC received purchase orders from BRC totalling \$830,587.29, that it then ordered the necessary raw materials to fill those orders, and that BRC then requested delivery of, and was invoiced and paid for, only \$208,318.58 of the forgings it had ordered. BRC requested delivery of no more of the forgings and declined to pay for the remaining forgings it had ordered, which had a value of \$622,268.71, including forgings PC had manufactured for, but not yet delivered to, BRC. Those completed but undelivered pieces have a value of \$214,587.24.

[5] PC sued for breach of contract and now moves for summary judgment. For the following reasons, I grant that relief.

The facts

[6] PC relies on the affidavit of its sales manager, Syl Demers. BRC has chosen to lead no evidence but did cross-examine Mr. Demers. BRC challenges the credibility of PC's account of the facts.

The need to reduce lead times

[7] Mr. Demers asserts in his affidavit that his email correspondence with BRC's president, Carter Will, reflects the oral discussions he was having with Mr. Will about the problem of lead times, and BRC's proposal that in exchange for the promise of full payment for all purchase orders, PC would order raw materials in advance and have an inventory of the forgings it manufactured

for BRC before BRC sought delivery. Mr. Demers says that on behalf of PC he agreed to this proposal.

[8] An email from Mr. Will dated January 6, 2017, does indeed reference the need to build up inventory to accommodate the needs of a client and its willingness to “prepay” for some of that inventory. Mr. Will’s email indicates the product it would be ordering but also notes that PC’s lead time “may be a deal breaker.” He closes his email by asking “Is there anything that can be done?” Mr. Demers’ deposes that in their discussions (although not reflected in this email) Mr. Will said that he hoped PC would be in a position to deliver products on 1 to 4 weeks’ notice.

[9] On January 11, 2017, Mr. Will wrote again to PC. He again reported what BRC wanted to order and said that to reduce the lead time he would like to place that order “now”, asking what payment terms PC would need to agree to start the process of ordering materials and producing forgings. In his affidavit, Mr. Demers refers to this email as evidence that “Mr. Will requested that in exchange for the promise of full payment of all purchase order placed by BRC, PC would order raw materials and inventory forgings in advance.” I think it is a fair reading of the email that it is consistent with the request described in the affidavit, although it does not express the request as clearly and fully as Mr. Demers’ description of that request.

The initial agreement

[10] Mr. Demers says in his affidavit that he agreed on PC’s behalf that PC would order raw materials and inventory forgings in advance on BRC’s commitment that it would pay the full amount of all of their purchase orders placed with PC. Mr. Demers attaches to his affidavit an email dated January 16, 2017, which, he says, evidences this initial agreement. In that email, Mr. Demers makes reference to some outstanding invoices but writes also that he hopes that the parties can agree that PC will order raw materials up front on the condition that BRC pay for those raw materials by February 10, 2017, and that PC will agree to payment of its invoices within 60 days. Again, the email is consistent with the agreement Mr. Demers describes but does not set out all the terms he says were agreed to in his affidavit.

[11] However, PC points to other evidence, including an email from BRC to Mr. Demers dated November 23, 2017, in which a BRC representative refers to the “unwritten agreement” BRC has

with PC that PC will “hold” forgings for a time. PC also points to a series of nine quotations sent to BRC between August 30, 2017, and February 22, 2019. On each quotation, the following terms appear (among others):

1. ACCEPTANCE. No contract of purchase and sale shall arise until [PC] shall have acknowledged and accepted in writing, at its home office, a written purchase order from [BRC] for the material on the terms and provisions quoted....

[...]

10. CANCELLATION. Orders will not be subject to cancellation or modifications, either in whole or in part, without the [PC]’s written consent, and then only under terms that will reimburse [PC] for all applicable costs incurred by it, including costs of purchased raw material either non-cancellable, in transit, or on hand, tools and dies, patterns, models, engineering costs, and a reasonable allowance for profit [emphasis added].

[12] Neither of these terms is inconsistent with the oral contract Mr. Demers described.

[13] After receiving the quotations, BRC then delivered eight purchase orders (dated between September 12, 2017 and March 1, 2019) by which BRC ordered forgings worth \$830,597.29 (including HST). In turn, PC then issued confirmations of BRC’s orders, acknowledging and accepting in writing BRC’s written purchase order.

[14] Mr. Demers deposes in his affidavit that it was at all times understood and agreed that upon PC’s confirmation of BRC’s purchase orders, PC would order the raw materials and create forgings for BRC in advance on the condition that BRC would pay the full amount of the purchase orders. Although Mr. Demers refers to the parties’ orally expressed understanding, that understanding is captured in writing in the terms quoted above from PC’s quotations and crystallized by PC’s written confirmations and acceptance of BRC’s written purchase orders.

Formalizing the agreement in writing

[15] In any case, Mr. Demers says that the parties sought to formalize their agreement. In an email dated January 3, 2018, Mr. Demers proposed draft language that included provisions that BRC was to provide “blanket purchase orders” for BRC’s forecasted requirements and that “BRC is committed to taking all parts on order within a 9-month window from the blanket purchase order

date.” In exchange, “PC offers firm pricing” and to “order and inventory enough raw material to cover a minimum of 3 months” of BRC’s blanket orders and to “forge and inventory enough forgings to cover a minimum of 1 month” of the blanket orders. BRC was to be responsible for anything that rendered the inventory obsolete.

[16] Mr. Demers says that BRC accepted these terms and points out, correctly, that they were incorporated by BRC into some (but not all) of its subsequent purchase orders. But Mr. Demers testified under cross-examination that the written version of the agreement changed nothing about the essence of the contract: “... when we talk about the unwritten agreement, really it was this agreement, and we put it down, you know, in writing going forward.” He rejected the suggestion that the written version’s reference to the possibility of changes to BRC’s forecasts meant that BRC’s purchase orders could be changed. He said that changes to the forecasts were relevant only to the date upon which PC’s forgings were released to BRC, which was subject to change, but that once PC had purchased raw materials on the basis of one of BRC’s purchase orders, BRC was obligated to pay the full amount of that purchase order.

[17] Pursuant to the agreement, PC ordered raw materials and forged products for BRC. When BRC requested their delivery, PC delivered the requested forgings and invoiced for them. Twelve invoices were sent and BRC paid PC for each of them (\$208,318.58 in total).

[18] However, after September of 2019, BRC did not request shipment of any more of the forgings and has failed or refused to pay for the remaining balance of the purchase orders, which stands at \$622,268.71. As of February 2020, PC was in possession of completed forgings it had manufactured for BRC having a value of \$214,587.24.

BRC’s terms and conditions

[19] In cross-examination, Mr. Demers was taken to BRC’s purchase orders and asked about the following reference found on each of them: “GO TO www.brceng.com/terms-and-conditions FOR TERMS AND CONDITIONS.” When asked, Mr. Demers testified that he did not have a copy of BRC’s terms and conditions. When BRC’s counsel purported to show Mr. Demers a copy, which he said he had retrieved from “a web archive,” Mr. Demers testified that it was the first time he had seen the document and that he had never reviewed BRC terms and conditions before. After

hearing the objection of PC's counsel, who noted that the witness had not identified the document, BRC's counsel marked the document for identification.

[20] The terms and conditions document includes a provision that reads as follows: "Buyer may terminate at any time in whole or in part upon three days of written notice." Mr. Demers testified that this and other provisions in the BRC terms and conditions document were inconsistent with the agreement which PC and BRC had reached. BRC never took the position that it could cancel its purchase orders on 3 days' notice and that was not a term PC would have accepted since it would have put PC at an unacceptable level of risk.

Mitigation of losses

[21] BRC sold its machining and flow control business in December 2019 to a company called AIP Industries ("AIP") and repudiated its contract with PC in February 2020. In a letter dated February 21, 2020, BRC invited PC to "sell, in finished or unfinished state, any of the unfinished inventory you made in anticipation of selling it to [BRC]."

[22] AIP did not take delivery of any of the forgings ordered by BRC and PC's attempts to sell the inventoried BRC forgings to others were almost wholly unsuccessful, largely because they were custom manufactured and of little or no use to anyone other than BRC. After offering the forgings manufactured for BRC to AIP and to six or seven of PC's other customers in western Canada, and to some companies in Texas, PC was able to sell some of them for a total of \$8,680.00. PC was also able to use all the unused raw material it had ordered for BRC for forgings produced for other companies. Otherwise, it has been unable to mitigate its loss.

Positions of the parties

[23] PC argues that it is entitled to summary judgment, there being no genuine issue for trial. Although it initially sought to recover the full value of BRC's unpaid purchase orders (\$622,268.71), on the hearing of the motion it amended its position and now seeks to recover only the value of the forgings which were manufactured for BRC but which were not delivered because delivery was never requested (\$214,587.24 less mitigation).

[24] In the absence of any evidence from BRC, PC submits, the evidence of Mr. Demers is uncontested, and the defendant has failed to point to any issue that could justify sending this matter to trial. Instead, the plaintiff has satisfied its onus, on evidence I should accept as credible, to show that BRC entered into a contract with PC, that BRC promised to pay for all items listed in its purchase orders, that PC confirmed those orders, acted on them by obtaining and paying for raw materials, and manufacturing and holding custom forgings for BRC, and that BRC failed to pay for all of the forgings it ordered, including those which PC manufactured but did not deliver. The amount of the loss claimed is the amount BRC failed to pay for forgings in PC's inventory when BRC repudiated the contract (\$214,587.24) less the value of the BRC forgings it was able to sell to other customers (\$8,680.00): a total of \$205,907.24.

[25] BRC says that the evidence fails to establish a breach of contract given that it was entitled to cancel any order on 3 days' notice. BRC further argues that PC has led insufficient evidence of its alleged losses and of its effort to mitigate those losses. On all issues, BRC submits that Mr. Demers' evidence lacks credibility and should be rejected.

Discussion

Breach of contract

[26] I agree with PC that the facts it alleges have been established on credible evidence on this motion. The cross-examination of Mr. Demers did not reveal any serious issue with his evidence, which evidence I accept. While the affidavit was in some respects drafted in a manner which appeared to overstate the contents of some of the emails attached to it, as I have said above, those emails were certainly consistent with Mr. Demers' evidence, which evidence was also corroborated by other documents, including especially the quotations, the purchase orders, the invoices, and the wording of the agreement as it was reduced to writing.

[27] As I noted above, quite apart from Mr. Demers' recollections of the oral agreement between PC and BRC, the documents leave no doubt that BRC ordered forgings after receiving PC's quotations (which set out PC's terms and conditions), that PC confirmed those orders, and that BRC failed to pay for everything it had ordered, including those forgings which were completed but not delivered. The absence of any affidavit from BRC indicating that any part of this is false,

or has been misunderstood, or must be considered in the context of other facts, suggests that there are no such countervailing facts (see *Diao v. Zhao*, 2017 ONSC 5511, at paras. 17 – 19, 22; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 20.02).

[28] Clearly the parties intended to reach an agreement and did so: PC quoted prices, BRC ordered products on the basis of those quotations, PC confirmed those orders, and BRC paid for over \$200,000 worth of forgings delivered by PC (see *1022423 Ontario Ltd. v. Metcap Living Management Inc.*, 2010 ONSC 1782, at paras. 4, 13). The parties also solidified their contract in writing – which included BRC’s commitment to take delivery of “all parts on order.” PC upheld its end of the bargain, producing forgings which were apparently to the satisfaction of BRC and creating an inventory on which BRC could draw on short notice. In the commercial context in which the parties were operating, no reasonable observer would conclude otherwise than that the parties intended to enter into the contract described by Mr. Demers (*Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Company Limited*, 2003 ABCA 221, at para. 9; G. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell; 2011), at pp. 15, 31).

[29] I add here that the terms and conditions document put to Mr. Demers in cross-examination is inadmissible hearsay. Mr. Demers had never seen it and could not identify it. Counsel’s description of the document and how it was found in a web archive are, obviously, not evidence. The document has not been authenticated or shown to be admissible in any way. In short, the document is not properly before the court on this motion.

[30] Moreover, the document is not explained by anyone, and I am left with only Mr. Demers’ evidence that the terms and conditions described in the document do not reflect the agreement between the parties. There is no evidence to the contrary. Even if I considered this inadmissible document, in the absence of any other evidence, and in the face of Mr. Demers’ evidence that it was irrelevant, it could not affect the result of this motion.

[31] It follows from the foregoing that I accept PC’s assertion that BRC breached its contract with PC and that I reject BRC’s position that PC has failed to establish a breach of contract. On this point, no genuine issue remains for trial. BRC’s position depends on its assertion that the BRC terms and conditions document was an operative part of the agreement with PC, including

the provision that it could cancel its orders at any time on three days' notice. There is no evidence of any of this. BRC has not put its best foot forward (see *Da Silva v. Gomes*, 2018 ONCA 610, at paras. 17 – 18; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 26 O.R. (3d) 423 (Gen. Div.) at para. 24; *Bank of Nova Scotia v. Shields*, 2013 ONSC 4701, at paras. 12 – 14; *Diao v. Zhao, supra*, at para. 17 – 18).

The credibility of Mr. Demers

[32] It will be obvious from the discussion to this point that I reject BRC's position that Mr. Demers' credibility is a genuine issue for trial. While his affidavit might have been more carefully drafted, I do not regard it as false or misleading as suggested by BRC, nor do I think Mr. Demers contradicted himself on cross-examination. On the contrary, he offered sensible explanations for his various positions (including the meaning of his affidavit), which positions are corroborated by the documents and by the conduct of the parties, and uncontradicted by any other evidence.

Damages and mitigation

[33] With respect to mitigation, Mr. Demers testified that PC made best efforts to mitigate its losses. It used the raw material that it had ordered to BRC for other purposes, and it sold as many of the completed forgings as it could to other customers. He testified that there was an extremely small market for the forgings given that they had been custom made for BRC – and were therefore of little use to other customers – and given the decline in the oil and gas industry in Alberta. This evidence is not contradicted by any other evidence, and I see no reason not to accept it as credible. I note in this regard that the onus to show a failure to mitigate is on the defendant (see *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, at para. 24).

[34] But BRC takes issue with PC's failure to produce detailed inventory records and suggests that Mr. Demers' claims about PC's losses – which are based on how much of the inventory created for BRC remains unsold – should not be accepted. This too, it is argued, raises an issue for trial. BRC claims that PC's "inventory evidence is being concealed on purpose" and suggests in its factum that PC was unable to sell more of the forgings created for BRC to other customers because those forgings do not exist.

[35] Mr. Demers was clear in his affidavit that as of February 2020, PC had completed 939 undelivered forgings for BRC. Those forgings have a value of \$214,587.24. While BRC now complains that inventory records are being “concealed” and suggests that Mr. Demers has sworn a false affidavit, these complaints were not put to Mr. Demers in cross-examination. While Mr. Demers was asked to confirm this evidence respecting the remaining inventory (question 226) and was asked questions about earlier inventory reports (questions 227 – 244), it was never suggested to him that his claim to have 939 forgings in inventory in February 2020 was false. Nor was any request for a more recent inventory report made. Nor was it ever suggested that PC was concealing evidence “on purpose.” Not only were these serious allegations not put to Mr. Demers, his evidence respecting the inventory in hand in February 2020 was completely unchallenged. Nor was he challenged on the evidence he gave during cross-examination that PC kept regularly updated inventory records which it shared “back and forth” with BRC so that both parties were fully aware at all times of how much inventory was on hand. No contradictory inventory report was put to Mr. Demers. I note here that BRC’s February 2020 letter acknowledges the existence of a remaining inventory, which it encouraged PC to attempt to sell.

[36] In these circumstances, I do not accept the argument of BRC that PC has failed to establish its losses. The evidence of Mr. Demers remains unchallenged. There is no reason in the record before me, including in the cross-examination, not to accept it as credible.

[37] Accordingly, I agree with PC that it has established that BRC failed to take delivery of, and pay for, completed forgings worth \$214,587.24 which BRC had ordered from PC and agreed to pay for. I am further satisfied that PC mitigated its loss by selling \$8,680.00 worth of the completed forgings and that its efforts to mitigate were satisfactory. PC’s damages are its expectation loss (“the amount required to put the innocent party in the position it would have been in had the contract been performed as agreed”) less the amount by which PC was able to mitigate that loss (see *Spiridakis v. Li*, 2020 ONSC 2173, at paras. 95 – 96). In this case, PC expected to be able to sell its completed forgings to BRC for \$214,587.24. It has mitigated that expectation loss by \$8,680.00. It is therefore entitled to damages in the amount of \$205,907.24.

Conclusion and costs

[38] The relief sought by the plaintiff PC is granted. Summary judgment is ordered, the plaintiff is awarded damages for breach of contract in the amount of \$205,907.24, and both pre- and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O., c. C-43, ss. 128 and 129. The pre-judgment interest will run from February 21, 2020.

[39] The plaintiff may serve and file brief written submissions respecting costs within 10 days of the release of this judgment. The defendant may serve and file brief responding submissions respecting costs within 7 days of the service of the plaintiff's costs submissions. The plaintiff may serve and file reply submissions, if any, within 3 days of the service of the defendant's costs submissions.

I.R. Smith J.

Released: April 12, 2023

CITATION: PC Forge v. BRC Motorsport Inc., 2023 ONSC 2242
COURT FILE NO.: CV-20-13093 (Welland)
DATE: 2023/04/12

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PC FORGE

– and –

BRC MOTORSPORT INC.
(formerly known as “BRC Engineering Ltd.”)

**REASONS ON MOTION FOR
SUMMARY JUDGMENT**

I.R. Smith J.

Released: April 12, 2023