NOTICE
Decision filed 10/05/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140542-U

NO. 5-14-0542

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NATIONAL MATERIAL COMPANY, L.L.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Christian County.
	)	
v.	)	No. 10-CH-64
	)	
THE GSI GROUP, L.L.C.,	)	Honorable
	)	Ronald D. Spears,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in granting summary judgment for the defendant on the plaintiff's claims for unjust enrichment and breach of contract involving the sale of goods between merchants.

¶ 2 The plaintiff, National Material Company, L.L.C. (National Material), appeals the entry of summary judgment in favor of defendant, The GSI Group, L.L.C. (GSI), on two counts of its complaint. At National Material's request, the circuit court of Christian County made an express written finding pursuant to Supreme Court Rule 304(a) that there was no just reason to delay an appeal from the order of summary judgment entered

on counts III (breach of contract) and VIII (unjust enrichment) of the complaint. National Material timely filed its notice of appeal.

¶ 3 National Material is a limited liability company organized under the laws of the state of Nevada and headquartered in Illinois. National Material specializes in supplying, servicing, and processing various types of hot and cold rolled steel and galvanized steel. GSI is a limited liability company organized under the laws of the state of Delaware and headquartered in Illinois. GSI manufactures commercial steel grain bins and silos.

¶ 4 National Material and GSI began doing business with each other in 1989 and enjoyed nearly a 20-year business relationship. National Material supplied GSI with thousands of tons of steel each year in the form of specially-made galvanized steel parts. As a general rule, GSI would provide National Material with a projection of its expected steel purchasing needs for the coming year. National Material would then use GSI's projections to purchase raw steel and process the material for GSI's use. Processing the steel material entailed pickling, galvanizing, slitting, cutting to length, and storing the finished steel products. The steel processed for GSI was required to be specially stored, as it was highly susceptible to moisture damage, which could render the steel useless for GSI's purposes. Damaged steel could only be sold to secondary or scrap buyers at vastly reduced sale prices, as much as 80% below customer-ready product price.

¶ 5 During the period from 1989 to 2006, the parties operated on a "handshake" basis, with no written agreements under which GSI agreed to buy any specific amount of steel over a specific time period. Prior to 2007, GSI's requirements varied, but averaged 800 tons per month. Generally, National Material maintained an average of 60 days'

inventory of steel product designated for GSI to ensure on-time delivery. National Material also operated under an understanding that GSI would buy, over a six- to nine-month period, the entire inventory National Material held for GSI's use.

¶ 6 In 2007, a New York based private equity firm called Centerbridge acquired GSI. Following the change in ownership, GSI decided to establish long-term supply relationships rather than rely solely on short-term forecasts, as had been its practice in the past.

¶ 7 In the fall of 2006, GSI, desiring written contracts for 2007, issued requests for proposals (RFPs) to supply steel products to GSI. The request included a spreadsheet with estimated annual volumes for each part needed. National Material successfully bid on the 2007 RFP. The proposed contract estimated that GSI would require 26,000 tons of steel products from National Material over the nine-month period between April 1, 2007, and December 31, 2007. The parties appeared to agree upon pricing and volume, but a written contract was never signed or finalized. GSI purchased steel from National Material on the pricing and delivery terms contained in the proposed contract, and on the last day of 2007, GSI purchased all of the steel that remained in National Material's inventory held for GSI. GSI purchased approximately 2750 tons of steel per month from National Material during this time period.

¶ 8 In August 2007, GSI issued a second RFP to National Material to bid on a two-year contract covering 2008 to 2009 to supply all of GSI's steel requirements. The forecasted steel requirements for 2008 totaled 132,000 tons, and for 2009, 151,000 tons. The tonnage included 16 lots consisting of 209 different parts. National Material

submitted a final version of its bid on October 22, 2007. GSI notified National Material later that month that its bid proposal was accepted. Under the two-year agreement, National Material would be the exclusive supplier for 50% of the specific parts that were subject of the RFP. The other 50% of the supply agreement was awarded to a different company, Worthington.

¶ 9 Those parts National Material became obligated to supply to GSI were to be made from galvanized steel. Galvanizing is a process that applies a protective zinc coating to steel to prevent it from rusting, usually by submerging the steel in a bath of molten zinc. National Material sourced its galvanized steel through ArcelorMittal, a major steel manufacturer. Because ArcelorMittal had to purchase zinc futures to assure National Material of a reliable source of galvanized steel for the duration of the two-year supply contract, ArcelorMittal required National Material to make a tonnage volume commitment for the contract period. National Material, in turn, required a corresponding volume commitment from GSI. National Material keyed the price of its steel products for each calendar quarter to the USA Midwest CRU Steel Prices Index for Hot and Cold Roll Coil Products, the leading index for the steel products National Material sold to GSI. The pricing formula adjusted the base prices, based on the differences between the averages of the CRU index prices in effect during the previous six months. By trailing the steel market index, each party would bear certain market risks, and reap certain benefits from the rise or fall in prices over the two-year contract. This pricing structure was also conditioned on a volume commitment from GSI.

¶ 10 From January 2008 through September 2008, GSI purchased galvanized steel parts from National Material at prices and in quantities consistent with the projections in GSI's RFP. A subsequent internal GSI steel-pricing strategy assessment noted that because steel prices were rising during this nine-month period, GSI realized $9.1 million in material costs savings as result of its supply agreement with National Material.

¶ 11 During this same period of time, National Material and GSI exchanged several drafts of a written contract. The first draft was sent in December of 2007, and National Material's draft was submitted mid-January. GSI wanted its purchase obligation to be limited to what GSI specified in its period purchase orders. National Material's version obligated GSI to purchase up to 135,000 tons of steel over the life of the two-year agreement, including any unsold inventory National Material held at the end of the term, at prices tied to a steel commodity price index. The parties never finalized a written contract. According to GSI, National Material proposed 33 material changes to GSI's draft contract. GSI was opposed to 17 of the changes. It was not until May of 2008, however, that the parties' attorneys became involved in the drafting of the final agreement. This is also when prices for steel began fluctuating. In October 2008, steel prices suddenly plummeted. GSI immediately stopped buying steel parts from National Material, and demanded a new pricing structure. At that time, National Material was holding 9700 tons of product in inventory for GSI.

¶ 12 By a separate letter agreement dated January 15, 2009, GSI agreed to purchase 8700 tons of inventory held by National Material at a lower price than the previous quarter. GSI also agreed not to purchase the same or similar parts from any other

supplier until National Material's inventory had been consumed. GSI refused to be held to the 5000-ton average monthly purchase requirement contained in the two-year RFP. GSI only ordered 500 tons per month in the first quarter of 2009 from National Material, and bought the balance of the material needed from other groups at significantly lower spot market prices. According to National Material, GSI, in 2008, purchased $8.9 million and, in 2009, $19.7 million worth of steel products from another company that National Material believes should have been purchased, in whole or in large part, from National Material. In an attempt to mitigate its losses, National Material began trying to sell the parts made for GSI, even though the specialty parts made for GSI were not suitable for sale to others in the regular course of National Material's business. National Material was faced with an unsold stockpile of a specialty product, commitments to purchase more material from its upstream supplier, and millions in lost revenue and profits.

¶ 13 On December 23, 2009, National Material filed suit against GSI for breach of the 2008-09 supply agreement, breach of the January 2009 letter agreement, fraud, unjust enrichment, injunctive relief/specific performance, and an accounting. After the counts for fraud, an accounting, and injunctive relief were dismissed, GSI filed a motion for summary judgment pertaining to the count for breach of the 2008-09 supply agreement as well as for the count of unjust enrichment. Argument was held September 4, 2014, and on September 23, the court granted GSI's motion for summary judgment. The court found that there was no meeting of the minds on a contract, that there was no writing sufficient to satisfy the statute of frauds, and that GSI was not unjustly enriched. On

October 2, 2014, the court made a Rule 304(a) finding, and stayed the proceedings on the remaining counts of National Material's complaint.

¶ 14 National Material appeals the granting of summary judgment in favor of GSI. National Material argues the court ignored certain disputed facts, and made inferences from the facts favoring GSI, when reasonable minds could make opposite inferences in National Material's favor. National Material further asserts the court improperly made credibility determinations that should have been left to a jury. See *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31, 826 N.E.2d 1111, 1124 (2005). Because a jury could reasonably have concluded that there was a meeting of the minds with respect to a two-year supply contract, National Material contends granting summary judgment in favor of GSI was inappropriate in this instance. GSI counters that its 2008-09 RFP only identified projected and estimated steel needs, and was not a contract or promise to buy a specific quantity of steel. Given that the parties never finalized a contract, GSI contends it had no duty to buy anything outside the scope of its purchase orders. We agree with National Material that because more than one conclusion could be inferred from the facts, a jury should have been allowed to make the decision as to whether the parties formed a contract. Alternatively, if the jury concluded that the parties did not have a two-year supply agreement, the jury should then have been allowed to determine whether GSI was unjustly enriched by failing to purchase steel product from National Material.

¶ 15 The purpose of summary judgment is to determine whether any genuine issue of material fact exists so that, in those instances where none exists, the cases can be summarily disposed of, thereby avoiding the expense of unnecessary trials. *Grimmig v.*

St. Clair County, 191 Ill. App. 3d 632, 635, 548 N.E.2d 92, 95 (1989). It is not used to try a question of fact, but simply to determine whether one exists. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 423, 706 N.E.2d 460, 463 (1998). A genuine issue of material fact exists where either the material facts are disputed, or the material facts are undisputed but reasonable people may draw different inferences from those facts. *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). Summary judgment is particularly inappropriate when parties seek to draw inferences on questions of intent. See *Cohn v. Checker Motors Corp.*, 233 Ill. App. 3d 839, 841, 599 N.E.2d 1112, 1114 (1992). Although summary judgment is an efficient aid, it is a drastic measure that should only be employed if the moving party's right to judgment is clear and free from doubt. *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31, 826 N.E.2d 1111, 1124 (2005); *Jackson*, 185 Ill. 2d at 424, 706 N.E.2d at 463. We are to review the order granting summary judgment *de novo*. *Bituminous Casualty Corp. v. Iles*, 2013 IL App (5th) 120485, ¶ 19, 992 N.E.2d 1257. We conclude that, in this instance, summary judgment was inappropriately granted in favor of GSI, and accordingly, reverse and remand the decision of the circuit court.

¶ 16 We begin our analysis by recognizing that the 2008-09 supply agreement at issue here is governed by the Uniform Commercial Code (UCC) because it involves the sale of goods between merchants, in this instance, steel products. See 810 ILCS 5/2-102, 2-105 (West 2008). We further recognize that a "contract for sale" includes both a present sale and a contract to sell goods at a future time. 810 ILCS 5/2-106(1) (West 2008). We also note that the UCC was enacted in Illinois to "simplify, clarify, and modernize the law

governing commercial transactions," and "to make uniform the law among the various jurisdictions." 810 ILCS 5/1-103(a)(1), (a)(3) (West 2008). The whole purpose of the UCC was not to change reality, but to reflect it. Accordingly, the UCC is to be liberally construed in order to provide "a practical working tool for the commercial community." *Servbest Foods, Inc. v. Emessee Industries, Inc.*, 82 Ill. App. 3d 662, 671, 403 N.E.2d 1, 8 (1980).

¶ 17 Relying on article 2 of the UCC, National Material points out that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." 810 ILCS 5/2-204(1) (West 2008). We agree that article 2, in particular, marks a sharp departure from the common law of contracts as it relates to contract formation and the intent of the parties. Whether a binding contract exists only after formal documents are executed is a question of intent. *Barton Chemical Corp. v. Pennwalt Corp.*, 79 Ill. App. 3d 829, 833, 399 N.E.2d 288, 291 (1979). Even when it is agreed that a formal document will be prepared to memorialize a bargain the parties have already made, the bargain may still be enforceable even though the document has not been executed. *Barton Chemical Corp.*, 79 Ill. App. 3d at 833, 399 N.E.2d at 291. The conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale even though the writings of the parties do not otherwise establish a contract. 810 ILCS 5/2-207(3) (West 2008). In particular, when the parties to a contract for the sale of goods under the UCC begin complying with the terms of a contract, such conduct is a strong indicator that the parties intended to be bound, even in the absence of a formal executed contract. See

Barton Chemical Corp., 79 Ill. App. 3d at 834, 399 N.E.2d at 291-92. Under section 1-201(b)(3), it is not just the writings of the parties that determines whether there is a contract, but also the evidence, the course of performance, the course of dealing, and usage of trade. 810 ILCS 5/1-201(b)(3) (West 2008). See also *Frank Novak & Sons, Inc. v. Sommer & Maca Industries, Inc.*, 182 Ill. App. 3d 781, 788, 538 N.E.2d 700, 704 (1989). In fact, the course of dealing, rather than simply modifying a writing, may even become part of the agreement, revealing the "bargain of the parties in fact." *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 396 (7th Cir. 1992).

¶ 18 GSI counters that the UCC still requires a definite expression of acceptance and does not change the basic common law requirement that there must be an objective manifestation of mutual assent. See *McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 510, 411 N.E.2d 936, 944 (1980). GSI does not believe that conduct by either of the parties resolved any of the disputed material provisions in the various draft contracts. GSI further points out that the statute does not allow the court to bind either party to a material term to which it has not agreed. See *Tecumseh International Corp. v. City of Springfield*, 70 Ill. App. 3d 101, 104-05, 388 N.E.2d 460, 462-63 (1979). While this may be true, as National Material asserts, a long history of prior dealings is "highly relevant" for the fact finder's consideration. See *Irvington Elevator Co. v. Heser*, 2012 IL App (5th) 110184, ¶¶ 20-21, 982 N.E.2d 824. Here, for nearly two decades, GSI purchased steel from National Material by communicating to National Material a specific quantity of steel needed in advance of any purchase orders. Because of the lead time needed to produce the materials, purchase orders were documents used to release material that was

already made, and incorporated pricing that had already been established. National Material highlights the language included in the RFPs solicited by GSI which specifically invited proposals with volume-based discounts, as well as language which suggested that GSI expected any supplier awarded its business to honor the negotiated pricing and volume commitments contained in the RFPs over the two-year term. Furthermore, the parties' course of dealing in 2007 shows that the parties operated under the draft 2007 supply agreement's quantity and prices even though a written contract was never signed. The exchange of draft contracts in 2007 was not interpreted by the parties as an objection to a working relationship. Additionally, as National Material points out, GSI solicited a bid from National Material based upon its projected volumes for 2008 and 2009. In response, National Material submitted a detailed final bid to GSI which expressly conditioned the final pricing contained in the bid upon GSI making a total volume commitment. GSI awarded the bid to National Material. Not once between the time the RFP was sent and accepted, did anyone from GSI communicate that it would not be bound by a volume commitment.

¶ 19 The record here shows that from the late 1980s until 2006, GSI and National Material had a course of dealing whereby GSI committed to purchase specific quantities of steel for months in advance, that National Material purchased the necessary materials for GSI and manufactured the product to GSI's specifications, and that GSI issued purchase orders and took delivery pursuant to those communications, including inventory left over at year-end. What GSI and National Material did for 20 years by "handshake" is consistent with how the parties performed in 2007 under the first RFP, and for the first 9

months under the second RFP. The fact that GSI denied making any specific volume commitment to National Material with respect to the second RFP does not automatically entitle GSI to summary judgment. Other evidence suggests that National Material wrote to GSI several times attempting to confirm volume commitments. Each time, GSI remained silent, and did not object. The various emails between the parties do not satisfy the contract requirement, but they may stand as written confirmation of a contract whose material terms were embodied by the RFP, bid proposal, and acceptance of the bid, as well as the parties' course of dealing and performance, and conversation about quantity. It was for the jury to decide these credibility issues and to determine whether there was a contract between the parties, in spite of the lack of any formal, written understanding. Again, the record shows that the parties acted like they had a deal. National Material never claimed the deal was not binding upon it. National Material delivered the specified parts at the agreed-upon prices and volumes for a nine-month period, even though they could have sold the same steel parts to GSI at much higher prices in the absence of the two-year contract. GSI purchased the steel products for the first nine months without complaint, and was the one who reneged on the deal when spot market pricing became more advantageous. GSI reaped the benefit of its agreement with National Material, and repudiated it only when the market for the goods at issue turned, making the deal no longer advantageous to GSI.

¶ 20 Ultimately, it is the jury's province to determine what terms comprise the contract and the intent of the parties. See *Nitrin, Inc. v. Bethlehem Steel Corp.*, 35 Ill. App. 3d 596, 608, 342 N.E.2d 79, 87-88 (1976). We agree with National Material that, here, the

jury could have reasonably inferred from the parties' course of dealing for 20 years, plus their course of performance in 2007 and in January through September 2008, that the parties intended a contract as reflected in the RFP, the final bid proposal, and acceptance. Summary judgment, therefore, was inappropriate under these circumstances. This does not mean that National Material automatically wins either, for it still has the burden to persuade a jury that an agreement was indeed made.

¶ 21 We also agree with National Material that a jury could have reasonably concluded that its contract claim was not barred by the UCC statute of frauds. Again, if the contract predominantly involves the sale of goods, the entire contract is subject to the UCC, and the UCC statute of frauds, not the general statute of frauds, applies. See *Irvington Elevator Co.*, 2012 IL App (5th) 110184, 982 N.E.2d 824. Article 2 of the statute of frauds greatly relaxes the writing requirements of the general statute of frauds applicable to common law contracts. Under article 2, the writing is sufficient even if material terms are omitted or misstated. Only one essential term must be in writing, and that is quantity, yet even this term need not be accurately stated. Here, the various writings are sufficient to evidence a deal sufficient enough to satisfy the statute of frauds because the various writings, combined with the course of dealings between the parties, address the elements of price and quantity. In addition, there is a specifically manufactured goods exception under which partial performance takes the contract outside the general statute of frauds. See 810 ILCS 5/2-201(3)(a) (West 2008). Section 2-201(3)(a) applies in those instances when the seller has made a substantial beginning of the manufacturing process or has made substantial commitments for their procurement. 810 ILCS 5/2-201(3)(a) (West

2008). Clearly National Material made substantial commitments for the procurement of materials necessary to supply goods to GSI. National Material contracted with ArcelorMittal to supply the raw steel. Because the zinc required to galvanize the steel was a key component of pricing from ArcelorMittal, ArcelorMittal required a total volume commitment from National Material to lock in a firm price to supply zinc-coated steel for two years. Such procurement commitments were more than sufficient to trigger the statute of frauds exception.

¶ 22 Finally, the trial court erred as a matter of law in granting GSI summary judgment on the unjust enrichment claim. An unjust enrichment claim can either sound in quasi-contract or in tort. *Peddinghaus v. Peddinghaus*, 295 Ill. App. 3d 943, 949, 692 N.E.2d 1221, 1225 (1998). Here National Material's unjust enrichment claim involves GSI's improper conduct. An unjust enrichment claim requires only that there was unjust retention of a benefit, including money, by one party to the detriment of the other party, and that fundamental principles of justice, equity and good conscience require the enriched party to disgorge the benefit. *Blumenthal v. Brewer*, 2014 IL App (1st) 132250, ¶ 12, 24 N.E.3d 168. National Material alleged that GSI willfully misrepresented its volume commitment to National Material in order to obtain pricing that would benefit GSI, while never intending to honor the entire length of the contract or its commitment to purchase half of its forecasted needs from National Material. A jury could conclude that by operating under the volume commitment pricing structure for nine months, GSI fraudulently induced National Material into accepting its purchase orders, and in so doing, obtained the benefits it contemplated in January 2008. Assuming National

Material and GSI did not have a two-year supply agreement, documents such as the RFP serve to memorialize GSI's improper inducement of National Material's pricing. National Material could have sold the same steel parts to GSI at much higher prices in the absence of a two-year contract given that GSI's purchase price trailed the steel market index by several months at a time when spot market prices were rising. Instead, GSI received the benefit of pricing it would not have obtained from National Material without its false inducement of a volume commitment to the detriment of National Material. It was the jury's issue to decide if there was a valid two-year supply agreement, and, if not, whether GSI's conduct was improper inducement leading to its benefit and to National Material's detriment, thereby supporting a claim for unjust enrichment.

¶ 23 We agree with National Material that, based upon the facts presented, a jury could reasonably infer that National Material and GSI, as merchants dealing in the sale of goods, formed a contract under the rules set forth in article 2 of the Uniform Commercial Code (UCC). The jury could also reasonably infer that the UCC's statute of frauds did not bar National Material's claim or, in the alternative, that GSI was unjustly enriched. We make no determination regarding the merits of the aforementioned issues. National Material will still have to carry its burden of proving its claims, but it is the jury that will decide these issues. Under the circumstances presented here, summary judgment should not have been granted.

¶ 24 For the reasons stated herein, we reverse the judgment of the circuit court of Christian County granting summary judgment in favor of GSI on counts III and VIII of

National Material's complaint, and accordingly remand this cause for further proceedings.

¶ 25 Reversed and remanded.