

STATE OF NORTH CAROLINA
COUNTY OF HERTFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06 CVS 0389

NUCOR CORPORATION,

Plaintiff

v.

CONOCOPHILLIPS COMPANY,

Defendant

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ORDER

THIS CAUSE, designated a complex business case by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to North Carolina General Statute section 7A-45.4(b), and assigned to the undersigned Special Superior Court Judge for Complex Business Cases, by Order of the Chief Special Superior Court Judge for Complex Business Cases, came before the court for hearing upon Plaintiff's Motion to Dismiss Defendant's Counterclaims (the "Motion") and was so heard on June 29, 2007; and

THE COURT, having considered the Motion, the Defendant's counterclaims, the briefs of the parties regarding the Motion, arguments of counsel, and appropriate matters of record, as discussed below, CONCLUDES that:

I.

PROCEDURAL BACKGROUND

1. The unverified Complaint for Declaratory Judgment of Plaintiff Nucor Corporation was filed on August 8, 2006, and served upon Defendant ConocoPhillips Company ("ConocoPhillips") on August 11, 2006.

2. ConocoPhillips filed Defendant's unverified Answer and Counterclaims on October 9, 2006 (the counterclaims beginning at page nine therein, and hereinafter being the "Counterclaim(s)").

3. Nucor Corporation filed the Motion, pursuant to Rule 12(b)(6), North Carolina Rules of Civil Procedure ("Rule(s)"), on January 31, 2007.

II.

CONOCOPHILLIPS' COUNTERCLAIMS

1. In substance, ConocoPhillips' Counterclaims allege that:

a. ConocoPhillips is an international, integrated energy company. Among other things, it sells natural gas to customers who are located in North Carolina. (Countercl. ¶ 3.)

b. Nucor Corporation is the largest steel producer in the United States. Among other things, it purchases large amounts of natural gas from suppliers such as ConocoPhillips. (Countercl. ¶ 4.)

c. Nucor Steel Hertford County is an operating division of Nucor Corporation that operates a large plate steel mill facility in Hertford County, North Carolina (Nucor Corporation and Nucor Steel Hertford County hereinafter, collectively being "Nucor"). (Countercl. ¶ 5.)

d. Nucor entered into a base contract (the "Base Contract") with ConocoPhillips (by its predecessor Conoco, Inc.) by which Nucor agreed to pay for natural gas that it ordered periodically from ConocoPhillips and that ConocoPhillips delivered to it. The Base Contract was in effect during November

2005 and December 2005. A copy of the Base Contract is attached to the Complaint as Exhibit 1. (Countercl. ¶ 6.)

e. The Base Contract provides that contracts for individual natural gas purchases may be formed by: (a) using an Oral Transaction Procedure published by the Gas Industry Standards Board, Inc.; (b) an offer and acceptance being transmitted in an Electronic Data Interchange (“EDI”); or (c) a telephone conversation. The Base Contract provides that ConocoPhillips and Nucor “shall be legally bound from the time they so agree to transaction terms and may each rely thereon.” (Countercl. ¶ 7.)

f. The Base Contract further provides that contracts for individual natural gas purchases will be confirmed by a Transaction Confirmation, but that the formation of such contracts does not depend on Transaction Confirmations. (Countercl. ¶ 8.)

g. As of November 2002, Nucor gave National Gas Distributors, LLC (“NGD”) authority as its agent to negotiate the terms of purchases of natural gas for use by Nucor, and to purchase such natural gas. On November 19, 2002, Johnny Jacobs of Nucor sent a letter confirming that relationship. A copy of that letter is attached to the Counterclaims as Exhibit A. (Countercl. ¶ 9.)

h. ConocoPhillips sold gas to Nucor periodically during the period from November 2002 until December 2005. (Countercl. ¶ 10.)

i. Nucor instructed ConocoPhillips to correspond with NGD, rather than Nucor, regarding the terms of sales of natural gas to Nucor for use by Nucor. Johnny Jacobs of Nucor confirmed this instruction in an e-mail dated

March 1, 2005. A copy of that e-mail is attached to the Counterclaims as Exhibit B. (Countercl. ¶ 11.)

j. After receiving such instructions, ConocoPhillips corresponded with NGD as the agent for Nucor. ConocoPhillips took Nucor's orders for natural gas purchases from Nucor's agent NGD, which then sent confirmations of Nucor's orders and sent invoices for Nucor's purchases. (Countercl. ¶ 12.)

k. ConocoPhillips delivered the natural gas ordered by Nucor via pipelines owned or controlled by North Carolina Natural Gas Corporation, until such time as North Carolina Natural Gas Corporation merged into Piedmont Natural Gas Company, Inc. ("Piedmont") effective September 30, 2003.

Thereafter, ConocoPhillips delivered the natural gas ordered by Nucor via pipelines owned or controlled by Piedmont. (Countercl. ¶ 13.)

l. Nucor sent payment for its natural gas purchases either directly to ConocoPhillips or, on one or more occasions, to ConocoPhillips through Nucor's agent, NGD. (Countercl. ¶ 14.)

m. Nucor never rescinded or revoked the statements contained in the November 19, 2002 letter at any time prior to December 20, 2005. (Countercl. ¶ 15.)

n. Prior to December 20, 2005, Nucor never notified ConocoPhillips that NGD had ceased being the agent for Nucor. (Countercl. ¶ 16.)

o. Nucor never rescinded or revoked the instructions contained in the March 1, 2005 e-mail at any time prior to December 20, 2005. (Countercl. ¶ 17.)

p. Prior to December 20, 2005, Nucor never notified ConocoPhillips that NGD no longer had authority to place natural gas orders and receive correspondence on behalf of Nucor. (Countercl. ¶ 18.)

q. In November 2005, NGD placed multiple orders for natural gas with ConocoPhillips via EDI and/or computerized instant messages (hereinafter, the “November Orders”). (Countercl. ¶ 19.)

r. NGD represented to ConocoPhillips that the November Orders were for Nucor and, at a minimum, failed to represent to ConocoPhillips that the December Orders were for any entity other than Nucor. (Countercl. ¶ 20.)

s. The November Orders totaled 546,851 million BTUs of natural gas costing \$5,541,858.58. (Countercl. ¶ 21.)

t. ConocoPhillips understood that NGD would send the invoice for the November Orders to Nucor, as was the parties’ practice pursuant to instructions from Nucor. (Countercl. ¶ 22.)

u. At the direction of NGD, ConocoPhillips in fact delivered the natural gas for the November Orders to the pipelines controlled by Piedmont. (Countercl. ¶ 23.)

v. Piedmont delivered the natural gas for the November Orders to a destination directed by NGD as the agent for Nucor. (Countercl. ¶ 24.)

w. Payment for the November Orders was due on or about December 25, 2005. (Countercl. ¶ 25.)

x. On or about December 1, 2005, and December 2, 2005, NGD placed multiple orders for natural gas with ConocoPhillips via EDI and/or

computerized instant messages (hereinafter, the “December Orders”).

(Countercl. ¶ 26.)

y. NGD, at a minimum, failed to represent to ConocoPhillips that the December Orders were for any entity other than Nucor. (Countercl. ¶ 27.)

z. The December Orders totaled 40,000 million BTUs of natural gas costing \$495,750.00. (Countercl. ¶ 28.)

aa. ConocoPhillips understood that NGD would send the invoice for the December Orders to Nucor, as was the parties’ practice pursuant to instructions from Nucor. (Countercl. ¶ 29.)

bb. At the direction of NGD, ConocoPhillips in fact delivered the natural gas for the December Orders to the pipelines controlled by Piedmont.

(Countercl. ¶ 30.)

cc. Piedmont delivered the natural gas for the December Orders to a destination directed by NGD as the agent for Nucor. (Countercl. ¶ 31.)

dd. Payment for the December Orders was due on or about January 25, 2006. (Countercl. ¶ 32.)

ee. As of December 21, 2005, ConocoPhillips had not received any payment for the November Orders, so it sent a second invoice directly to Nucor dated December 21, 2005, with a payment due date of December 31, 2005. This invoice was meant to serve as a reminder of the earlier invoice; it acknowledged that the amount had been previously invoiced by another party, NGD, and that Nucor need not pay the amount twice. Having learned that Nucor denied that the natural gas had been ordered on behalf of Nucor and denied that

Nucor was obliged to pay it, ConocoPhillips then sent another invoice requesting payment by check directly to ConocoPhillips. (Countercl. ¶ 33.)

ff. As of January 10, 2006, ConocoPhillips had not received any payment for the December Orders, so it sent another invoice directly to Nucor dated January 10, 2006, with a payment due date of January 25, 2006. (Countercl. ¶ 34.)

gg. As of January 13, 2006, ConocoPhillips had not received payment for either the November Orders or the December Orders. On that date, it sent a letter demanding payment in full in the amount of \$6,037,608.58 be sent directly to ConocoPhillips. (Countercl. ¶ 35.)

hh. ConocoPhillips has not been paid in full for either the November Orders or the December Orders. (Countercl. ¶ 36.)

2. ConocoPhillips seeks relief for breach of contract, unjust enrichment, conversion, and negligent misrepresentation. (Countercl. ¶¶ 37-68.)

III.

NUCOR'S MOTION

1. Pursuant to Rule 12(b)(6), Nucor moves for dismissal of each of ConocoPhillips' Counterclaims, contending that:

a. ConocoPhillips' Counterclaims depend largely, if not entirely, on ConocoPhillips' contention that NGD ordered the natural gas at issue as an agent of Nucor. The allegations supporting this contention are, however, directly contradicted by documents properly before the court; should, therefore, be

disregarded; and, accordingly, all of ConocoPhillips' Counterclaims fail as a matter of law and should be dismissed ("Nucor's Agency Argument");

b. ConocoPhillips' Counterclaims allege the existence of an express contract, the existence of which constitutes an insurmountable bar to its Counterclaim for unjust enrichment; and, accordingly, such claim fails as a matter of law and should be dismissed ("Nucor's Express Contract Argument"); and

c. ConocoPhillips does not make sufficient allegations regarding Nucor and NGD's relationship to support its Counterclaims for conversion and *respondeat superior*; and, therefore, such claims fail as a matter of law and should be dismissed ("Nucor's Insufficient Pleading Argument").

2. Nucor concedes that the allegations of ConocoPhillips' Counterclaims must be taken as true for purposes of ruling on the Motion. (Pl.'s Br. Supp. Mot. Dismiss 2).

IV.

DISCUSSION

A.

Rule 12(b)(6) Standard

1. A claim should be dismissed under Rule 12(b)(6) where it appears that the claimant is entitled to no relief under any statement of facts that could be proven. This will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact that

necessarily will defeat the claim. *Orange County v. Dep't of Transp.*, 46 N.C. App. 350, 379-80, 265 S.E.2d 890, 909 (1980).

B.

Nucor's Agency Argument

2. For purposes of its Motion, Nucor concedes that the allegations of ConocoPhillips' Counterclaims must be taken as true. However, Nucor argues that, under North Carolina precedent holding it proper to consider certain documents in addition to the complaint in the context of a motion to dismiss¹ and foreign precedent holding that a conflicting document may prevail over the bare allegations of the complaint,² the court may, and indeed should, disregard allegations in the Counterclaims that directly contradict documents ConocoPhillips attached to, referred to, or relied on in its Counterclaims. (See Pl.'s Br. Supp. Mot. Dismiss 3; Pl.'s Rep. Br. Supp. Mot. Dismiss 4-5.)

3. Nucor further argues that Counterclaims Paragraphs 9,11-12, and 33 are directly contradicted by one or more of five documents properly before the court (the "Five Documents")³ and that, therefore, those Paragraphs should be disregarded.

¹ *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) ("This Court has further held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant.") (citation omitted); *Coley v. Bank*, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979) ("[b]ecause these documents were the subjects of some of plaintiffs' claims and plaintiffs specifically referred to the documents in their complaint, they could properly be considered by the trial court in ruling on a motion under Rule 12(b)(6)").

² *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991) ("[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached pursuant to Rule 10(c), Fed.R.Civ.P., the exhibit prevails."); *Shepard v. Texas Dep't of Transp.*, 158 F.R.D. 592, 595 (E.D. Tex. 1994) ("[a]nd where an exhibit contradicts an assertion made in the complaint and eliminates any possible claim for relief, dismissal is appropriate"). *Cf. Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) ("well pleaded-material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.");

³ The Five Documents, which Nucor relies on and contends are properly before the court, consist of: (a) the Limited Agency Agreement, as referenced in Paragraph 9 of the Counterclaims and attached as

Nucor contends that, absent those Paragraphs, ConocoPhillips' allegations of agency between Nucor and NGD are insufficient as a matter of law.

4. However, even accepting *arguendo*⁴ Nucor's position that Paragraphs 9, 11-12, 17 and 33 should be disregarded, ConocoPhillips is still left having sufficiently pled an agency relationship between Nucor and NGD,⁵ the existence of which is not beyond proof,⁶ to survive a Rule 12(b)(6) motion to dismiss.⁷ Therefore, in regards to

Exhibit A to the Counterclaims; (b) a March 1, 2005 e-mail authored by Johnny Jacobs of Nucor, as referenced in Paragraph 12 of the Counterclaims and attached as Exhibit B to the Counterclaims; (c) various Transaction Confirmations sent from NGD to Nucor, as referenced in Paragraph 12 of the Counterclaims and attached as Exhibit 3 to Nucor's Brief in support of its Motion; (d) a November 2005 invoice sent by ConocoPhillips to Nucor, as referenced in Paragraph 33 of the Counterclaims and attached to Nucor's Brief in support of its Motion as Exhibit 4; and (e) the Base Contract, as referenced in Paragraphs 6-8 of the Counterclaims and attached to Nucor's Brief in support of its Motion as Exhibit 1.

⁴ For purposes of analyzing Nucor's Agency Argument in this context only, the court (a) accepts it as proper to consider each of the Five Documents in the context of a motion to dismiss, (b) interprets each of the Five Documents as supportive of Nucor's Agency Argument, and, (c) accordingly, disregards Paragraphs 9, 11-12, 17 and 33 of the Counterclaims.

⁵ (See, e.g., Countercl. ¶¶ 14, 16, 20, 24, 31, 62-66.) Though Nucor encourages the court to disregard such allegations as mere conclusions of law, an agency relationship may exist on fairly simple terms and the allegations are sufficient, at this stage of the litigation, to support such a relationship. See *Harrold v. Dowd*, 149 N.C. App. 777, 784, 561 S.E.2d 914, 920 (2002) ("A principal agent relationship arises upon two essential elements: (1) authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent.")(citations omitted). See also *Clouse v. Chairtown Motors, Inc.*, 14 N.C. App. 117, 119, 187 S.E.2d 398, 400 (1972) (a complaint should not be dismissed if "the complaint contains a statement of the claim 'sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved' so as to meet the requirements of Rule 8(a). A claim should not be dismissed unless it appears that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.")(citing *Sutton*, 277 N.C. 94, 176 S.E.2d 161).

⁶ The scope of any agency relationship is a fact-intensive inquiry. See, e.g., *Olvera v. Charles Z. Flack Agency*, 106 N.C. App. 193, 198, 415 S.E.2d 760, 763 (1992) (agent may bind principal in contract via ratification or an action within the scope of the agent's actual or apparent authority); *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 599, 394 S.E.2d 643, 650 (1990) ("An agency can be proved generally, by any fact or circumstance with which the principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy.")(citations omitted). Whether or not Nucor's contention that the Five Documents contradict the Counterclaims is correct, it is notable that just because a document contradicts an allegation, it does not necessarily defeat all varieties of that allegation (e.g., even if the Limited Agency Agreement directly contradicts ConocoPhillips' interpretation of that document, absent a broad and procedurally improper finding of fact, it does not prove that ConocoPhillips can offer no support of its allegations of agency).

⁷ To a certain extent, Nucor goes beyond its contention that certain allegations of the Counterclaims should be disregarded and asks the court to draw, in its favor, factual conclusions regarding the contended agency between Nucor and NGD. (See, e.g., Nucor's Br. Supp. Mot. 6 ("NGD itself believed it was acting as Conoco's agent, as is evident from the Transaction Confirmations"); Nucor's Br. Supp. Mot. 10 ("Conoco cannot argue that NGD had authority over and above the express terms of the Limited Agency Agreement, because Conoco had notice of the actual terms of the representation.")). Such

the contended agency relationship between Nucor and NGD, ConocoPhillips' Counterclaims neither disclose facts that necessarily defeat the Counterclaims nor fail to make sufficient allegations.

5. With regard to Nucor's Motion as to ConocoPhillips' Counterclaim for negligent misrepresentation, the same reasoning would apply. Though such claim may be "creative," its allegations should be taken as true at this stage.

6. Accordingly, in regards to Nucor's Agency Argument, Nucor's Motion should be DENIED.

C.

Nucor's Express Contract Argument

7. Noting that North Carolina will not recognize an unjust enrichment claim where an express contract exists between the parties,⁸ and pointing to ConocoPhillips' allegations regarding the Base Contract, Nucor argues that the Counterclaims demonstrate an insurmountable bar to ConocoPhillips' Counterclaim for unjust enrichment. (See Pl.'s Br. Supp. Mot. Dismiss 11-12.)

8. In regards to the ability to plead alternative contract and unjust enrichment claims, both parties base their respective arguments on *Eastway Wrecker Service, Inc. v. City of Charlotte*, 165 N.C. App. 639, 599 S.E.2d 410 (2004). As Nucor correctly

requests are untimely and are not grounds on which to deprive ConocoPhillips of its right to "prove any set of facts in support of [its] claim which would entitle it to relief," *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) ("In analyzing the sufficiency of the complaint, the complaint must be liberally construed")(citations omitted). See *Formyduval v. Britt*, 177 N.C. App. 654, 660, 630 S.E.2d 192, 196 (2006) *aff'd*, 361 N.C. 215, 639 S.E.2d 443 (2007) (when faced with a motion to dismiss, the trial court should accept all of claimant's allegations as true and review those allegations in the light most favorable to the claimant).

⁸ *Atlantic & E. Carolina Ry. Co. v. Wheatley Oil Co.*, 163 N.C. App. 748, 753, 594 S.E.2d 425, 429 (2004) ("The doctrine of unjust enrichment is based on 'quasi-contract' or contract 'implied in law' and thus will not apply here where a contract exists between two parties")(citations omitted).

observes, the *Eastway* court, in holding that the plaintiff's *quantum meruit* claim was improperly dismissed on the grounds that plaintiff alternatively pled the existence of an express contract, was persuaded by the plaintiff's repudiation of the express contract in its *quantum meruit* claim. *Id.*, at 642, 599 S.E.2d at 412 (“[P]laintiff’s alternative claim for relief in *quantum meruit* does not allege that a contract exists, but rather that the parties’ contract is invalid because of defects in its formation and performance.”) While it is true that ConocoPhillips does not disavow the Base Contract in its Counterclaim for unjust enrichment, the court does not find this to be grounds on which to properly dispose of the claim under Rule 12(b)(6). *See Sutton*, 277 N.C. at 106, 176 S.E.2d at 168 (a defective statement of a good cause of action is not best met with a Rule 12(b)(6) motion, but, rather, is better dealt with under other provisions of Rule 12, the rules governing discovery, or a motion for summary judgment).

9. Accordingly, in regards to Nucor’s Express Contract Argument, Nucor’s Motion should be DENIED.

D.

Nucor’s Insufficient Pleading Argument

10. Nucor’s Insufficient Pleading Argument notes that North Carolina rarely considers intentional tortious acts, such as conversion, to be within the scope of an agent’s authority. (Pl.’s Br. Supp. Mot. Dismiss 13.) Nucor contends that, accordingly, ConocoPhillips can only maintain its action for conversion if it sufficiently alleges that Nucor received the natural gas at issue and that NGD’s actions were (a) expressly authorized by Nucor, (b) committed within the scope of NGD’s employment and in furtherance of Nucor’s business and within NGD’s implied authority, or (c) ratified by

Nucor. (Pl.'s Br. Supp. Mot. Dismiss 13.) Nucor argues that ConocoPhillips failed to allege or will be unable to prove such allegations and, therefore, its conversion Counterclaim should be dismissed pursuant to Rule 12(b)(6). Nucor's argument is misplaced.⁹ See *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 (alleged tortfeasor's receipt of goods at issue is not always a necessary element to a conversion claim).¹⁰ Accordingly, Nucor's Insufficient Pleading Argument does not demonstrate that ConocoPhillips' conversion Counterclaim fails as a matter of law.

11. Nucor's Insufficient Pleading Argument further argues that ConocoPhillips' *respondeat superior* Counterclaim should be dismissed on the same grounds as the conversion Counterclaim. For the same reasons the court finds such argument unpersuasive as to the conversion Counterclaim, Nucor's Insufficient Pleading Argument does not demonstrate that ConocoPhillips has failed to allege sufficiently the elements of its *respondeat superior* Counterclaim.

12. Accordingly, with regards to Nucor's Insufficient Pleading Argument, Nucor's Motion should be DENIED.

V.

CONCLUSION

Based on the foregoing, it hereby is ORDERED, ADJUDGED and DECREED that, taking the allegations of the Counterclaims as true, ConocoPhillips has not failed

⁹ Compare reasoning and authority contained in *supra* note 7, with Nucor's request that the court accept the factual conclusions that "Nucor (obviously) never expressly authorized NGD to steal gas from Conoco" and that "Nucor never ratified the theft by NGD" (Pl.'s Br. Supp. Mot. Dismiss 14).

¹⁰ See also *Mabe v. Dillon*, 46 N.C. App. 340, 264 S.E.2d 796 (1980) (though unauthorized assumption and exercise of the right of ownership of the property at issue is an element of a conversion claim, plaintiff can maintain an action for conversion even if he willfully left the property in the possession of a third party and even if the defendant may have been an innocent purchaser, unless plaintiff clothed the third party with some indicia of title).

