IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3839

GULF STATES UTILITIES CO.,

Plaintiff-Appellant,

versus

IMO DELAVAL, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-90-1002 "B")

(November 1, 1993)

Before KING, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

This diversity jurisdiction case requires that we characterize a Louisiana commercial transaction as a contract to build or a contract of sale to determine the applicable prescriptive period. In part because the parties bought and sold large and complicated equipment, their transaction is best seen as a contract to build governed by the ten year statute. The district court was persuaded

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

that this was a contract to sale and granted summary judgment. We reverse and remand.

I.

Gulf States Utilities Co. owns and operates a nuclear power plant. The Nuclear Regulatory Commission requires each nuclear power plant to have emergency power generators to cool the reactor and operate safety devices. To comply with this regulation, Gulf purchased from IMO DeLaval, Inc. two emergency generator systems powered by diesel engines.

IMO had sold three similar diesel generator systems to the Long Island Lighting Co. for use at the Shoreham Nuclear Power Station. After the Gulf purchase, a crankshaft in one of the Shoreham generators failed. The Nuclear Regulatory Commission notified all utilities that owned IMO generators of the Shoreham crankshaft failure.

Utilities that owned IMO generators reassessed their systems in light of the Shoreham crankshaft failure. Gulf modified its generators, "derating" its engines from 3500 kw to 3130 kw. Gulf operated its generators at the lower capacity to obtain from the Nuclear Regulatory Commission the necessary operational license.

Invoking diversity jurisdiction, Gulf filed this action in the U.S. District Court for the Middle District of Louisiana against IMO for redhibition and breach of contract. The complaint sought $8 million in damages for the cost of reassessing and modifying the generators, and for revenue lost during the generator shutdown.

IMO moved for summary judgment, contending that it contracted to sell the generators and, accordingly, that Gulf could not sue after one year. Gulf replied that it sued for breach of a contract to build, controlled by a ten year prescriptive period. The district court granted summary judgment. We reverse and remand.

II.

We cannot affirm a summary judgment unless "there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the evidence, as well as inferences that may be drawn from the evidence, in the light most favorable to the party that opposed the motion. Little v. Liquid Air Corp., 952 F.2d 841, 847 (5th Cir. 1992).

III.

Gulf filed its lawsuit at least four years after its claims arose. The prescriptive period for redhibition claims brought under contracts of sale runs one year after the sale or discovery of a hidden defect. La. Civ. Code art. 2534. The prescriptive period for similar claims brought under contracts to build runs ten years from the accrual of the claim. Id. art. 3499.

Generally, with a contract to build, (1) the purchaser has some control over the specifications of the object; (2) the sale negotiations take place prior to construction of the object; and (3) the seller furnishes skill, material, and labor to build the object. Louisiana Paving v. St. Charles Parish Pub. Sch., 604 So.2d 593, 597 (La. App. 5th Cir.), cert. denied, 605 So.2d 1370

(La. 1992). In addition, courts evaluate the practical aspects of the deal to determine the nature of the contract. KSLA-TV, Inc. v. Radio Corp. of America, 501 F. Supp. 891 (W.D. La. 1980) (Stagg, J.); Litvinoff, 7 Louisiana Civil Law Treatise-Obligations § 157 (1975).

Gulf submitted unique specifications for the diesel engines. Federal regulations required that the engines be closely integrated into existing machinery at the plant to meet certain performance standards. Accordingly, Gulf provided unique specifications for the machines, so that IMO could not fill the order with stock items. In fact, the contract required IMO to design unique engines, and then submit its design for review and approval.

The timing of the approval process means that IMO did not manufacture the engines until it received a final order in the form of a written approval of the design. Each nuclear power plant has unique requirements for standby emergency generators, and IMO did not complete the engines until its personnel oversaw their installation. IMO did not complete the engines until they had been integrated into existing machinery at the plant.

The contract required IMO to furnish the skill, material, and labor to build the engines. The unique specifications themselves required IMO personnel to exercise a great deal of expertise and ingenuity to produce an operable generator system that could meet federal standards. These services did not end with the delivery and erection of the engines, but extended to maintaining a quality

assurance program to ensure that the engines continued to operate properly.

The specter of subjecting to the one year statute such a complicated endeavor as building diesel engines, calibrated to preexisting electric generators that power emergency and safety devices in a nuclear power plant, informs our characterization task. See Peoples Water Serv. v. Menge Pump & Mach. Co., Inc., 452 So.2d 752 (La. App. 5th Cir. 1984).

Louisiana jurisprudence abjures the harshness of applying the one year prescriptive period when the builder has a protracted obligation to construct and continually monitor a large and complicated product. We do not see this as an easy case, but, on the undisputed facts, we are persuaded that this contract primarily involved an obligation to build, not the sale of a product. Our decision takes the limitation defense from the case. It will not be available at trial.

REVERSED and REMANDED.