[Cite as *Extreme Machine & Fabricating, Inc. v. Avery Dennison Corp.*, 2016-Ohio-1058.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

EXTREME MACHINE & FABRICATING, INC.,	)	CASE NO. 14 MA 86
PLAINTIFF-APPELLANT,	)	
VS.	)	OPINION
AVERY DENNISON CORP.,	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 10CV2494

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellant:

Atty. John C. Grundy
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For Defendant-Appellee:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 1, 2016

[Cite as *Extreme Machine & Fabricating, Inc. v. Avery Dennison Corp.*, 2016-Ohio-1058.]
ROBB, J.

{¶1} Plaintiff-Appellant Extreme Machine & Fabricating, Inc. appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of Defendant-Appellee Avery Dennison Corp. The trial court found that Avery Dennison's purchase order contained the controlling contractual terms for the sale of specially manufactured goods and Extreme Machine was not entitled to the engineering costs requested in a revised quotation.

{¶2} We conclude Extreme Machine's detailed quotation was the offer, and Avery Dennison's purchase order was the acceptance. As we find the contract was complete at that time, we agree that Extreme Machine's revised quotation itself could not create a binding additional term. However, the offered price for the two sample units clearly only applied if an order for the remainder of the quoted units was placed. The lack of a conditional price for the two sample units (in case an order for more units was not placed) did not preclude the formation of a contract. The missing price term is a factual question to be answered by using the Uniform Commercial Code's supplemental term of "a reasonable price at the time of delivery" with consideration of the parties' conduct and other circumstances.

{¶3} For these and the following reasons, the trial court's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

STATEMENT OF THE CASE

{¶4} Extreme Machine manufactures machines and parts for various industries; they have an office in Youngstown, Ohio. Avery Dennison manufactures and sells labels from a plant in Mentor, Ohio. They use roll racks to hold large rolls of paper on which the labels are printed. As they were interested in new racks that could be fitted with two sizes of cores, Avery Dennison's engineering manager spoke to Extreme Machine's general manager about manufacturing the new racks.

{¶5} The parties entered seven prior contracts in the past four years. Before Extreme Machine can manufacture an order, they must be provided with engineering drawings and specifications. Avery Dennison supplied Extreme Machine with

engineering drawings for the prior contracts. On this occasion, however, Avery Dennison did not provide engineering drawings. Extreme Machine utilized an engineering firm, which was its practice when a customer does not provide the engineering drawings.

{¶6} After some e-mails and a meeting, Extreme Machine's general manager sent Avery Dennison's engineering manager a document on November 6, 2009, which was called "Quotation 110109-01." This quotation was for supplying material and labor to fabricate and paint "[m]ultiple core paper roll racks" including safety locks and core hold downs. The quantity was listed as 2,302 at a rate of $669 per rack for a total price of $1,540,038. Delivery was to occur in three weeks for the first two sample racks. After approval of the racks, the first shipment of 200 racks would occur in six weeks; the delivery rate for the remainder of the order would be 200 racks per week. The quotation stated:

> Please note that pricing is based upon an order of the total number of racks.
>
> The price for 2 sample racks is $1320.00. This price is only good if an order is received for 2300 racks within 6 weeks after receiving an order for the 2 sample racks.

The quotation provided that transfer of ownership would occur "FOB" upon leaving Extreme Machine's plant in Hermitage, Pennsylvania. The terms of payment were to be discussed at the time of an order. The quotation said it was subject to review at order placement based upon current material prices.

{¶7} Avery Dennison responded with a November 16, 2009 purchase order for two "[t]rial racks per quote 110109-01." The amount to be paid was listed as $1,320; the space for the price of each unit was filled in with the amount of $660 (half of $1,320). The product was to be shipped to Avery Dennison's plant in Mentor and billed to their office in Las Vegas, Nevada. The payment terms provided for "30 DAYS NET." The document further stated: "This purchase Order is subject to Avery Dennison[']s Standard Terms and Conditions of purchase." Avery Dennison focuses on the following provisions in their standards terms and conditions:

1. Acceptance-Agreement. Seller's commencement of work on the goods subject to this Purchase Order or shipment of such goods, whichever occurs first, shall be deemed an effective acceptance of this purchase order. Any acceptance of this Purchase Order is limited to acceptance of the express terms contained herein and any attachments hereto. Any proposal for additional or different terms or any attempt by Seller to vary in any degree any of the terms of this offer is hereby objected to and rejected, but such proposals shall not operate as a rejection of this offer unless such variances are in the terms of the description, quantity, price or delivery schedule of the goods, but shall be deemed a material alteration thereof, and this offer shall be deemed accepted by the Seller without said additional or different terms. If this Purchase Order shall be deemed an acceptance of a prior offer by Seller, such acceptance is limited to the express terms contained on the face and back hereof unless Seller notifies Buyer to the contrary in writing within ten (10) days of receipt of this Purchase Order. * * *

15. Entire Agreement. Ambiguity. Waiver. This Purchase Order, together with all exhibits and schedules hereto, constitutes the entire agreement among the parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties. No supplement, modification or waiver of this Purchase Order shall be binding unless executed in writing by the party to be bound thereby. * * *

{¶8} Extreme Machine immediately responded with an email stating that a revised quotation was attached "showing the entire amount of the cost that is going to put into fixture and engineering." The email said they were proceeding with the manufacturing of the two sample racks. The attached revised quotation added the

following sentence to the prior quotation: "If an order for 2300 racks is not received within six weeks from receiving the sample racks then a total material and engineering charge of $30,000 would apply."

{¶9} On December 10, 2009, the two sample racks were delivered. Avery Dennison paid $1,320 and decided not to order the other 2,300 racks listed in the quotation. Extreme Machine filed a complaint against Avery Dennison alleging breach of a contract to pay $30,000 for two sample rolling racks. Extreme Machine alternatively asserted detrimental reliance on Avery Dennison's representation that it would either order 2,300 racks or pay a materials and engineering charge in the amount of $30,000.

{¶10} Both parties sought summary judgment. Avery Dennison argued its purchase order was the offer which invited acceptance by commencing manufacture or shipment. It was urged that the $30,000 engineering charge was an additional term prohibited by R.C. 1302.10(B)(1) (offer expressly limits acceptance to terms of offer), (2) (materially alters the offer), or (3) (objection to additional terms provided). The affidavit of Avery Dennison's engineering manager was attached.

{¶11} Extreme Machine disputed which documents constituted the contract, urging its quotation was the offer and Avery Dennison's purchase order would constitute the material alteration (if read as omitting the engineering charge). Extreme Machine also posited that the affidavit of its president established the elements of a claim for promissory estoppel (noting they labeled it a claim for detrimental reliance in the complaint). Avery Dennison responded that the affidavit was insufficient to show entitlement to judgment for promissory estoppel and urged that the existence of a contract negated the claim for promissory estoppel.

{¶12} On October 19, 2011, the trial court granted the motion for summary judgment filed by Avery Dennison and denied the motion for summary judgment filed by Extreme Machine, finding there were no genuine issues of material fact and Avery Dennison was entitled to judgment as a matter of law. The court held that Avery Dennison was not obligated to pay the engineering charge because it was not part of the contract of sale, citing R.C. 1302.10. The court found the purchase order was the

offer, the revised quotation was a prohibited attempt to add an additional term, and the acceptance was the commencement of work on the goods.

{¶13} Extreme Machine asked for a status conference; on July 3, 2014, the trial court overruled the request, pointing out that summary judgment had been entered and the case was now closed. On July 9, 2014, Extreme Machine appealed the October 19, 2011 judgment. In a July 22, 2014 judgment entry, this court ruled the appeal was timely filed as the trial court failed to instruct the clerk to serve the parties and the clerk thus failed to note service of the judgment on the docket.[1]

GENERAL LAW: SUMMARY JUDGMENT & U.C.C.

{¶14} Summary judgment shall be rendered if the evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Summary judgment shall not be rendered unless it appears that reasonable minds can only come to a conclusion adverse to the non-moving party, who is entitled to have the facts construed most strongly in the party's favor. *Id.* A summary judgment may be rendered only on the issue of liability when there is a genuine issue as to the amount of damages. *Id.*

{¶15} The movant has the initial burden to show that no genuine issue of material fact exists. *Byrd v. Smith*, 110 Ohio St.3d 24, 26-27, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). The non-moving party then has a reciprocal burden to respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that there is a genuine issue for trial; the non-movant may not rest upon mere allegations or denials in the pleadings. Civ.R. 56(E).

{¶16} Civ.R. 56 must be construed in a manner that balances the right of the non-movant to have a jury try claims and defenses that are adequately based in fact

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[1] *See Clermont Cty. Transp. Improvement Dist. v. Gator Milford*, *L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, syllabus ("The 30–day time period to file a notice of appeal begins upon service of notice of the judgment and notation of service on the docket by the clerk of courts regardless of actual knowledge of the judgment by the parties."); App.R. 4(A)(3) ("In a civil case, if the clerk has not completed service of the order within the three-day period prescribed in Civ.R. 58(B), the 30-day periods referenced in App.R. 4(A)(1) and 4(A)(2) begin to run on the date when the clerk actually completes service.").

with the right of the movant to demonstrate, prior to trial, that the claims or defenses have no factual basis. *Byrd*, 110 Ohio St.3d 24 at ¶ 11, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The material issues in a case depend on the applicable substantive law. *Byrd*, 110 Ohio St.3d 24 at ¶ 12. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We consider the propriety of granting summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.

{¶17} The parties agree that the applicable statutory sections are contained in the Uniform Commercial Code ("U.C.C."), which governs transactions in goods. *See* R.C. 1302.02. *See also* R.C. 1302.01(A)(8) (goods/future goods), (11) (contract or agreement relating to present or future sale of goods). Goods encompass "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action." R.C. 1302.01(A)(8). The parties also agree they are both considered merchants under R.C. 1302.01(A)(5). *See also* R.C. 1302.01(A)(7) ("between merchants" involves a transaction where both parties are chargeable with the knowledge or skill of merchants).

{¶18} A contract for the 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. R.C. 1302.07(A). *See also* R.C. 1302.10(C) ("Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract."). If the writings do not establish a contract, the terms of a contract relying on conduct will consist of those terms on which the writings of the parties agree and any U.C.C. supplemental terms. *See* R.C. 1302.10(C).

{¶19} Under the U.C.C., a contract for sale does not fail for indefiniteness even though one or more terms are left open if the parties have intended to make a

contract and if there is a reasonably certain basis for giving an appropriate remedy. R.C. 1302.07(C). The parties can conclude a contract for sale even though the price is not settled. R.C 1302.18(A). If nothing is said as to price or the price if left to be agreed upon by the parties and they fail to agree, then the price is "a reasonable price at the time for delivery." R.C. 1302.18(A)(1)-(2).

{¶20} An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances, unless the language or circumstances unambiguously indicate otherwise. R.C. 1302.09(A)(1). Pursuant to R.C. 1302.10:

> (A) A definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (B) The additional terms are to be construed as proposals for addition to the contract. Between merchants, the terms become part of the contract unless one of the following applies:
>
> (1) The offer expressly limits acceptance to the terms of the offer.
>
> (2) They materially alter it.
>
> (3) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received. * * *

The parties focused on this statute, each contending the other attempted to make impermissible additions and each pointing to a different document as the controlling offer.

ASSIGNMENT OF ERROR NUMBER ONE

{¶21} Extreme Machine's first assignment of error provides:

THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT DEFENDANT-APPELLEE'S OMISSION OF THE $30,000.00 ENGINEERING CHARGE IN THE EVENT THAT DEFENDANT-APPELLEE DID NOT COMPLETE THE ORDER FOR THE ADDITIONAL 2,300 RACKS WITHIN THE LIMITING TIME PERIOD IS A 'MATERIAL ALTERATION' WITHIN THE MEANING OF R.C. 1302.10(B)(2).

{¶22} As proposed by Avery Dennison, the trial court found the $30,000 engineering charge was prohibited as an additional term under R.C. 1302.10(B). Avery Dennison's argument presumes its purchase order was the controlling offer. Extreme Machine characterizes its quotation as the offer. To the extent that the purchase order could be read as an attempt to change the terms of the quotation, Extreme Machine argues the purchase order is a prohibited material alteration of its offer.

{¶23} There are various factual issues concerning the parties' conduct. As aforementioned, conduct can be evaluated to establish a contract under the U.C.C. *See* R.C. 1302.07(A) ("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"), (B) ("An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined").

{¶24} However, we need not rely on mere conduct to establish the existence of a contract here due to the parties' initial writings. Mutual assent to enter a contract is normally manifested by an offer and acceptance. *Walker v. Jefferson Cty.*, 7th Dist. No. 02JE14, 2003-Ohio-3490, ¶ 34. "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id.* at ¶ 36, citing *McSweeney v. Jackson*, 117 Ohio App.3d 623, 632, 691 N.E.2d 303 (4th Dist.1996); 1 Restatement of the Law 2d, Contracts, Section 24 (1981).

{¶25} Extreme Machine's quotation was more than an invitation to make an offer; it was the offer. The terms were such that only the buyer's assent was

necessary to form a binding contract. *See SST Bearing Corp. v. MTD Consumers Group, Inc.*, 1st Dist. No. C-040267, 2004-Ohio-6435, ¶ 15-16 (a price quotation "may be deemed an offer to form a binding contract if it is sufficiently detailed, and if it appears from the terms of the quotation that all that is needed to ripen the offer into a contract is the recipient's assent"). The quote contained specific terms, identified custom-made goods, and was sent in response to specific negotiations. The quote described the product to be manufactured, and a rate ($669 each) was provided for a quantity of 2302 units for a total cost of $1,540,038. The quotation provided the FOB origin, the place of delivery, and the delivery schedule. The first two sample racks would be delivered in three weeks, and the first shipment of 200 racks would occur six weeks "[a]fter rack approval." The offer stated: "Please note that pricing is only based upon an order of the total number of racks." The price for the two sample racks was $1,320; however, "This price is only good if an order is received for 2300 racks within 6 weeks after receiving an order for the sample racks."

{¶26} Avery Dennison's purchase order was the acceptance of this offer. This characterization is not affected by the Avery Dennison's attachment of its standard terms and conditions to the purchase order. The attachment provided that if the purchase order was deemed an acceptance of a prior offer by the seller, then the resulting contract was limited to the express terms of the purchase order (unless the seller objects within ten days). The attachment was a conditional acceptance under the standard terms and conditions, if there was no objection by Extreme Machine to the various additions.

{¶27} However, the purchase order did not expressly reject or alter the terms of the quote. It did not eliminate the conditional pricing of the quotation. Rather, the purchase order incorporated the terms of the quotation. That is, Avery Dennison ordered the two trial racks at $1,320 "per quote 110109-01," specifically citing the number assigned to the quote by the manufacturer. As such, the purchase order specifically declared the order was in accordance with the terms of the manufacturer's quote. *See, e.g.,* Black's Law Dictionary (10th Ed.2014) (defining "per" as: "In accordance with the terms of; according to <per the contract>.").

{¶28} The very manufacturer's quote cited in the purchase order clearly warned that the price was inapplicable if the remaining racks were not ordered in a timely manner, meaning the first two racks would cost them $1,320 only if they proceeded to order the remaining racks at a subsequent date. The buyer placed the order for the two sample racks for the price acknowledged for those two items on the express condition that the buyer placed the remainder of the anticipated order.

{¶29} On this point, had the buyer ordered 2,300 racks within six weeks of the order for the sample racks, the manufacturer would have been bound by the price in the offer as well as the other obligations. The reference to changes in material prices would not have eliminated this obligation. In fact, only 10 days had passed from the time of the offer until the time of the acceptance.

{¶30} Because the quote specified that the price for the sample racks only applied if the buyer proceeded to order all 2,300 racks, the subsequent failure to proceed with the remainder of the order merely meant a price term was missing from the final, resulting contract. "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." R.C. 1302.07(C).

> The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of 'indefiniteness' are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like.

Official Comment to U.C.C. 2-204 (1961).

{¶31} The standards provided for "open price" terms are contained in R.C. 1302.18, which begins by providing that "[t]he parties if they so intend can conclude a contract for sale even though the price is not settled." R.C. 1302.18(A). Pursuant to this statute, if nothing is said as to price or the price is left to be agreed by the parties

and they fail to agree, then the applicable standard is "a reasonable price at the time for delivery." R.C. 1302.18(A)(1)-(2). *See also* Official Comment to UCC 2-305 (1961) (provision rejects the defeating of such agreements on the ground of "indefiniteness").

{¶32} As we find Avery Dennison's purchase order is the acceptance, we find Extreme Machine's later revised quotation setting forth the missing price term to be an untimely attempt to alter a binding written contract. We note: "Although the failure to object to a confirmatory writing eliminates a statute of frauds defense, it does not establish the existence of a contract." *Tubelite Co. v. Original Sign Studio, Inc.*, 10th Dist. No. 07AP-601, 176 Ohio App.3d 241, 247, 2008-Ohio-1905, 891 N.E.2d 820, 825, ¶ 16, citing *American Bronze Corp. v. Streamway Prod.*, 8 Ohio App.3d 223, 227-228, 456 N.E.2d 1295 (8th Dist.1982).

{¶33} Therefore, although we do not find Avery Dennison was entitled to summary judgment on its assertion that the contract was solely for two racks for $1,320, we do not agree with the opposite position that Extreme Machine was entitled to summary judgment on its assertion that the contract, as a matter of law, requires a judgment in its favor for $30,000 (minus the $1,320 already paid). In partial agreement with Extreme Machine's position, however, we agree that a written contract was formed wherein Avery Dennison agreed to pay a stated amount if it proceeded to order the anticipated quantity of racks and that Avery Dennison agreed to pay a different, as yet undetermined, amount in case it decided not to proceed with the order after receiving the two sample racks.

{¶34} In accordance, Extreme Machine's first assignment of error is sustained in part. The trial court's decision is reversed, and the case is remanded for further proceedings concerning the amount to be recovered for the two sample racks where the remaining quantity was not ordered. There is a factual issue concerning the reasonable price at the time of delivery. The manufacturer's asserted engineering cost is pertinent to this subject, even though the manufacturer's presentation of this amount in a second quote (in an attempt to unilaterally add the term potentially

missing from the agreement) was not binding. The parties' conduct, including contemporaneous discussions and prior dealings, can be considered as well.

ASSIGNMENT OF ERROR NUMBER TWO

{¶35} The second assignment of error set forth by Extreme Machines alleges:

> THE TRIAL COURT ERRED IN FAILING TO ADDRESS EMF'S CLAIM UNDER THE DOCTRINE OF PROMISSORY ESTOPPEL SET OUT IN COUNT III OF THE COMPLANT.

{¶36} The parties agree that the elements of a promissory estoppel claim are: (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) the reliance caused an injury to the party claiming estoppel. *Trehar v. Brightway Ctr.*, 7th Dist. No. 14JE20, 2015-Ohio-4144, ¶ 17, citing *Landpor Contractors, Inc. v. C&D Disposal Tech. L.L.C.*, 7th Dist. No. 11JE28, 2013-Ohio-1436, ¶ 34. As Avery Dennison points out, Extreme Machine's complaint labeled this count "detrimental reliance." Contrary to Avery Dennison's suggestion, the label is not dispositive. Detrimental reliance is an element of a promissory estoppel cause of action, and the other elements were pled as well.

{¶37} Extreme Machine claims the affidavit of its president established entitlement to summary judgment on its promissory estoppel claim. Notably, the affidavit of the president of Extreme Machine does not state that Avery Dennison agreed to pay $30,000. Rather, it provides that Avery Dennison represented that it would pay for the engineering cost. Although Extreme Machine may have decided to bill $30,000 for the two sample racks due to engineering costs, there is no indication the actual cost was $30,000, which is pertinent to the injury sustained by the claim that they detrimentally relied on the representation. In any event, the affidavit did not set forth *who* at Avery Dennison represented *what* to *whom* at Extreme Machine. There is no indication the president was involved in any discussions, and this particular portion of the affidavit did not concern business records or practices.

{¶38} "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall

show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Civ.R. 56(E). This deficiency was pointed out in Avery Dennison's response to Extreme Machine's cross-motion for summary judgment. Assuming the doctrine of promissory estoppel could have been applied, the affidavit of its president did not establish entitlement to summary judgment on that claim.

{¶39} On the topic of whether the application of promissory estoppel could be warranted on remand, Avery Dennison concludes the existence of a legally binding contract operates to bar a claim for promissory estoppel. *Citing Olympic Holding Co. v. ACE Ltd.*, 122 Ohio St.3d 89, 96, 2009-Ohio-2057, 909 N.E.2d 93, ¶ 39 ("The doctrine of promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice."). Avery Dennison also states the doctrine of promissory estoppel is inapplicable due to the integration and no modification clauses of its acceptance.

{¶40} We note that this would not preclude reliance on conduct, which includes oral statements, to ascertain a missing price term. As we ruled above, the U.C.C. instructs the fact-finder to implement a reasonable price under these circumstances; various considerations, including conduct, were held to be pertinent to the evaluation on remand. Pursuant to R.C. 1301.103(B), principles of law and equity including estoppel can be used to supplement the U.C.C. unless the principle is displaced by a particular provision, including R.C. 1307.02 and R.C. 1302.18(A). *See, e.g.,* R.C. 1302.07(A) (contract for the 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), (C) (contract for the sale of goods does not fail for indefiniteness even if one or more terms are left open if the parties have intended to make a contract and if there is a reasonably certain basis for giving an appropriate remedy); R.C 1302.18(A) (the parties can conclude a contract for sale even though the price is not settled), (1)-(2) (if nothing is said as to price or the price if left to be agreed by the parties and they fail to agree, then the price is "a reasonable price at the time for delivery").

{¶41} We note that Extreme Machine sets forth this assignment of error "[i]n the alternative" to its main contractual argument contained in assignment of error number one, which we sustained in part. In the prior assignment of error, we disagreed with Avery Dennison's argument as to the contractual terms and the applicable offer and reversed the entry of summary judgment. The contract demonstrates a promise to pay one amount if all 2,302 are ordered with a price that was clearly only available if the entire order was placed; *there was a contract to pay a different price* if, after receiving the two samples, the remainder of the order was not placed.

{¶42} Since we found an enforceable contract with a missing conditional price term and cited the U.C.C. supplemental term for a missing price, promissory estoppel need not be utilized to find the existence of a promise to pay a different price if only the two sample racks were ordered. *See McGonagle v. Somerset Gas Transmission Co.*, 10th Dist. No. 11AP-156, 2011-Ohio-5768, ¶ 23 (finding promissory estoppel assignment of error moot due to conclusion that letter was an enforceable agreement with a missing term).

{¶43} Judgment reversed and remanded for further proceedings according to law and consistent with this court's opinion.

Donofrio, P.J., concurs.

DeGenaro, J., concurs in judgment only; see concurring in judgment only opinion.

DeGENARO, J., concurring in judgment only.

{¶44} While I agree with my colleagues' ultimate decision to reverse and remand this case, I must respectfully decline to join their rationale. The majority

concludes that the parties entered into a valid, written contract; that Extreme Machine's quotation was the offer; that Avery Dennison's purchase order was the acceptance; and that the engineering charge, contained in Extreme Machine's revised quotation, did not create a binding additional term to the contract. Concluding that the offered price for the two sample units only applied if an order for the remainder of the units was placed, the majority reverses the trial court's judgment and remands the case for the trial court to determine the conditional price for the two sample units.

{¶45} In contrast, given the procedural posture of this case, an appeal of a summary judgment, I would hold that our review is much more straight-forward. No written contract was formed because the parties writings continually differ as to the dickered for terms. Accordingly we must turn to the doctrine of promissory estoppel to resolve this appeal, which necessitates a remand to determine damages.

{¶46} Some elaboration of the facts is warranted. In the fall of 2009, Daniel Dunlap of Avery Dennison contacted Jim Tufaro, General Manager of Extreme Machine & Fabricating Inc. regarding the design and manufacture of roll racks, and the parties engaged in negotiations through emails and a meeting. It bears repeating that for the seven prior contracts between the parties, Avery Dennison provided the engineering drawings and specifications; this was the first time Extreme Machine had to prepare them.

{¶47} On November 6, 2009, Extreme Machine sent a price quote for the project; which I will refer to as Quote 1. Quote 1 provided, in pertinent part, that the first two sample racks would be produced in three weeks, and after approval, weekly shipments would begin thereafter. Regarding pricing, Quote 1 stated: "Please note that pricing is based upon an order of the total number of racks. The price for 2 sample racks is $1320.00. This price is only good if an order is received for 2300 racks within 6 weeks after receiving an order for the 2 sample racks."

{¶48} On November 16, 2009, in response, Avery Dennison sent a purchase order to Extreme Machine which stated in pertinent part that it was ordering two "trial racks per quote" at the unit price of $660 for a total of $1,320. Avery Dennison

ignored the offer's clear statement that the unit price of $660 was based upon the purchase of 2,300 racks, not two.

{¶49} Tufaro sent an email to Avery Dennison the next day: "Attached is a revised copy of the rack proposal, showing the entire amount of cost that is going to be put into fixture *and engineering*. Confirming our conversations and receipt of an order yesterday we are proceeding with the manufacturing of two sample racks." (Emphasis added) This attachment, which I term Quote 2, included new language specifying the price if only the two sample racks were purchased: "If an order for 2300 racks is not received within 6 weeks from receiving the sample racks then a total material *and engineering* charge of $30000.00 would apply." (Emphasis added)

{¶50} On December 10, 2009, Extreme Machine delivered the two trial racks for Avery Dennison to evaluate, who then paid Extreme Machine $1,320. On January 29, 2010, Extreme Machine sent an invoice to Avery Dennison for the purchase price and engineering charge, showing a credit for the purchase price and an outstanding balance for the engineering cost of $28,680. On February 15, 2010, Avery Dennison sent an email advising Extreme Machine it was dissatisfied with the design and decided not to order any additional racks.

{¶51} Generally, the UCC would control as this action involves the sale of goods. *See generally* R.C. 1302.02. "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." R.C. 1302.07. However, where the parties disagree as to dickered for terms a contract is not formed. *See Alliance Wall Corp. v. Ampat Midwest Corp*., 17 Ohio App.3d 59, 62, 477 N.E.2d 1206 (8th Dist.1984). Because we have that situation here, a contract was not formed.

{¶52} This is not a situation in which Extreme Machine produces a good en masse. This is a specially manufactured good, designed for a specific purpose, particular to this transaction. And for the first time in the parties' course of dealings, Avery Dennison did not provide the engineering specifications; it requested Extreme Machine to prepare them. The dickered for term—the price for engineering expenses if two racks were purchased or if 2,300 racks were purchased—was never agreed to

by the parties. Since there is no agreement as to this essential term, no written contract was formed.

{¶53} Extreme Machine's Quote 1 is an offer which contains all of the essential terms of a contract; had Avery Dennison accepted the offer with a purchase order containing the specifications of Quote 1, a contract would have been formed.

{¶54} However, Avery Dennison's Purchase Order altered the terms of Quote 1 in several material ways. First, it eliminated the conditional pricing language of Quote 1. Instead, Avery Dennison placed a purchase order for two trial racks for a total of $1,320. Second, it does not reference, accept, or reject the total cost of $1,540,038 for 2,300 racks. These terms materially differ from Extreme Machine's Quote 1, which essentially provided that engineering costs would be spread over the purchase of the 2,300 units.

{¶55} When Extreme Machine received the Purchase Order, Tufaro sent an email to Avery Dennison on November 17, 2009, stating: "Attached is a revised copy of the rack proposal, showing the entire amount of cost that is going to be put into fixture and engineering. Confirming our conversations and receipt of an order yesterday we are proceeding with the manufacturing of two sample racks." The attachment—Quote 2—included new language proposing a price if only two sample racks were purchased: "If an order for 2300 racks is not received within 6 weeks from receiving the sample racks then a total material and engineering charge of $30000.00 would apply." These terms directly conflict with Avery Dennison's Purchase Order.

{¶56} In ¶26 *supra*, the majority characterizes the Purchase Order as a conditional acceptance if there was no objection by Extreme Machine, specifically, that "the resulting contract was limited to the express terms of the purchase order (*unless the seller objects within ten days)." Id.*, (emphasis added) Tufaro objected by email the day after the Purchase Order was received.

{¶57} Examining the evidence presented by both parties, the continual discrepancy regarding the dickered term means no written contract was formed. The terms in Quote 1 and the Purchase Order directly conflict; specifically, the unit

quantity and pricing. This lack of agreement is further evidenced by Quote 2, in which the quantity and pricing differ from the terms of the Purchase Order. It is clear that the Purchase Order was not intended to be the final agreement.

{¶58} In sum, neither of the documents can truly be viewed as controlling. Thus, due to the lack of agreement between all three documents regarding the dickered for terms, no written contract was formed.

{¶59} Accordingly we must turn to the doctrine of promissory estoppel to resolve this case. The doctrine of promissory estoppel, what is labeled as "detrimental reliance" at times in Extreme Machine's pleadings, is a theory of recovery "where the requisites of contract are not met, yet the promise should be enforced to avoid injustice." *Olympic Holding Co. v. ACE Ltd*., 122 Ohio St.3d 89, 96, 909 N.E.2d 93, 100 (2009). "Promissory estoppel specifically exists to provide an action for damages to compensate a party injured due to his reliance on an unenforceable promise." *Filo v. Liberato*, 2013-Ohio-1014, 987 N.E.2d 707, ¶ 10 (7th Dist.). R.C. 1301.103 allows principles of law and equity, such as promissory estoppel, to supplement the provisions of Ohio's version of UCC Article 2 where they do not conflict with the explicit provisions of the Article. *See generally* R.C. 1301.103(B).

{¶60} The elements of a promissory estoppel claim are: 1) a clear, unambiguous promise; 2) foreseeable and reasonable reliance; 3) injury caused by that reliance. *Trehar v. Brightway Ctr.*, 7th Dist. No. 14JE20, 2015-Ohio-4144, ¶34. "The doctrine of promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice. *Doe v. Univision Television Group, Inc.* (Fla.App.1998), 717 So.2d 63, 65." *Olympic Holding Co. v. ACE Ltd.*, 122 Ohio St.3d 89, 96, 2009-Ohio-2057, 909 N.E.2d 93, 100, ¶ 39.

{¶61} Here, Avery Dennison asked Extreme Machine to prepare the engineering specifications in order to manufacture two sample racks; the unambiguous promise. Extreme Machine's reliance was reasonable and foreseeable, and it suffered injury as a result, to wit, engineering costs. Thus, Extreme Machine has stated a valid claim for promissory estoppel as the basis for recovery of the

engineering costs against Avery Dennison, and a remand is required for the trial court to resolve the issue of damages.