IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BOISE CASCADE CORPORATION,	:	January Term, 2002
Plaintiff,	:	No. 3939
v.	:	Commerce Court
SONOCO PRODUCTS COMPANY,	:	Control No.: 021749
Defendant.	:	

ORDER and MEMORANDUM

AND NOW, this 5th day of May, 2003, upon consideration of the Motion for Summary Judgment of Boise Cascade Corporation (the "Boise Motion"), all responses in opposition thereto, the Motion for Summary Judgment of Sonoco Products Company (the "Sonoco Motion"), all responses in opposition thereto and all matters of record and in accord with the contemporaneous Opinion in support of this Order, it is hereby **ORDERED** and **DECREED** that summary judgment as to Count I of the complaint of Boise Cascade Corporation is **GRANTED**;

It is further **ORDERED** and **DECREED** that the remainder of the Boise Motion is **DENIED**;

It is further **ORDERED** and **DECREED** that the Sonoco Motion is **DENIED**;

It is further **ORDERED** and **DECREED** that this case shall proceed to trial on the issue of damages only.

BY THE COURT:

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GENE D. COHEN, J.

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MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court are the motions for summary judgment of Boise Cascade Corporation ("Boise") and Sonoco Products Company ("Sonoco"). For the reasons fully set forth below, the motion for summary judgment of Boise is **granted** in part and **denied** in part. The motion for summary judgment of Sonoco is **denied**.

I. BACKGROUND

On March 9, 1987, Boise and Sonoco entered into an asset purchase agreement (the "Agreement") whereby Boise sold certain assets to Sonoco which included, *inter alia*, a can cleaning device (the "Cleaner"). The sale closed on March 31, 1987 (the "Closing Date"). On July 10, 1998, an employee of Sonoco, Martin Rivera ("Rivera"), suffered injuries allegedly resulting from the operation of the Cleaner. Rivera's injuries occurred over 10 years after the Closing Date.

In July of 2000, Rivera commenced suit in the Superior Court of New Jersey, Law Division, against Boise and two other defendants.[1] Rivera sought damages based upon the theories of strict liability, failure to test/warn, negligent design manufacture and loss of usual services and consortium

[1] Rivera was prevented from suing Sonoco by New Jersey's workers' compensation laws.

(the "Rivera Action"). The Rivera Action proceeded to arbitration where the complaint was dismissed due to Rivera's failure to present an expert witness. The entire case was subsequently dismissed because neither Boise nor Rivera appealed the arbitration dismissal or sought entry of judgment.

Boise alleges that Sonoco breached the Agreement and acted in bad faith when it failed to defend, indemnify and hold Boise harmless regarding the Rivera Action. Although the Rivera Action did not result in a decision adverse to Boise, Boise still incurred legal fees and costs that it alleges should be paid by Sonoco. Boise also claims that the Agreement provides for the payment of its legal fees and costs in the present action to enforce the Agreement.

The Agreement contains two indemnification clauses, paragraph 20.4 provides for Sonoco's indemnification by Boise and paragraph 20.5 provides for Boise's indemnification by Sonoco (the "Boise Clause"). The following is the text of the two clauses.

> 20.4 Indemnification by Boise Cascade. Except as set forth in Section 6.5 and Schedule 6.5, Boise Cascade, from after the Closing, shall indemnify and hold Sonoco and its officers, directors, and employees harmless from and against any and all liabilities, claims for personal injury from and against any and all liabilities, claims for personal injury or property damages, and losses (including all related claims for legal fees, costs, and expenses in connection therewith)("Claims") suffered or incurred by Sonoco with respect to (i) any Claims by any third-party arising out of any event or events occurring prior to Closing and related to the Purchased Assets or the Business; (ii) any material inaccuracy in, breach of, or nonfulfillment of, any representation, warranty, agreement, or obligation of Boise Cascade under this Agreement which survives the Closing; and (iii) any Claim arising out of the noncompliance by Boise Cascade with the bulk sales laws of any state in which the Purchased Assets are located with respect to the transfer of the Purchased Assets hereunder.
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> 20.5 Indemnification by Sonoco. Except as set forth in Section 6.5 and Schedule 6.5, Sonoco, from after the Closing, shall indemnify and hold Boise Cascade and its officers, directors, and employees

> harmless from and against any and all liabilities, claims for personal injury from and against any and all liabilities, claims for personal injury or property damages, and losses (including all related claims for legal fees, costs, and expenses in connection therewith)("Claims") suffered or incurred by Boise Cascade with respect to (i) any Claims by any third-party arising out of any event or events occurring on or after the effective time of Closing and related to the Purchased Assets or the Business; (ii) any material inaccuracy in, breach of, or nonfulfillment of, any representation, warranty, agreement, or obligation of Boise Cascade under this Agreement which survives the Closing; and (iii) all tax liabilities assumed by Sonoco; (iv) any failure by Sonoco to fully and completely discharge any portion of the Assumed Liabilities as and when they are required to be discharged; and (v) any claims by any Employee who is subsequently terminated by Sonoco except to the extent that such claims relates to specific acts of Bosie Cascade its agents or employees, which are unrelated to the termination.

Agreement, Exhibit 1 of the Complaint, pp. 56 and 57.

After Sonoco's refusal to indemnify, Boise commenced this civil action by filing a Complaint against Sonoco in the Court of Common Pleas of Philadelphia County on April 26, 2002 (the "Complaint"). The Complaint contains two counts against Sonoco: (1) breach of contract and (2) bad faith. Sonoco filed an answer with new matter denying Boise's claim and made the following admissions:[2]

(1) Rivera sustained his injuries while operating the Cleaner at a plant owned by Sonoco;

(2) Boise tendered the Rivera Action for defense and indemnification on September 1, 2000;

(3) GAB Robbins, acting on behalf of Sonoco, initially retained counsel to represent Boise in the Rivera Action and an answer was filed on behalf of Sonoco as successor-in-interest to Boise;

(4) Sonoco concluded it was not required to indemnify and hold Boise harmless; and,

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[2] Answer To Plaintiff's Complaint With New Matter And Jury Trial Demand Of Defendant Sonoco Products Company, ¶¶14,16-18, 21, 25.

(5) Following the dismissal of the Rivera Action, a request for indemnification was made by Boise that was refused.

The parties subsequently filed the motions for summary judgment that are now before the Court.

II. SUMMARY JUDGMENT

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this Court may grant Summary Judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a prima facie cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998). To succeed, a Defendant moving for summary judgment must make a showing that the Plaintiff is unable to satisfy an element in his cause of action. Basile v. H&R Block, 777 A.2d 95, 100 (Pa. Super. Ct. 2001). To avoid summary judgment, the Plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in favor of the Plaintiff. McCarthy, 724 A.2d at 940. In addressing the issue, this Court is bound to review the facts in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The Plaintiff, must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989).

III. DISCUSSION

Boise alleges that Sonoco breached the Agreement by failing to defend Boise in the Rivera Action and failing to indemnify and hold Boise harmless for the damages it suffered. Boise also alleges that Sonoco acted in bad faith in failing to perform as the Agreement required. As a result, Boise seeks punitive damages and the legal fees and costs that it incurred, not only in the Rivera

Action, but also in this action.

Sonoco essentially presents two defenses. First, Sonoco asserts that because New Jersey substantive and procedural law applies, this action is barred by New Jersey's "entire controversy" doctrine. Second, Sonoco alleges that the Rivera Action concerned claims that arose from events that occurred prior to the Closing Date and, therefore, Sonoco is not required to indemnify and hold Boise harmless.[3] Sonoco also filed its own summary judgment motion.

For the reasons set forth more fully below, the Court finds that Sonoco breached the Agreement and grants Boise summary judgement as to Count I of the Complaint. The Court denies Boise summary judgment as to Count II because, under Delaware law, it fails to state a claim upon which relief may be granted. Sonoco's motion for summary judgment is denied.

A. Delaware Substantive Law Applies To This Proceeding.

Under the Agreement, both Boise and Sonoco explicitly agreed that Delaware law would govern the interpretation and performance of the Agreement.[4] It is well settled Pennsylvania law that "if the parties have designated that the law of a particular state should apply to their agreement, then Pennsylvania courts typically will apply that choice of law provision." University Mechanical & Engineering Contractors Inc. v. Ins. Co. of North America, 2002 WL 857105 (Pa. Com. Pl. Ct. 2002)(citing General Accident Insurance Co. v. Allen, 547 Pa. 693, 701, 692 A.2d 1089 (1997).

Although Pennsylvania generally respects the parties choice of law, "Pennsylvania's conflict of laws rules direct that a Pennsylvania court apply Pennsylvania's procedural laws when it is

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[3] Sonoco also argues that the legal fees and costs sought by Boise are excessive and not warranted. This argument is an issue for damages and not liability.

[4] The governing law provision is as follows "30.6 Governing Law. The interpretation and performance of this Agreement shall governed (sic) in all respects by the law of the state of Delaware." See Agreement, Exhibit 1 to the Complaint, p. 71.

serving as the forum state regardless of which state's substantive law applies." Branca v. Conley, 2001 WL 1807403 (Pa. Com. Pl. Ct. 2001)(citing Larrison v. Larrison, 750 A.2d 895, 898 (Pa. Super. Ct. 2000)). Therefore, the Court will look to Delaware substantive law in interpreting and enforcing the Agreement and Pennsylvania procedural law will apply to the conduct of the action.

B. This Case Is Not Barred By New Jersey's Entire Controversy Doctrine.

Sonoco's argument that this action is barred by New Jersey's entire controversy doctrine is without merit. Sonoco premises its argument by alleging in a single paragraph that New Jersey's Rules of Court and substantive law must be applied. Based upon this sweeping assertion, Sonoco argues that New Jersey's entire controversy doctrine bars the present action. Sonoco cites no authority to support its position that New Jersey and not Delaware substantive law apples.[5] Furthermore, Sonoco cites no authority to support its contention that the New Jersey Rules of Court, not the procedural rules of Pennsylvania, apply. Sonoco's argument, lacking any support, must fail in light of well settled Pennsylvania precedent respecting contractual choice of law provisions. Therefore, Delaware substantive law and Pennsylvania procedural law will apply.[6]

C. Delaware Contract Law.

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[5] Sonoco's present position is contrary to the position taken in its answer to the Complaint. By way of new matter, Sonoco stated that Delaware law is controlling in this case. "This action is barred by and/or subject to the law of the state of Delaware." See Answer To Plaintiff's Complaint With New Matter And Jury Trial Demand Of Defendant Sonoco Products Company, ¶54.

[6] Assuming this Court were required to apply New Jersey's entire controversy doctrine, Boise's action would not be barred because: (1) there are no issues of contribution; (2) Sonoco could not have been a joint tortfeasor in the Rivera Action; (3) Boise's claims are based upon a contractual indemnity obligation; and (4) Sonoco had notice of the Rivera Action and the opportunity to defend. See Harley Davidson Motor Co. v. Advance Casting, Inc., 696 A.2d 666, 672 (N.J. Super. Ct. 1997); McNally v. Providence Washington Ins. Co., 698 A.2d 543 (N.J. Super. Ct. 1997).

Under Delaware law, the intention of the parties are the primary guiding force in contract construction. E.I. du Pont de Nemours and Company v. Shell Oil Company, 498 A.2d 1108, 1113 (Del. 1985). "In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein." Id. (citing State v. Dobson, 217 A.2d 497 (1966)); Bamdad Mechanic Co. v. United Technologies Corp., 586 F.Supp. 551 (D.Del. 1984). "Moreover, the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." Id. (citing Stemerman v. Ackerman, 184 A.2d 28, 34 (Del. Ch. 1962)). Lastly, if the language of the contract is clear, the intent of the parties is derived from ordinary and usual meaning of the language. See Northwestern National Ins. v. Esmark, Inc., 672 A.2d 41 (Del. 1996).

Delaware law routinely upholds and enforces indemnification provisions. See American Inc. Group v. Risk Enter. Mgmt., Ltd., 761 A.2d 826 (Del. 2000); Precision Air, Inc. v. Standard Chlorine of Del., Inc., 654 A.2d 403 (Del. 1995); Downey v. Sanders, 1996 WL 190755 (Del. Super. Ct. 1996). Parties may also agree to indemnify for another party's own negligence. James v. Getty Oil, Co. (Eastern Operations), 472 A.2d 33 (Del. Super. Ct. 1983). However, "the protective language of an indemnity agreement must be 'crystal clear or sufficiently unequivocal to show that the contracting party intended to indemnify the indemnitee for the indemnitee's own negligence.'" Downey, 1996 WL at 2 (citing Sweetman v. Strescon Industries, Inc., 389 A.2d 1319, 1321 (Del. Super. Ct. 1978).

C. Boise Is Entitled To Indemnification Under The Agreement.

Boise argues that the Rivera Action is a third party claim relating to the assets purchased by Sonoco that arose from events occurring *after* the Closing Date and, therefore, Sonoco is required

to indemnify and hold Boise harmless.[7] In its defense, Sonoco argues that the Rivera Action is a third party claim relating to the assets it purchased that arose from events occurring *prior* to the Closing Date. Specifically:

> Sonoco's position is that the allegation of the Rivera Complaint dealt with misdesign or changes in the product that was sold to Sonoco that had to have occurred prior to the date of the sale. Hence, those liabilities still exist to Boise Cascade under the Agreement.[8]

Sonoco fails to cite to any depositions, affidavits, admissions, answers to interrogatories or documents that supports its position. In fact, Sonoco does not proffer *any* evidence at all that would create a genuine issue of material fact. It is undisputed that Rivera's injury occurred after the Closing Date and the injury was related to an asset purchased by Sonoco from Boise. Other than Sonoco's conclusory allegations in its answer and brief, Sonoco presents no evidence to rebut Boise's factual allegations. Therefore, under the plain language of the Agreement, Rivera's claim against Boise arose from an event that occurred after the Closing Date.

Sonoco clings to the argument that because the Rivera Action was never adjudicated to its conclusion on the merits, Sonoco is relieved from its indemnification obligations. While the Court agrees that no adjudication on the merits occurred in the Rivera Action, the Court fails to see how that creates a genuine issue of fact as to the claims of Bosie, here and now.

It is clear under Pennsylvania law that:

> In order to withstand a motion for summary judgment, a non-moving party must adduce sufficient evidence on an issue essential to his case

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[7] Boise makes several alternate arguments that the Court need not reach because Sonoco has failed to present a genuine issue of material fact in defense to Boise's primary argument.

[8] Defendant Sonoco Products Company Opposition To Plaintiff's Motion For Summary Judgment, p.12; See also Answer to Plaintiff's Complaint With New Matter And Jury Trial Demand Of Defendant Sonoco Products Company, ¶15.

> and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to summary judgment.

Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Casualty Ins. Guaranty Assoc., 777 A.2d 84, 88 (Pa. Super. Ct. 2001). Moreover, "parties seeking to avoid the entry of summary judgment against them may not rest upon the averments contained in their pleadings. On the contrary, they are required to show, by depositions, answers to interrogatories, admissions or affidavits, that there is a genuine issue for trial." Washington Federal Savings and Loan Assoc. v. Stein, 357 Pa.Super. 286, 288, 515 A.2d 980, 981 (1986). Because Sonoco presents no evidence that would create a genuine issue for trial, the Court finds that summary judgment in favor of Boise is warranted as to Count I.

Sonoco's position is further weakened by its failure to answer Boise's request for admissions.[9] Boise served a Request for Admissions on Sonoco on November 12, 2002 to which Sonoco never responded. Rule 4014 provides, in pertinent part:

> (a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rules 4003.1 through 4003.5 inclusive set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request...
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> (b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a verified answer or an objection addressed to the matter, signed by the party or by his attorney....
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> * * *

[9] Even without Sonoco's failure to respond to the admissions, the Court finds that Sonoco has proffered no evidence to establish there is a genuine issue of material fact.

(d) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission....

Pa.R.C.P. 4014. Under this rule, requests for admissions must call for "matters of fact rather than legal opinions and conclusions." Id.; Dwight v. Girard Med. Ctr., 154 Pa. Commw. 326, 333, 623 A.2d 913, 916 (1993); Commonwealth v. Diamond Shamrock Chemical Co., 38 Pa. Commw. 89, 94, 391 A.2d 1333, 1336 (1978). Since conclusions of law are not within the permissible scope of requests for admissions under Rule 4014, those statements in the requests for admissions which constitute conclusions of law are not properly before the court. Id.

Sonoco does not refute the allegation that it failed to respond to Boise's request for admissions.[10] Because of Sonoco's failure to respond to the requests for admissions and pursuant to Rule 4104, the following facts hereby are deemed admitted for purposes of the instant motion:

1. Marvin Rivera was an employee of Sonoco on or about July 10, 1998. (Req. No. 1).

2. Marvin Rivera suffered injuries as a result of an accident on or about July 10, 1998 involving a can cleaning device owned by Sonoco. (Req. No. 2).

3. Marvin Rivera's injuries, involving a can cleaning device owned by Sonoco, occurred during the scope of his employment at Sonoco. (Req. No. 3).

4. Marvin Rivera's injuries, involving a can cleaning device owned by Sonoco, occurred at Sonoco's Jamesburg, New Jersey plant. (Req. No. 4).

5. The can cleaning device at issue in the Rivera action was owned at the time of the accident by Sonoco. (Req. No. 8).

6. The can cleaning device at issue was manufactured by Great Lakes Runway Engineering Corporation. (Req. No. 9).

7. Boise did not manufacture the can cleaning device at issue in the Rivera action. (Req.

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[10] Although Sonoco has offered an excuse for its failure to respond, the merits of which the Court does not address, Sonoco inexplicably has failed to move this Court to have its admissions withdrawn or to even provide answers at this stage. By ignoring Rule 4014, Sonoco has run the risk of having the facts alleged in the admissions deemed admitted.

No. 17).

8. Boise did not modify the can cleaning device at issue in the Rivera action. (Req. No. 18).

The aforementioned admissions further support entry of summary judgment in favor of Boise as to Count I.

E. The Agreement Requires Sonoco To Indemnify Boise For The Attorneys's Fees And Costs Incurred In This Action.

Boise correctly argues that the Agreement requires Sonoco to indemnify Boise for the attorney's fees and costs incurred in this action. The Supreme Court of Delaware has held:

> [W]here indemnification is required and the indemnitor has been given proper notice of the pending litigation and an adequate opportunity to undertake its duty to defend, the indemnitee is entitled to recover its costs and attorney's fees for the expenses incurred in its defense of the action giving rise to the claim to indemnification *and in enforcing its right to indemnification.* (emphasis added)

Pike Creek Chiropractic Center, P.A. v. Robinson, D.C., 637 A.2d 418, 422 (Del. 1994). The Delaware Supreme Court adopted the reasoning of the Alaska Supreme Court set forth in Manson-Osberg Co. v. Statem, 552 P.2d 654 (Alaska 1976). The Pike Creek court quoted the following language from the Manson-Osberg case:

> The hold harmless clause required that the [indemnitor] shall save harmless the [indemnitee] from all suits, actions, or claims of any character brought on account of injuries or damages sustained by any person. The [indemnitee] is not held harmless if it must incur costs and attorney's fees in bringing suit to recover on the indemnity clause. The [indemnitor] on the other hand can avoid such costs and attorneys fees by paying the amount due without necessity of suit.

Pike Creek, 637 A.2d at 422. It is undisputed that Sonoco had proper notice of the Rivera Action and had adequate opportunity to defend. Therefore, under Delaware law, Sonoco must indemnify Boise for its attorneys' fees and costs incurred in this action as well as in the Rivera Action.

B. Delaware Law Does Not Provide For Bad Faith Claims Outside The Insurance and Surety Context.

Boise alleges that Sonoco acted in bad faith when it failed to defend and indemnify Boise. The Court finds that even if it were to hold that Sonoco breached its duty to perform under the Agreement in good faith, Delaware law does not permit bad faith actions outside of the insurance context.[11] Boise cites no cases where a Delaware court permitted a bad faith cause of action outside of the insurance context. Only recently, after exhaustive analysis, did a Delaware Court expand the concept of a bad faith cause of action to include surety agreements. See International Fidelity Ins. Co. v. Delmarva Systems Corp., 2001 WL 541469 (Del. Super. Ct. 2001). This Court does not believe that the Delaware courts would expand established Delaware law to permit a bad faith claim under the facts of this case. Therefore, as a matter of law, Count II of Boise's complaint fails.[12]

IV. CONCLUSION

For the reasons set forth above, the summary judgment motion of Boise is granted in part and

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[11] Delaware law imposes a duty of good faith and fair dealing on every contract. Kelly v. McKesson HBOC, Inc., 2002 WL 88939 (Del. Super. 2002). "As such, a party to a contract has made an implied covenant to act reasonably to fulfill the intent of the parties to the agreement. Id. at 10. However, Delaware courts "will not readily imply a contractual obligation where the contract expressly addresses the subject of the alleged wrong, yet does not provide for the obligation that is claimed to arise by implication." Id. "It follows that where the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play." Dave Greytak Enterprises, Inc. v. Mazda Motors of America, 622 A.2d 14 (Del. Ch. 1992)(citing Williams Natural Gas Co. v. Amoco Production Co., 1991 WL 58387 (Del. Ch. 1991). It is questionable that the duty to perform in good faith even comes into play in the case since the Agreement expressly addresses indemnity.

[12] Boise also requests that the Court award punitive damages and attorneys fees and costs based upon Sonoco's bad faith. As already stated, Delaware law does not provide for a bad faith action outside the insurance and surety context. Therefore, Sonoco may not be awarded punitive damages based upon Sonoco's alleged bad faith. As for attorneys' fees and costs, the Court has already held in Boise's favor on this issue.

denied in part. The motion is granted as to Count I of Boise's Complaint and the case will proceed to trial on the issue of damages only. The motion is denied as to Count II of the Complaint. Furthermore, the motion of summary judgment of Sonoco is denied as moot.

BY THE COURT:

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GENE D. COHEN, J.

Dated: May 5, 2003