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

HERMAN GOLDNER COMPANY, INC., et al.,	:	March Term, 2001
Plaintiffs	:	
	:	No. 3501
v.	:	
	:	Commerce Case Program
CIMCO LEWIS INDUSTRIES, et al.,	:	
Defendants	:	Control No. 070103
	:	Control No. 080623

OPINION

Defendants Cimco Lewis Industries t/a Cimco Refrigeration ("Cimco") and Klenzoid, Inc. ("Klenzoid") have filed preliminary objections ("Objections") to the complaint ("Complaint") of Plaintiffs Herman Goldner Company ("Goldner") and Heat Transfer Technology, Inc. ("HTT"). For the reasons set forth in this Opinion, the Court is sustaining the Objections to Goldner's negligence claim and overruling the remaining Objections.

BACKGROUND

This dispute revolves around the construction of the First Union Center ("Project"). On July 12, 1994, Spectrum Arena Limited Partnership ("Spectrum") entered into a contract ("Prime Contract") with L.F. Driscoll Company ("Driscoll"), under which Driscoll agreed to act as general contractor for the Project. Driscoll subsequently entered into a "Subcontract" with Goldner for the Project's HVAC work, with the Subcontract incorporating the terms of the Prime Contract. The Subcontract also included a two-year warranty provision ("Warranty Provision"). Goldner, in turn,

entered into a written purchase order with HTT ("HTT Purchase Order"), whereby HTT agreed to secure the design and fabrication of refrigeration equipment for making artificial ice ("Equipment").

On January 31, 1995, HTT and Cimco agreed to a written purchase order with Cimco ("Cimco Purchase Order") under which Cimco would design and fabricate the Equipment in accordance with the terms of the Subcontract and in coordination with other entities working on the Project. Cimco also agreed to extend the warranty set forth in the Warranty Provision for an additional three months and was aware that the condenser in the Equipment would be cooled with circulating water supplied through an open cooling tower system.

HTT also entered into a written purchase order agreement with Klenzoid on February 13, 1995 ("Klenzoid Purchase Order"). Under the Klenzoid Purchase Order, Klenzoid agreed to design and manufacture a water treatment/filtration system ("System") for use at the Project to, among other things, prevent corrosion in the circulating system and the Equipment. Like Cimco, Klenzoid agreed to adhere to the terms of the Subcontract and to coordinate its efforts with Project contractors and was also aware that the condenser in the Equipment would be cooled with circulating water supplied through an open cooling tower system.

According to the Complaint, the operation of the Equipment and Systems resulted in abnormal corrosion in the heat exchange tubes and substantial System failures. The Plaintiffs attribute these failures to Cimco's use of steel heat exchange tubes, rather than the copper exchange tubes specified in the Subcontract and required for an open cooling tower system, and to Klenzoid's improper construction of the System. Both Defendants, however, have refused to correct their errors.

On the basis of these allegations, the Plaintiffs assert claims against Cimco and Klenzoid for breach of contract, breach of express warranty, breach of implied warranties and against Klenzoid alone for negligence. The Defendants counter that the Plaintiffs have failed to attach necessary documents, that the claims asserted are legally insufficient and that the Complaint is insufficiently specific.

DISCUSSION

While Goldner's negligence claim against Klenzoid is barred by the gist of the action doctrine, the remaining Objections are without merit and are overruled.

I. The Plaintiffs' Failure to Attach All Portions of the Prime Contract and the Subcontract Is Excusable

If a claim set forth in a complaint is based on a writing, a plaintiff must attach a copy of the writing to the complaint. Pa. R. Civ. P. 1019(i).[1] Where a defendant is alleged to be in possession of the document in question, however, an objection based on this requirement will be overruled. Foster v. Peat Marwick Main & Co., 138 Pa. Commw. 147, 157, 587 A.2d 387 (1991).[2] See also McClellan v. Health Maint. Org. of Pa., 413 Pa. Super. 128, 145 n.10, 604 A.2d 1053, 1061 n.10 (1992)

[1] Rule 1019(h) was amended effective January 1, 2001 to be relettered as Rule 1019(i).

[2] It is also important to note that "[t]he Rules of Civil Procedure are designed to achieve the ends of justice and are not to be accorded the status of substantive objectives requiring rigid adherence. . . . [C]ourts should not be astute in enforcing technicalities to defeat apparently meritorious claims." Lewis v. Erie Ins. Exch., 281 Pa. Super. 193, 199, 421 A.2d 1214, 1217 (1980) (citations omitted). See also Rule 126 (allowing the rules of civil procedure to be "liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable" and allowing a court "to disregard any error or defect of procedure which does not affect the substantial rights of the parties"); Dream Pools of Pa., Inc. v. Baehr, 326 Pa. Super. 583, 588-89, 474 A.2d 1131, 1134 (1984) (allowing liberal construction of the Rules to ensure justice and disregarding procedural errors that "do not affect the substantial rights of the parties").

(objections based on a failure to attach a document were without merit where the complaint alleged that the document was in the possession of the defendants and set forth the substance of the document); St. Hill & Assocs., P.C. v. Capital Asset Research Corp., May 2000, No. 5035, slip op. at 3 (C.P. Phila. Sept. 2, 2000) (Herron, J.) (overruling objection based on 1019(i) where plaintiff supplied both the court and the defendant with a copy of the missing document).[3]

Here, the Plaintiffs have attached a substantial portion of the Subcontract to the Complaint and have summarized the key provisions of the Prime Contract and Subcontract that they believe the Defendants have breached. In addition, they assert that the drawings and specifications related to the Prime Contract and the Subcontract are voluminous and are in the possession of both Cimco and Klenzoid. Complaint at ¶ 8. As a result, the Objections asserting failure to attach a document are without merit.

II. With the Exception of Goldner's claim for Negligence, the Complaint Is Sufficiently Specific and Legally Sufficient

To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the allegations are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted). See also In re The Barnes Found., 443 Pa. Super. 369, 381, 661 A.2d 889, 895 (1995) ("a pleading should . . . fully summariz[e] the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [a] cause of action is based"). For the purposes of reviewing preliminary objections asserting legal insufficiency, "all well-pleaded material, factual averments and all inferences fairly

[3] Available at http://courts.phila.gov/cptcvcomp.htm.

deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000). Furthermore,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

B. Breach of Contract and Breach of Written and Express Warranty Claims

Each of the Defendants' attacks on the Plaintiffs' breach of contract and breach of express and implied warranty claims focuses on the supposed failure to alleged a breach. The Subcontract, as incorporated into the Purchase Orders, required Klenzoid and Cimco to adhere to the Project's specifications and to cooperate with the Plaintiffs. Complaint at ¶¶ 14(a), 14(c), 21(a), 21(f). The Complaint alleges that the Defendants failed to fulfill these obligations. Id. at ¶¶ 40, 43. This is legally sufficient and sufficiently specific to sustain the Plaintiffs' breach of contract claims.

The same can be said of the breach of warranty claims. Both Purchase Orders incorporated or included language requiring that all work was to be "of good quality, free from faults and defects" and stating that work "not conforming to these requirements, including substitutions not properly approved and authorized may be considered defective." Complaint at ¶¶ 14(d), 21(d). In addition, Pennsylvania law permits a court to read implied warranties of merchantability and fitness for a particular purpose into sale contracts under certain conditions. 15 Pa. C.S. §§ 2314, 2315. The Defendants are accused of breaching each of these warranties. Complaint at ¶¶ 31, 34, 47, 51, 57, 61. Moreover, the specificity in the Complaint is more than adequate to allow the Defendants to prepare a defense.

Accordingly, the Plaintiffs' claims for breach of contract and warranty are legally sufficient and sufficiently particular, and the Objections thereto are overruled.

C. Negligence Claim

Klenzoid asserts that Pennsylvania's gist of the action doctrine bars Goldner's negligence claim against it. The Court agrees.

The Pennsylvania Superior Court has described the gist of the action doctrine as follows:

> [T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition, . . . a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally, . . . the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995) (citing Bash v. Bell Telephone Co., 411 Pa. Super. 347, 601 A.2d 825 (1992)). See also Snyder Heating Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 715 A.2d 483, 487 (Pa. Super. Ct. 1998) ("[t]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral"). Here, there is no social imposed duty implicated by Klenzoid's conduct. Rather, the duties Klenzoid is alleged to have breached arise solely from the various contracts between and among the Parties. Thus, Goldner's negligence action is barred by Pennsylvania law.

CONCLUSION

With the exception of Klenzoid's Objections to Goldner's negligence claim, each of the Objections is without merit and is overruled.

BY THE COURT:

JOHN W. HERRON, J.

Dated: September 25, 2001

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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CIMCO LEWIS INDUSTRIES, et al.,	:	
Defendants	:	Control No. 070103
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ORDER

AND NOW, this 25th day of September, 2001, upon consideration of the Preliminary Objections of Defendants Cimco Lewis Industries t/a Cimco Refrigeration and Klenzoid, Inc. to the Complaint of Plaintiffs Herman Goldner Company, Inc. and Heat Transfer Technology, Inc. and the Plaintiffs' response thereto and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objections asserting legal insufficiency of Plaintiff Herman Goldner Company, Inc.'s negligence claim, titled as Count VIII, are SUSTAINED, and Count VIII is STRICKEN;

2. The remaining Preliminary Objections are OVERRULED; and

3. The Defendants are directed to file an answer to the Complaint within 20 days of the date of entry of this Order.

BY THE COURT:

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JOHN W. HERRON, J.