

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

HERMAN GOLDNER COMPANY, INC. and	:	
HEAT TRANSFER TECHNOLOGY, INC.	:	
	:	March Term, 2001
	:	
Plaintiffs,	:	No. 03501
v.	:	
	:	Commerce Program
CIMCO LEWIS INDUSTRIES t/a	:	
CIMCO REFRIGERATION and	:	
KLENZOID, INC.	:	Control Nos. 101535
Defendants	:	101568
	:	

ORDER and MEMORANDUM

AND NOW, this 6th day of March 2003, upon consideration of Plaintiffs' Motion for Summary Judgment, all responses in opposition, the respective memoranda, all matters of record, and in accordance with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** that said Motion is **DENIED**.

In addition, upon consideration of the Motion for Summary Judgment of Defendant Cimco Lewis Industries t/a Cimco Refrigeration, all responses in opposition, the respective memoranda, all matters of record, and in accordance with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** that said Motion is **DENIED**.

BY THE COURT:

GENE D. COHEN, J.

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MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court are two Motions for Summary Judgment. Defendant “Cimco Lewis Industries, t/a Cimco Refrigeration, a division of Toromont Industries, Ltd.” (“Cimco”) has moved for summary judgment as to Plaintiffs’ entire complaint (the “Complaint”). Plaintiffs Herman Goldner Company, Inc. and Heat Transfer Technology, Inc. (collectively “Plaintiffs”) have moved for summary judgment in their favor as to Count I (breach of contract) and Count III (breach of warranty) of the Complaint.

I. Cimco Refrigeration’s Motion for Summary Judgment

Cimco has moved for summary judgment on two grounds: 1) Plaintiffs’ claims are barred by the doctrine of *res judicata*; and 2) Plaintiffs can not recover against Cimco because Plaintiffs have named an “unincorporated division” as a defendant. Both arguments lack merit.

A. Plaintiffs' Claims Are Not Barred By *Res Judicata*

For the doctrine of *res judicata* to prevail, there must be a concurrence of four conditions: 1) identity of the thing sued upon; 2) identity of the cause of action; 3) identity of persons and parties to the action; and, 4) identity of the quality or capacity of the parties suing or sued. Burke v. Pittsburgh Limestone Corp., 375 Pa. 390, 100 A.2d 595 (1953); Gatling v. Eaton Corp., 2002 Pa. Super. 276 (2002). Moreover, and perhaps most importantly, the court must consider “whether ultimate and controlling issues have been decided in a prior proceeding in which present parties actually had an opportunity to appear and assert their rights.” Id. A dismissal without prejudice is not intended to be *res judicata* of the merits of the controversy. Stevenson v. Silverman, 417 Pa. 187, 208 A.2d 789 (1965); Robinson v. Trenton Dressed Poultry Co., 344 Pa. Super. 545, 496 A.2d 1240 (1985).

With that in mind, it does not appear that Plaintiff’s claim is barred by *res judicata*, as the 1999 Complaint was never adjudicated on its merits; it was dismissed due to Plaintiffs’ failure to respond to the Preliminary Objections.¹ Accordingly, Cimco’s Motion for Summary Judgment on these grounds must be denied.

B. Cimco’s Claim that Plaintiffs’ Have Sued An Improper Party Lacks Merit

As previously stated, Cimco further argues that Plaintiffs can not recover against it

¹With respect to the prior action at issue, Cimco, who was also a defendant in the 1999 action, filed Preliminary Objections to the 1999 Complaint, which were uncontested. On May 12, 2000, Judge Manfredi granted Cimco’s Preliminary Objections. See Plaintiffs’ Opposition Brief, Exh. H. In doing so, Judge Manfredi used an order prepared by Cimco, but crossed out the pre-typed words “with prejudice.” He also stamped “NO RESPONSE” on the order, indicating that the 1999 Complaint was dismissed due to Plaintiffs’ failure to respond to the Preliminary Objections.

because Plaintiffs have named an “unincorporated division” as a defendant. This argument fails for several reasons:

1. Cimco has not attached any documents or other evidence which describes what type of entity Cimco is, nor has it produced any documents to support its claim that the entity sued is an improper one. Cimco’s bald and unsupported allegations are insufficient to warrant summary judgment;
2. Pa.R.C.P. 2177 requires actions against a corporation to be prosecuted in the “corporate name,” which is defined as “any name, real or fictitious, under which a corporation or similarly entity was organized or conducts business, whether or not such name has been filed or registered.” Pa.R.C.P. 2177, 2176. The documents attached to the motions reflect that, throughout the course of dealing between the parties, Cimco repeatedly identified itself as “Cimco Refrigeration”, including on the specification sheet, price quotation and various other documents;
3. Preliminary Objections were filed in this case on behalf of “Cimco Lewis Industries t/a Cimco Refrigeration,” however the issue of “improper party” was never raised.

Accordingly, Cimco’s Motion is denied. If it turns out that Cimco has been designated incorrectly, this could easily be remedied by a simple amendment of the caption. However, at this stage of the litigation, Cimco has failed to sustain its burden and its motion for summary judgment must be denied.

II. Plaintiffs’ Motion for Summary Judgment

A. Factual Issues Exist Which Render Summary Judgment Inappropriate As Respects Counts I and III of Plaintiffs’ Complaint

Plaintiffs’ have moved for Summary Judgment as to Counts I (breach of contract) and III (breach of warranty) of its Complaint against Cimco. Summary judgment may only be granted in cases where it is “clear and free from doubt that the moving party is entitled to judgment as a matter of law.” Horne v. Haladay, 1999 Pa. Super. 64, 728 A.2d 954 (1999). Here, genuine issues of material fact exist which preclude the entry of summary judgment. Specifically, the

parties are in dispute as to whether the substitution of certain materials used to construct the artificial ice surface at the First Union Center was reasonable and/or permissible pursuant to the purchase order and the job specifications. The resolution of this dispute requires a factual determination to be made by the jury. Accordingly, Cimco's Motion is denied.

CONCLUSION

For the above-stated reasons, this court hereby finds as follows:

1. Plaintiffs' Motion for Summary Judgment as to Counts I and III of the Complaint is **DENIED**
2. Cimco's Motion for Summary Judgment is likewise **DENIED**.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

GENE D. COHEN, J.

Dated: March 6, 2003