IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

PRECISION TOWERS, INC.	:	APRIL TERM, 2002
	:	
Plaintiff	:	No. 2143
	:	
v.	:	Commerce Program
	:	
NAT-COM, INC., and VALUE STRUCTURES, INC.,	:	
	:	
Defendants	:	Control No. 070580

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MEMORANDUM OPINION

GENE D. COHEN, J. ..... September 23, 2002

Plaintiff, Precision Towers, Inc. ("PTI"), has filed a Complaint in this matter, alleging that defendants failed to supply proper materials for the construction of a communications tower or monopole which was being erected by Plaintiff for the benefit of the City of Philadelphia ("the City") and that defendants failed to reimburse Plaintiff for funds withheld by the City for the alleged structural defects in the monopole. The Complaint purports to state claims for breach of contract and/or breach of warranty.

Defendant, Value Structures, Inc. ("VSI"), has filed Preliminary Objections ("Objections") to the Complaint, asserting failure to attach any purported contract between itself and Plaintiff as required pursuant to Pa. R. Civ. P. 1019(i), failure to plead whether the contract was oral or written, and setting forth demurrers to the contract claim for lack of privity and to the breach of warranty claim for failure to allege that Plaintiff provided notice or reasonable time to cure any defects.

For the reasons set forth below, the Objections are sustained in part and overruled in part.

BACKGROUND

The operative facts, as pled in the Complaint, are as follows. On October 9, 1998, the City awarded to PTI. the contract # 994081 for the construction of a monopole to be erected at a site situated at Germantown Avenue and Carpenter Lane in Philadelphia, PA. Compl., ¶¶ 4-5. PTI, in turn, entered into an agreement with defendant, Nat-Com, Inc. ("NCI") for the provision of certain materials and labor in connection with the fabrication of the monopole. Id. at ¶ 6. NCI then entered into an agreement with VSI for the fabrication of the monopole in accordance with contract specifications. Id. at ¶ 7. PTI then built the monopole on the site on or about January 3, 1999. Id.

The contract specifications for the monopole were purportedly set forth in the City's bid instructions; in particular, TIA/EIA Standard 222-F, which PTI provided to NCI and VSI. Id. at ¶ 8. Subsequent to the construction of the monopole and its initial use by the City, it was discovered that it did not structurally comply with the bid specifications according to certain engineering reports which were attached to the Complaint. Id. at ¶ 9. As a result of these structural defects, the City contracted with Plaintiff to build another communications tower or "lattice tower" which was built on the same site as the monopole. Id. at ¶ 10. In addition, the City was required to transfer all communications antenna devices and related equipment from the monopole to the lattice tower on account of the alleged defects. Id. at ¶ 11. The City has withheld the sum of $166,700.00 payable to PTI as a consequence of the structural defects in the monopole's construction. Id. at ¶ 12. Further, the monopole is a purported threat to health, safety and welfare and the City will require PTI to remove it at an approximate cost of $25,000.00. Id. at ¶ 13.

As alleged, PTI has made repeated requests of NCI and VSI for reimbursement of the funds withheld by the City as a result of the monopole's failure to meet contract specifications and defendants' alleged breach of warranties, including the warranty of fitness for a specific purpose and an express warranty. Id. at ¶ 14. The express warranty is purportedly set forth in a letter from VSI to NCI and provides that VSI "warrants the 147 foot Cellular Antenna Pole, per drawing # PA 1005-1, for a period of 20 years against any structural defects." Compl., Exhibit C. PTI has also allegedly provided services to NCI and sent invoices to it in the amount of $172,635.80, which NCI has refused to pay PTI. Id. at ¶¶ 14-15.

With this background, PTI filed its Complaint against NCI and VSI. Though not clearly pled, the first count of the Complaint appears to be against both NCI and VSI for the funds withheld by the City and the additional costs incurred by VSI for the removal of the monopole. Count II of the Complaint is only asserted against NCI for payment of specific invoices for services rendered by PTI for NCI.

DISCUSSION

A court may properly grant preliminary objections when the pleadings are legally insufficient for one or more of several reasons enumerated in Pennsylvania Rule of Civil Procedure 1028, two of which are asserted by VSI in this case:

(2) failure of a pleading to conform to law or rule of court . . .;

(4) legal insufficiency of a pleading (demurrer) [.]

Pa. R. Civ. P. 1028(a)(2) and (4), respectively. See Baker v. Cambridge Chase, Inc., 725 A.2d 757, 764 (Pa. Super. Ct. 1999).

It is well-established that when ruling on preliminary objections in the form of a demurrer, a court

accepts as true all well-pleaded, material and relevant facts, as well as every inference reasonably deducible from those facts. Willet v. Pennsylvania Medical Catastrophe Loss Fund, 549 Pa. 613, 619, 702 A.2d 850, 853 (1997)(citations omitted). Preliminary objections, which result in a denial of the pleader's claim or the dismissal of his suit, should only be sustained in cases that clearly and without a doubt fail to state a claim for which relief may be granted under any theory of law. Id. In addition, where doubt exists as to whether a demurrer should be sustained, the doubt should be resolved in favor of overruling it. Id. at 619-20, 702 A.2d at 853. See also, Chem v. Horn, 725 A.2d 226, 228 (Pa. Commw. Ct. 1999)(stating that "[t]he question presented by a demurrer is whether, in the facts averred, the law says with certainty that no recovery is possible.").

First, VSI objects to the Complaint for failure to attach a contract between itself and VSI or the contracts between plaintiff and the City or plaintiff and NCI pursuant to Pa. R. Civ. P. 1019(i). VSI also objects for plaintiff's failure to allege whether the contract with either defendant was oral or written. Plaintiff, in its Answer,[1] asserts that the contract in this case was originally between NCI and VSI and that it would be necessary to obtain the contract through discovery. Pl. Answer to Prel. Objs., at ¶ 5.

Rule 1019 of the Pennsylvania Rules of Civil Procedure provides the following in pertinent part:

> (h) When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.
>
> (i) When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not

[1]Although plaintiff's answer was filed only with the Prothonotary and not with Motions' Court as required by Phila. Civ. R. 206.1, this Court will not consider the Preliminary Objections as uncontested since Phila. Civ. R. 1028(c)(1), as amended on March 3, 2000, does not require an answer to preliminary objections raising an issue under Pa. R. Civ. P. 1028(a)(2), (3) and (4).

> accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa. R. Civ. P. 1019(h) and (i). See Williams v. Nationwide Mut. Ins. Co., 751 A.2d 881, 884 (Pa. Super. Ct. 2000)(holding that insured's complaint against insurer was fatally flawed where plaintiff failed to attach the pertinent parts of the insurance policy to the complaint to demonstrate how the insurer's contractual duty to pay undisputed UM or UIM benefits would arise); Cooke v. the Equitable Life Assurance Soc. of the U.S., 723 A.2d 723, 727 (Pa. Super. Ct. 1999)(holding that trial court did not err as a matter of law in dismissing petition to compel arbitration where employer failed to attach manual forming a basis for its defense); Adamo v. Cini, 656 A.2d 576, 579 (Pa. Commw. Ct. 1995)("[o]rdinarily, a complaint should be stricken for failure to attach an essential document.").

Here, plaintiff failed to attach any contract between itself and VSI or any other agreement demonstrating that VSI was an intended or incidental third beneficiary. The writings which were attached to the Complaint include the two engineering reports, providing a structural analysis of the monopole (see Compl., Exhibits A & B), the letter between VSI and NCI including the purported warranty (see Compl., Exhibit C) and the invoices between plaintiff and NCI. Notwithstanding these writings or plaintiff's assertion that it was an intended third beneficiary, this Court finds the Complaint to be fatally flawed where it fails to attach any contract between itself and VSI. Even taking all of the allegations as true and all reasonable inferences therefrom, plaintiff may not proceed on a breach of contract claim or breach of warranty claim absent such attachments or the necessary allegations that the agreement was oral or is not in plaintiff's possession.

VSI also sets forth a demurrer to the breach of contract claim because of plaintiff's failure to

establish any contract or privity of contract between itself and VSI. "[I]t is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract." Electron Energy Corp. v. Short, 408 Pa. Super. 563, 571, 597 A.2d 175, 178 (1991)(holding that corporate president cannot be liable for breach of contract where he is not a party to the contract). See also, Fleetway Leasing Co. v. Wright, 697 A.2d 1000, 1003 (Pa. Super. Ct.1997)("a person who is not a party to a contract cannot be held liable for breach by one of the parties to a contract"); Commonwealth v. Noble C. Quandel Company, 137 Pa. Commw. 252, 260, 585 A.2d 1136, 1140 (1991)(same). Under this principle, VSI cannot be held liable to plaintiff absent a contract between them.

Plaintiff virtually concedes this point in its Answer to the Preliminary Objections, but it asserts that it was an intended beneficiary of the contract between NSI and VSI. Pl. Mem. of Law, at 2-3. Pl. However, absent the contract between VSI and NCI or the contract between PTI and NCI or the contract between PTI and the City, this Court cannot allow PTI to proceed on a third party beneficiary theory. Nor does PTI present any clearly articulated allegations which would allow this Court to divine that it intended to proceed on a third party beneficiary theory. As explained by the Pennsylvania Supreme Court,

> . . . a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, Spires [v. Hanover Ins. Co., 364 Pa. 52, 56-57, 70 A.2d 828, 830-31 (1950)],[2]

[2]The Spires decision was overruled by Guy v. Liederbach, 501 Pa. 47, 59-60, 459 A.2d 744, 750-51 (1983) which held that a third party did not have to be expressly named in the contract to be an intended third party beneficiary so long as that party met the criteria set forth in Restatement (Second) of Contracts § 302 (1979). The Guy court further explained the "two part test for determining whether one is an intended third party beneficiary: (1) the recognition of the beneficiary's right must be 'appropriate to effectuate the intention of the parties,' and (2) the performance must 'satisfy an obligation of the promisee to pay money to the beneficiary' or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance'." 501 Pa. at 60, 459

> unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. . . .

Scarpitti v. Weborg, 530 Pa. 366, 372-73, 609 A.2d 147, 150 (1992). See also, Hicks v. Metropolitan Edison Co., 665 A.2d 529, 535 (Pa Commw. Ct. 1995)(holding that though a third party beneficiary need not be expressly named in the contract if the circumstances indicate that the contracting parties intended to confer a benefit upon the third party, status as a third party beneficiary cannot be conferred on the public at large). Here, PTI's allegations are insufficient to show that it was expressly named as a beneficiary of the contract between NCI and VSI or that the circumstances warrant finding such beneficiary status.

Finally, VSI asserts that the breach of warranty claim fails on the grounds that plaintiff failed to allege that it provided notice of the breach of warranty and an opportunity for defendants to cure the alleged

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A.2d at 751.

Section 302 of the Restatement (Second) of Contracts, governing intended and incidental beneficiaries, states as follows:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Rest. (2d) of Contracts, § 302 (1979).

defect. This Court must disagree.

Section 2607 of Pennsylvania's Uniform Commercial Code ("U.C.C.") provides, in pertinent part, that: "[w]here a tender [of goods] has been accepted . . .the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller or be barred from a remedy...". 13 Pa.C.S.A. § 2607(c)(1). Comment 4 to Section 2607 states that:

> 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.
>
> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

Cmt. 4 to § 2607.

The filing of a complaint has been held to satisfy the notice requirement for a breach of warranty claim. See Yates v. Clifford Motors, Inc., 283 Pa.Super. 293, 308-09, 423 A.2d 1262, 1270 (1980)(holding that, in a suit for damages resulting in the rescission of a contract for the purchase for a truck, the filing of the complaint was adequate notice that the truck was being rejected given the fact that Section 1-102(1) of the U.C.C. requires liberal construction of the Code's provisions); Beneficial Commercial Corp. v. Brueck, 23 Pa. D. & C.3d 34, 40, n.3 (C.P. Allegheny Cty. 1982)("Under certain circumstances, it appears that a third party complaint may meet the requirements of both [section 2607(c)

and 2607(e)].”). See also, Bednarski v. Hideout Homes & Realty, Inc., 709 F.Supp. 90, 92-93 (M.D. Pa. 1988)(applying Pennsylvania law)(recognizing that a third party complaint may serve as adequate notice as required by Section 2607 and that the issue of whether such notice was provided within a reasonable time is a jury question); In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation, 155 F.Supp.2d 1069, 1110-1111, 2001 WL 883151, *29-30 (S.D. Ill. 2001), rev’d, in part, on other grounds, 288 F.3d 1012 (7th Cir. 2002)(holding that the filing of a complaint may be sufficient to satisfy the notice requirements of § 2-607 under certain circumstances)(comparing cases which have held both ways).

Under these principles, PTI’s Complaint may be deemed to satisfy the notice requirement. Moreover, in paragraph 14 of the Complaint, plaintiff alleges that it made repeated requests of NCI and VSI for the reimbursement of funds withheld by the City on account of the failure of the monopole to meet contract specification and the breach of warranties by defendants, including the warranty for fitness for a specific purpose and the express warranty set forth in Exhibit C. Compl., ¶ 14. This allegation may be deemed to satisfy the notice requirement. Therefore, the Objection for failure to allege notice of the breach of warranty or an opportunity to cure must be overruled. However, absent a contract or other evidence that the warranty set forth in Exhibit C to the Complaint was intended to flow to PTI, this Court cannot allow PTI to proceed on a breach of warranty claim against VSI.

CONCLUSION

For the reasons set forth above, this Court is entering a contemporaneous Order, sustaining the Preliminary Objections in part and overruling them in part.

BY THE COURT,

GENE D. COHEN, J.

Dated: September 23, 2002

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v.	:	Commerce Program
	:	
NAT-COM, INC., and VALUE STRUCTURES, INC.,	:	
	:	
Defendants	:	Control No. 070580

ORDER

AND NOW, this 23rd day of September, 2002, upon consideration of the Preliminary Objections of defendant, Value Structures, Inc. ("VSI"), to the Complaint of plaintiff, Precision Towers, Inc., Plaintiff's response in opposition thereto, all other matters of record and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** as follows:

1. The Preliminary Objection for failure to allege whether the agreement between plaintiff and VSI, was oral or written as required by Pa. R. Civ. P. 1019(h) is **Sustained** without prejudice;

2. The Preliminary Objection for failure to attach any contract demonstrating privity

between plaintiff and VSI is **Sustained** and the Complaint against VSI is **Dismissed** without prejudice;

3. The demurrer to the breach of warranty claim, asserting lack of notice and opportunity to cure, is **Overruled**;

4. The demurrers to the breach of contract claim and/or warranty claim for failure to establish contractual privity with defendant, Value Structures, Inc., are **Sustained without prejudice**;

5. Plaintiff is **ORDERED** to file an Amended Complaint within twenty (20) days of this Order.

BY THE COURT,

GENE D. COHEN, J.