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

STONHARD, A DIVISION OF STONCOR GROUP, INC., Plaintiff	:	April Term, 2001
	:	No. 2427
v.	:	Commerce Case Program
ADVANCED GLASSFIBER YARNS, INC., Defendant	:	Control No. 100380

OPINION

Counterclaim Defendant Stonhard, a division of Stoncor Group, Inc. ("Stonhard"), has filed preliminary objections ("Objections") to the counterclaim ("Counterclaim") of Counterclaim Plaintiff Advanced Glassfiber Yarns, Inc. ("AGY"). For the reasons set forth in this Opinion, the Court is issuing a contemporaneous order sustaining the Objections in part and overruling the Objections in part.

BACKGROUND

On July 7, 2000, Stonhard and AGY entered into a contract ("Contract") under which Stonhard was to install flooring ("Flooring") at AGY's plant. According to Stonhard's complaint, the Parties subsequently agreed to certain modifications to the Contract, bringing the total amount due to $36,845.00. Although Stonhard contends it fulfilled its obligations under the Contract, it was never paid and has asserted a claim for breach of contract. AGY counters that the Flooring was defective and damaged the previously existing floor of AGY's plant, requiring the Flooring and the original floor's removal and replacement.

On the basis of its allegations, AGY has filed the Counterclaim, which asserts claims for breach of contract, breach of implied warranty, breach of express warranty, violations of Pennsylvania's Unfair Trade Practices Act ("UTPCPL"),[1] negligent installation, subrogation, strict liability and negligence. In response, Stonhard argues that several of AGY's claims are barred by the economic loss doctrine and by the inapplicability of the Uniform Commercial Code ("UCC") to service transactions.[2]

DISCUSSION

AGY concedes that its UTPCPL claim is legally insufficient and has requested permission to file an amended counterclaim eliminating this count. Accordingly, the Court has dismissed this claim. The remaining Objections, however, are overruled.

When a court is presented with preliminary objections based on legal insufficiency,

> [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.

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[1] 73 Pa. C.S. §§ 201-1-201-9.3.

[2] There appears to be some confusion over which claims are challenged by the Objections. Stonhard filed an original set of preliminary objections on October 3, 2001 objecting to six of AGY's claims. On November 5, 2001, Stonhard filed an amendment to its original preliminary objections, challenging only AGY's strict liability and UTPCPL claims. AGY asserts that all preliminary objections not appearing in the November 5, 2001 filing have been abandoned, while Stonhard contests this assertion. It is not necessary to resolve this dispute, as the additional preliminary objections filed on October 3, 2001 are without merit.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999). It is with this in mind that the Court must examine the Objections.

I. The Economic Loss Doctrine Does Not Apply to AGY's Claims

The purpose of the economic loss doctrine, as adopted in Pennsylvania, is "maintaining the separate spheres of the law of contract and tort." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (1989). Under the Commonwealth's version of the doctrine, "negligence and strict liability theories do not apply in an action between commercial enterprises involving a product that malfunctions where the only resulting damage is to the product itself." REM Coal Co. v. Clark Equip. Co., 386 Pa. Super. 401, 412-13, 563 A.2d 128, 134 (1989) (adopting approach of East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)). See also East River S.S. Corp., 476 U.S. at 870 (where "no person or other property is damaged, the resulting loss is purely economic"); Waterware Corp. v. Ametek/US Gauge Div., PMT Prods., 51 Pa. D. & C.4th 201, 211-12 (C.P. Phila. 2001) ("the Commonwealth's version of the doctrine precludes recovery for economic losses in a negligence action if the only damage sustained by the plaintiff/purchaser is damage to the product itself but no other property damage or personal injury resulted").

The question raised by the Objections is whether the Counterclaim alleges damage to "other property," allowing AGY to proceed on its strict liability, negligence and negligent installation claims. Although there is little Pennsylvania case law defining the term "other property,"[3] both Saratoga Fishing

[3] The Pennsylvania Superior Court has stated that "where various components of a product are provided by the same supplier as part of a complete and integrated package, even if a defect in one

Co. v. J.M. Martinac & Co., 520 U.S. 875 (1997), and 2-J Corp. v. Tice, 126 F.3d 539 (3rd Cir. 1997), in which the United States Supreme Court and the Third Circuit Court of Appeals examined the definition of "other property," are instructive.

In Saratoga Fishing Co., a fishing vessel was initially bought by Joseph Madruga, who added extra equipment to the vessel. After the vessel was sold to the plaintiff, it caught fire and sank because of a defective hydraulic system in place when Madruga made his original purchase. When the plaintiff brought suit against the designer of the hydraulic system and the builder of the vessel, the defendants argued that the economic loss doctrine barred the plaintiff's claims. After reviewing East River S.S. Corp., the Supreme Court concluded that the extra equipment added by Madruga was "other property":

> When a manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the "product itself" under East River. Items added to the product by the Initial User are therefore "other property," and the Initial User's sale of the product to a Subsequent User does not change these characterizations.

520 U.S. at 879.

The Third Circuit relied on Saratoga Fishing Co. in 2-J Corp., where a warehouse built using the defendant's materials and design collapsed, destroying the plaintiff's inventory that was being stored inside. The court noted that Saratoga Fishing Co. essentially defined "the product" for the purposes of the economic loss doctrine as "no more and no less than whatever the manufacturer placed in the

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component damages another, there is no damage to 'other property' of the plaintiff." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (1989) (citation omitted). Because this matter does not address several components provided by the same supplier, however, this definition is not particularly useful.

stream of commerce by selling it to the initial user" and allowed the plaintiff to proceed on its tort claims. 126 F.3d at 543.

Here, the Counterclaim repeatedly alleges that AGY has suffered and continues to suffer substantial damages. Counterclaim at ¶¶52, 64, 67. AGY asserts that these damages include damage to the original floor of AGY's plant, which was "required to be scraped, ground, cut up and dug up in the process of removing the defective flooring system which was chemically bonded to it." Defendant's Memorandum at 6. This original flooring qualifies as "other property," as it was hardly placed in the stream of commerce by Stonhard. As such, the economic loss doctrine does not apply to AGY's claims, and the Objections thereto are overruled.

II. Because the Plaintiff May Pursue Common Law Breach of Warranty Claims, the Objections to Such Claims Are Overruled

Stonhard also challenges AGY's breach of implied warranty and breach of express warranty claims. In this regard, its argument is limited to the assertion that the UCC right to recover for breach of warranty applies only to sales and does not extend to services agreements. This argument is not persuasive.

Even if Stonhard is correct that the Contract was for services, not sales, and that the UCC is not implicated, it does not follow that AGY's warranty claims are barred. In Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970), the Pennsylvania Supreme Court held that whether the transaction at issue could be characterized as a sale was irrelevant to whether the plaintiff could pursue a claim for breach of warranty:

> Although one Pennsylvania case, involving a construction agreement, does seem to require the existence of a technical sale before implied warranties may arise, in many cases we

> have implied warranties in non-sales transactions. Although these cases were decided prior to our adoption of the Uniform Commercial Code, that enactment did not intend to impede the parallel development of warranties implied in law in non-sales situations. We therefore do not feel obligated to hinge any resolution of the very important issue here raised on the technical existence of a sale. . . . It was therefore error for the lower court to have sustained the preliminary objections in the nature of a demurrer . . . on the present record without sufficient inquiry as to whether the policies for which warranties are implied in law would be furthered by their implication in this situation.

439 Pa. at 506-08, 267 A.2d at 870–71 (footnotes and citations omitted) (emphasis added). See also 13 Pa. C.S. § 2313 cmt. 2 (the warranty provisions of UCC § 2-313 "are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract"); Jones & Laughlin Steel Corp. v. Johns-Mansville Sales Corp., 453 F. Supp. 527, 538 (W.D. Pa. 1978), rev'd in part on other grounds, 626 F.2d 280 (3rd Cir. 1980) (noting that "the implied warranty of fitness for purpose is not an invention of the U.C.C. [but] is an outgrowth of the common sense and common law recognition that such a warranty may be implied under certain circumstances" and concluding that "[w]hether or not the U.C.C. applies is not decisive" for warranty claims); Friends Cove Mut. Ins. Co. v. Champion Home Builders, 43 Pa. D. & C.3d 542, 546 (C.P. 1983) (even where the UCC warranties do not apply, certain implied warranties may be relevant). Similarly, the question of whether the UCC warranties apply to the transaction between the Parties is irrelevant insofar as AGY may have legitimate common law breach of warranty claims.

The cases cited by Stonhard are, at best, irrelevant. In DeMatteo v. White, 233 Pa. Super. 339, 336 A.2d 355 (1975), for example, the Superior Court did not address non-UCC warranty claims and held only that the four-year UCC statute of limitations did not apply because the agreement

between the parties was not a "sale." See also Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (relying on the "predominant factor" test to apply UCC to agreement); Meyers v. Henderson Constr. Co., 147 N.J. Super. 77 (1977) (four-year statute of limitations applied to contract governed by UCC); J&R Elec. Div. of J.O. Morey Stores, Inc. v Skoog Constr. Co., 348 N.E.2d 474 (Ill. App. Ct. 1976) (because contract was not governed by the UCC, UCC provision allowing modification without consideration did not apply). Because Stonhard has failed to show why AGY's common law breach of warranty claims should be barred, the Objections to such claims are overruled.

CONCLUSION

With the exception of the Objections to AGY's UTPCPL claim, the Objections are without merit and are overruled. AGY will be permitted to file an amended counterclaim to remove its claim for violations of the UTPCPL.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: November 21, 2001

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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CIVIL TRIAL DIVISION

STONHARD, a DIVISION OF STONCOR GROUP, INC.	:	April Term, 2001
Plaintiff	:	
	:	No. 2427
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	:	Commerce Case Program
ADVANCED GLASSFIBER YARNS, INC.,	:	
Defendant	:	Control No. 100380

ORDER

AND NOW, this 21st day of November, 2001, upon consideration of the Preliminary Objections of Counterclaim Defendant Stonhard, a division of Stoncor Group, Inc., to the Counterclaim of Counterclaim Plaintiff Advanced Glassfiber Yarns, Inc. and the Counterclaim Plaintiff's 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 to Count IV - Pennsylvania Unfair Trade Practices Act are SUSTAINED and Count IV is DISMISSED;

2. All remaining Preliminary Objections are OVERRULED;

3. The Counterclaim Plaintiff is directed to file an amended counterclaim within twenty days of this Order.

BY THE COURT:

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JOHN W. HERRON, J.