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

ASHBURNER CONCRETE AND MASONRY SUPPLY, INC.,	:	DECEMBER TERM, 2000
Plaintiff	:	No. 489
v.	:	
O'CONNOR TRUCK SALES, INC.,	:	COMMERCE PROGRAM
Defendant	:	Control Nos. 061984; 061985

OPINION

This action arises from the alleged failure to properly repair and service a cement truck, manufactured by Ford Motor Company. Plaintiff, Ashburner Concrete and Masonry Supply, Inc., filed a Complaint against defendant, O'Connor Truck Sales, Inc., asserting counts for breach of contract, breach of oral warranty and negligence and gross negligence. Defendant has filed two motions. The first motion is a Motion for Judgment on the Pleadings, asserting that Count III of the Complaint, sounding in negligence and gross negligence, is barred by the economic loss doctrine, and moving to strike the demand for attorney fees and punitive damages. The second motion is a Motion for Leave to Join Ford Motor Company ("Ford") as an additional defendant for purposes of indemnity and contribution, on the grounds that Ford manufactured a component part which was purportedly subject to a recall and is allegedly the cause of plaintiff's damages.

For the reasons set forth in this Opinion, the Motion for Judgment on the Pleadings is granted. However, the Motion for Leave to Join an Additional Defendant is denied.

BACKGROUND

Plaintiff is engaged in the business of manufacturing, hauling, delivering and pouring cement. Compl., ¶ 6. Defendant is an authorized service and repair facility for certain Ford products. Compl. & Answer, ¶¶ 7-8. Plaintiff is the owner of a certain Ford cement truck, vehicle identification number ("vin") 1FZUB2E1SVA08998 (the "truck"). Id. at ¶ 9. Prior to the matter involved in this action, defendant had repaired and serviced plaintiff's truck including the one at issue. Id. at ¶ 10. Defendant was aware of plaintiff's business and the need to use vehicles (i.e., trucks) in that business. Id. at ¶ 11.

On May 20, 1999, plaintiff's truck became disabled. Id. at ¶ 13. Plaintiff took the truck to defendant's place of business for repair. Id. at ¶ 14. The problem with the truck involved a failed or defective air compressor. Id. at ¶ 15. See Compl., Exhibit A (the pertinent invoice). Plaintiff alleges that the parties entered into an oral contract, pursuant to which defendant agreed to repair and service the truck and plaintiff agreed to pay defendant for these services. Compl., ¶ 16. Defendant submits that the contract was not oral, but is identified as the pertinent invoice attached to the Complaint at Exhibit A. Answer, ¶ 16.

On June 1, 1999, the truck was purportedly returned to plaintiff with the alleged representation that all necessary repairs were made. Compl., ¶ 17. Defendant allegedly failed to properly repair and service the truck or perform the repairs in a workman-like manner in accordance with the Ford repair model. Id. at ¶ 18. Specifically, as alleged, defendant failed to extract and replace the severed bolt used to hold the compressor to the engine. Id. at ¶ 19. The bolt had purportedly been severed prior to bringing the truck in for repair on May 20, 1999. Id. Instead of replacing the bolt, defendant purportedly used caulk, a substance which defendant allegedly knew or should have known would not substitute the bolt and would cause the compressor to come loose due to the vibration from the large diesel engine. Id. at ¶ 20.

Additionally, defendant allegedly failed to replace the hose leading from the compressor to the oil pan. Id. at ¶ 21. Defendant allegedly knew or should have known that the absence of the hose would cause oil to leak and the engine to seize. Id. Defendant's purported failure to properly repair the truck caused its engine to seize and the cement drum to stop turning on June 2, 1999. Id. at ¶ 23.

On December 6, 2000, plaintiff filed its Complaint against defendant, asserting three counts for breach of contract, breach of oral warranty and negligence and gross negligence, alleging that it suffered damages to the truck engine, cement barrel, loss of materials and loss of present and future business. Defendant filed its Answer with New Matter on March 7, 2001. On June 26, 2001, defendant filed the two motions which are presently before this court.

The court will address these motions *seriatim*.

DISCUSSION

I. Motion For Judgment on the Pleadings As to Count III (Negligence and Gross Negligence)

Rule 1034 of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). On a motion for judgment on the pleadings, which is similar to a demurrer, the court accepts as true all well-pleaded facts of the non-moving party, but only those facts specifically admitted by the nonmovant may be considered against him. Mellon Bank v. National Union Ins. Company of Pittsburgh, 2001 WL 79985, at *2 (Pa.Super.Ct. Jan. 31, 2001). However, "neither party will be deemed to have admitted conclusions of law." Id. See also, Flamer v. New Jersey Transit Corp., 414 Pa.Super. 350, 355, 607 A.2d 260, 262 (1992)("While a trial court cannot accept the conclusions of law of either party when ruling on a motion for judgment on the pleadings,

it is certainly free to reach those same conclusions independently.")(citations omitted). In ruling on a motion for judgment on the pleadings, the court should confine itself to the pleadings, such as the complaint, answer, reply to new matter and any documents or exhibits properly attached to them. Kelly v. Nationwide Ins. Co., 414 Pa.Super. 6, 10, 606 A.2d 470, 471 (1992). See also, Kotovosky v. Ski Liberty Operating Corp., 412 Pa.Super. 442, 445, 603 A.2d 663, 664 (1992). Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial would be a fruitless exercise. Ridge v. State Employees Retirement Board, 690 A.2d 1312, 1314 n.5 (Pa.Commw.Ct. 1997)(citations omitted).

In its motion, defendant moves to dismiss Count III of the Complaint on the grounds that plaintiff only seeks economic damages which are not recoverable under tort theories of liability pursuant to the economic loss doctrine. Plaintiff responds that Pennsylvania does recognize a tort cause of action for negligent performance of services even if the losses suffered by plaintiff are purely economic. This court agrees with defendant and finds that the economic loss doctrine does bar plaintiff's claim in Count III.

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)("NYSEG"). As noted in NYSEG:

> The Supreme Court [in East River]. . .emphasized that where an allegedly defective product causes damage only to itself, and other consequential damages resulting from the use of the product, the law of contract is the proper arena for redressing the harm because in such a case, the damages alleged relate specifically to product quality and value as to which the parties have had the opportunity to negotiate and contract in advance. They have allocated the risks of possible types of losses and agreed on the level of quality that will be given for the price demanded. When the product fails to conform and only economic losses result, the parties' recovery one against the other for economic losses should be limited to an action on that contract and no additional

recovery in negligence or strict liability is permitted. . . .

387 Pa.Super. at 550-51, 564 A.2d at 925-26. See also, REM Coal Company, Inc. v. Clark Equipment Co., 386 Pa.Super. 401, 411-413, 563 A.2d 128, 132-134 (1989)(en banc)(adopting the rationale of East River SS. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871-73 (1986)).

Thus, 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. Id. at 412, 563 A.2d at 133. Economic losses include damage to the product and consequential damages in the nature of costs of repair, replacement and/or lost profits. REM, 386 Pa.Super. at 403, 563 A.2d at 129. Damages to goodwill and business reputation are also considered economic losses. Valley Forge Convention & Visitors Bureau v. Visitor's Servs., Inc., 28 F.Supp.2d 947, 951 (E.D.Pa. 1998)("Contrary to plaintiff's suggestion, [economic losses] also include loss of business reputation and goodwill."); Lucker Mfg. v. Milwaukee Steel Foundry, Div. Grede Foundaries, 777 F.Supp. 413, 417 (E.D.Pa. 1991)("[T]he economic loss rule bars tort recovery for goodwill damages.").

Moreover, the doctrine has been applied to service contracts. Hartford Fire Ins. Co. v. Associated Constr. and Management Corp., 2000 WL 424273, at *7 (E.D.Pa. Apr. 19, 2000)(holding that economic loss doctrine bars negligence claims as to engineering services related to roof repair and reconstruction); Factory Market, Inc. v. Schuller Int'l Inc., 987 F.Supp. 387, 397 (E.D.Pa.1997)(same); Sun Co., Inc. v. Badger Design & Constructors, Inc., 939 F.Supp. 365, 370 (E.D.Pa. 1996) (economic loss doctrine applied to losses from breach of engineering services contract); see also, Bash v. Bell Tel. Co. of Pa., 411 Pa.Super. 347, 356, 601 A.2d 825, 829 (1992)(tort recovery denied for losses resulting from phone

company's failure to list commercial advertiser in phone book).

Here, Count III of the Complaint purports to state a claim for defendant's alleged negligent repair of plaintiff's truck and defendant's alleged misrepresentation that the repairs had been properly made. See Compl., ¶¶ 30-37. This conduct allegedly caused plaintiff damage to its truck, the truck's engine, the cement barrel, loss of materials and loss of present and future business. Under the principles outlined above, this claim is barred by the economic loss doctrine. Therefore, defendant's Motion for Judgment on the Pleadings as to Count III is granted and Count III is dismissed with prejudice.

Additionally, defendant's Motion to Strike the demand for attorney fees and for punitive damages is also granted without prejudice. The general rule holds that attorney fees cannot be recovered from an adverse party, "absent an express statutory authorization, a clear agreement by the parties or some other established exception." Merlino v. Delaware *County*, 728 A.2d 949, 951 (Pa. 1999). Attorney fees are generally not recoverable for a mere breach of contract action. Gorzelsky v. Leckey, 402 Pa.Super. 246, 251, 586 A.2d 952, 955 (1991). Further, punitive damages are not available for a mere breach of contract. Baker v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 370 Pa.Super. 461, 469-70, 536 A.2d 1357, 1367 (1987). Rather, punitive damages require evidence that "outrageous conduct" such as willful, malicious, wanton, reckless or oppressive conduct. Bannar v. Miller, 701 A.2d 232, 242 (Pa.Super.Ct. 1997). The only claims which remain are Count I (breach of contract) and Count II (breach of oral warranty), which both sound in contract. None of plaintiff's allegations support circumstances which would entitle it to attorney fees or punitive damages. Therefore, defendant's motion to strike the demand for attorney fees and the demand for punitive damages is granted.

II. Motion for Leave to Join Ford As Additional Defendant

In this motion, defendant asserts that it intends to join Ford for purposes of indemnity and contribution because Ford had purportedly issued a recall for the bolts responsible for holding the component and accompanying parts in place; parts which are necessary for the proper operation of the engine. See Joinder Complaint, ¶ 4. Defendant, thus, avers that Ford is alone liable or jointly and severally liable or liable over to defendant on the cause(s) of action declared in plaintiff's Complaint. Id. at ¶ 5. Defendant also asserts that this motion for joinder is late because defendant only recently received the information allowing it to file the motion, but that this late joinder would not be prejudicial to Ford, whose counsel has been provided with all documents and discovery and that discovery in the action is continuing. Motion for Leave to Join Additional Defendant, ¶¶ 6, 9, 11.

Plaintiff opposes this motion on the grounds that defendant has failed to show good cause to justify the late joinder since the averments in the Complaint indicate that the bolt had been severed prior to its repair. See Pl. Mem. of Law in Support of its Opposition, at 3. Plaintiff also contends that defendant seeks to join Ford for a products liability cause of action, while the claims here are for breach of contract, breach of warranty and negligence, and do not involve Ford. Id.

Rule 2252 of the Pennsylvania Rules of Civil Procedure states the following:

> (a) Except as provided by Rule 1706.1, any defendant or additional defendant may join as an additional defendant any person, whether or not a party to the action, who may be
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> > (1) solely liable on the plaintiff's cause of action, or
> > (2) liable over to the joining party on the plaintiff's cause of action, or
> > (3) jointly or severally liable with the joining party on the plaintiff's cause of action, or
> > (4) liable to the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the plaintiff's cause of action is based.

Pa.R.C.P. 2252. Further, a writ or praecipe for joinder must be filed by the original defendant or an additional defendant no later than sixty days "after service upon the original defendant of the initial pleading of the plaintiff or any amendment thereof unless such filing is allowed by the court upon cause shown." Pa.R.C.P. 2253.

The rules pertaining to joinder of additional defendants are "to be broadly construed to effectuate its purpose of avoiding multiple lawsuits by settling in one action all claims arising out of the transaction or occurrence which gave rise to the plaintiff's action. Gordon v. Sokolow, 434 Pa.Super. 208, 214, 642 A.2d 1096, 1099 (1994)(citations omitted). See also Francisco v. Ford Motor Co., 406 Pa.Super. 144, 146, 593 A.2d 1277, 1278 (1991). Nonetheless, "joinder is permitted only as long as the additional defendant's alleged liability is related to the claim which the plaintiff asserts against the original defendant." Gordon, 434 Pa.Super. at 214, 642 A.2d at 1099. Further, the right to join an additional defendant pursuant to Pa.R.C.P. 2252(a)(1)-(3) is limited to the condition that liability is "premised upon the same cause of action alleged by the plaintiff in his or her complaint." Id. If the allegations contained in the joinder complaint relate to different harms than the original complaint and require different evidence as to different occurrences happening at different times, then joinder of additional defendants is not permitted. Id. at 215, 642 A.2d at 1100.

Moreover, a party requesting a late joinder must show (1) that joinder is based on proper grounds, (2) that some reasonable excuse exists for the delay in commencing joinder proceedings, and (3) that the original plaintiff will not be prejudiced by the late joinder. Lawrence v. Meeker, 717 A.2d 1046, 1048

(Pa.Super.Ct. 1998)(citing Francisco, 406 Pa.Super. at 146, 593 A.2d at 1278)).[1]

The limitations for joinder are primarily intended to protect a plaintiff from being unduly delayed in prosecuting his or her action. Id. at 1048. The Pennsylvania Superior Court has also focused on the potential for prejudice to the proposed additional defendant. See Prime Properties Development Corp. v. Binns, 397 Pa.Super. 492, 502, 580 A.2d 405, 409 (1990)(finding that lapse of time alone is not grounds for denying leave to join an additional defendant).

Here, defendant has presented a reasonable excuse for the delay of six months in moving to join Ford since defendant has purportedly only recently been provided with plaintiff's expert report and has recently discovered that the vehicle was subject to an open recall into parts, affecting the operation of the component which plaintiff alleges had failed. See Def. Mem. of Law in Support of Motion to Join, at 3. Further, it does not appear that plaintiff or Ford would be prejudiced by the late joinder since Ford has purportedly received notice of the action and the trial date is not scheduled until March, 2002.

The problem with the joinder rests in the fact that the court is dismissing the negligence claim from the Complaint, and the only claims which remain are contract claims as between plaintiff and the original defendant. It 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, 567, 597 A.2d 175, 177

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[1]Plaintiff relies on the test, as enunciated in Consul v Burke, 403 Pa.Super. 400, 406, 589 A.2d 246, 249 (1991), which requires the defendant to show: (1) some reasonable justification or excuse for the delay; (2) a statement of the facts alleged to render the proposed additional defendant alone liable, or liable with, or liable over to defendant, or liable to the defendant on a proper cross claim; and (3) allegations that the late joinder will not be prejudicial to the proposed additional defendant. However, this test is substantially similar to the one followed in Lawrence, since the second prong of this test mirrors the first prong of the test in Lawrence.

(1991)(citations omitted). Here, Ford is not a party to the contract, whether it is an oral contract or a written one, as evidenced by the invoice attached to the Complaint. This court thus does not see how Ford could be held liable under Count I. Further, Ford cannot be held liable under Count II as it was not the alleged warrantor of the repairs of the plaintiff's truck. Additionally, defendant supports its motion for joinder by asserting that "[t]his is a negligence action based on damages sustained from engine failure. . . . [and] [t]he proposed additional defendant was intimately involved in the design and construction of the truck and the issuance of a recall." Def. Mem. of Law in Support of Motion to Join, at 3.

Clearly, defendant cannot premise Ford's liability on the same causes of action remaining in this case, as required to join pursuant to Pa.R.C.P. 2252 (a)(1)-(3). Moreover, defendant, in its proposed Joinder Complaint, did not assert a cross-claim against Ford regarding a transaction or occurrence upon which plaintiff's cause of action is based. Therefore, having dismissed the negligence claim, this court finds no grounds on the record for allowing Ford to be joined as an additional defendant.

CONCLUSION

For the reasons set forth above, this court is issuing a contemporaneous Order, granting defendant's Motion for Judgment on the Pleadings as to Count III and striking the demand for attorney fees and punitive damages. The court is also denying defendant's Motion for Leave to Join an Additional Defendant.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: August 10, 2001

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

ASHBURNER CONCRETE AND MASONRY SUPPLY, INC.,	:	DECEMBER TERM, 2000
	:	No. 489
Plaintiff	:	
v.	:	COMMERCE PROGRAM
O'CONNOR TRUCK SALES, INC.,	:	
Defendant	:	Control Nos. 061984; 061985

ORDER

AND NOW, this 10th day of August, 2001, upon consideration of defendant's Motion for Judgment on the Pleadings, plaintiff's response in opposition thereto, defendants's Motion for Leave to Join Additional Defendant, Ford Motor Company, Nunc Pro Tunc, plaintiff's response in opposition thereto, all other matters of record, and in accordance with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that:

1. The Motion for Judgment on the Pleadings is **Granted**;

2. Count III (Negligence and Gross Negligence) of Plaintiff's Complaint is dismissed with prejudice.

3. Plaintiff's demand for attorney fees and punitive damages is stricken.

4. The Motion for Leave to Join Additional Defendant Nunc ProTunc is **Denied** without prejudice.

BY THE COURT:

JOHN W. HERRON, J.