STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Subrogee of Boone Enterprises, t/a Boone's Long Lake Inn,

Plaintiff,

vs

File No. 90-8468-NZ
Consolidated Cases
HON. PHILIP E. RODGERS, JR.

NORTHERN FIRE & SAFETY, INC., a Michigan corporation,

Defendant,

and

NORTHERN FIRE AND SAFETY, INC., a Michigan Corporation,

Plaintiff

vs

ANSUL FIRE PROTECTION, a division of GRINNELL CORPORATION, a foreign corporation,

Defendant.
_____/

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DECISION AND ORDER

The motions which have been submitted to the Court for decision include the Defendant Ansul Fire Protection's (Ansul) Motion for Summary Disposition filed on September 3, 1992 and the Defendant Northern Fire & Safety, Inc.'s (Northern) Motion for Summary Disposition filed on September 22, 1992. The Court entertained the oral arguments of counsel on October 23, 1992 and then took the matter under advisement. Based upon the applicable standard of review and for reasons that will be more fully delineated ahead, it is this Court's opinion that the Defendant Ansul's Motion for Summary Disposition be granted and that of the Defendant Northern be denied.

This litigation has its origin in an early morning fire which extensively damaged Boone's Long Lake Inn, a popular Grand Traverse County restaurant, on April 17, 1989. Plaintiff St. Paul Fire & Marine Insurance Co. (St. Paul) filed a complaint against the Defendant Northern on November 16, 1990 seeking reimbursement for damages in excess of $730,000.00 which St. Paul had paid to its subrogee for damages occasioned by the fire. St. Paul's three-count complaint asserted claims of negligence, breach of contract and breach of express or implied warranty.

The St. Paul v Northern case was scheduled for a trial to commence on March 16, 1992. Following a court-ordered status conference with trial counsel, the Court learned that the Defendant Northern was pursuing an independent action against Ansul for claims arising out of the same fire. The Court was further advised that the parties had agreed as to all damages claimed by the Plaintiff with the exception of losses claimed for business interruption and agreed that absent a further stipulation concerning those damages, that they would be submitted to the Court for resolution without a jury. Based upon that stipulation and the disclosure of the independent action against the Defendant Ansul, the Court adjourned the trial in the matter of St. Paul v Northern on March 13, 1992 and, subsequently, entered an order on May 27, 1992 consolidating the cases for discovery and trial.

Northern's complaint against the Defendant Ansul is one for contribution and anticipates the possibility that Northern may be held liable to St. Paul for damages arising out of the 1989 fire at Boone's Long Lake Inn. In summary, St. Paul seeks damages from Northern for claimed deficiencies in the design and installation of a fire suppression system which its subrogee (Boone) purchased from the Defendant Northern in 1981 and which was modified to accommodate a new double broiler in 1983. The Court believes that the facts necessary to resolve both motions are established beyond any reasonable dispute. Ansul brings its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Northern brings its motion for summary disposition on St. Paul's complaint pursuant to MCR 2.116(C)(7) and (8).

The standard of review for a (C)(7) motion is set forth in Moss v Pacquing, 183 Mich App 574, 579 (1990).

> "In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. Wakefield v Hills, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. Levinson v Sklar, 181 Mich App 693, 697; 449 NW2d 682 (1989); Hazelton v Lustig, 164 Mich App 164, 167; 416 NW2d 373 (1987)."

The standard of review for a (C)(8) motion is set forth in Mitchell v General Motors Acceptance Corp. 176 Mich App 23 (1989).

> "A motion for summary disposition brought under MCR 2.116 (C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will

not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]"

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

> "A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
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> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372."

The essence of both motions is the applicability of the economic loss doctrine to the claims made by St. Paul and, in turn, to the claims which underlie Northern's demand for contribution. The pivotal precedent upon which these motions must be judged is the Michigan Supreme Court's recent decision in Neibarger v Universal Cooperatives Inc, 439 Mich 512 (1992). Again, as will be more fully discussed ahead, this Court is persuaded that the losses occasioned by the fire at Boone's Long Lake Inn were commercial in nature, within the contemplation of the parties when the system was

purchased and had their origin in the failure of the fire suppression system to extinguish a kitchen fire in its incipient stage. A review of the exhibits and deposition testimony submitted in support of the Defendant Ansul's motion convinces the Court that the purchase and installation of the fire suppression system was a transaction in goods and that the economic losses generated from its defective performance are subject to the exclusive remedies described within the Uniform Commercial Code (UCC). Northern's complaint is based upon a statutory right of contribution which is not applicable in a case governed by the UCC. MCL 600.2925a(1); MSA 27A.2925(1). Any attempt to amend the complaint and assert a claim for indemnification based upon violations of express or implied warranties would be futile in view of the applicable UCC notice requirements. MCL 440.2607(3)(a); MSA 19.2607.

While the application of the economic loss doctrine will serve as the basis to dismiss Count I of St. Paul's complaint, Counts II and III survive to the extent that they are predicated on warranties of future performance, the cause of action for which did not arise until the fire loss was experienced on April 17, 1989. MCL 440.2725(2); MSA 19.2725. Northern was put on notice of the fire by St. Paul in a letter dated February 8, 1990 and served with St. Paul's complaint on December 3, 1990. See, Exhibit 2 to Ansul's Brief. However, Northern's president acknowledges notice of the fire and a possible claim against his company within days of its occurrence. See, Exhibit 4 to Ansul's Brief. St. Paul's complaint, then, was timely filed.

In the briefs filed with this Court, Ansul and Northern agree that the design, sale and installation of a fire suppression system in Boone's Long Lake Inn was a transaction in goods as that term is defined in Article 2 of the UCC. Northern and Ansul further admit that the damages suffered by St. Paul's subrogee were economic or commercial losses as that term is encompassed within the economic loss doctrine. Northern additionally acknowledges that there is no right of contribution in a claim governed by the UCC and admits at page 4 of its response to Ansul's motion that its claims against

Ansul are only for contribution on the basis of a common liability in tort. Therefore, if the economic loss doctrine applies and no independent duty may be found to support a tort recovery by St. Paul against Northern, then Northern's contribution claim must be dismissed. Neibarger, supra, at p 520 and Roberts v Richland Mfg Co, 260 F Supp 274, 277-278 (ED Mich, 1966).

St. Paul, not unexpectedly, has different views of the transaction, the damages and the applicability of the economic loss doctrine than those shared by Ansul and Northern in their written submissions to the Court. St. Paul asserts that the transaction was predominantly one for design, installation and service and that the significant damage to property other than the fire suppression system itself renders the losses catastrophic and accidental and, therefore, subject to tort rather than contract remedies.

The parameters of the dispute outlined by the parties, then, involve the nature of the transaction, the appropriate categorization of the losses incurred and the impact of significant damages to other property in considering the applicability of the economic loss doctrine. The Court will address each of these considerations in turn.

The design, sale and installation of a fire suppression system at Boone's Long Lake Inn was predominantly a transaction in goods. MCLA 440.2102; MSA 19.2102 and MCL 440.2105(1); MSA 19.2105. As was the case in Neibarger, this transaction involved a mixture of goods and services. Just as the Plaintiff in Neibarger sought to purchase a system to milk cows, so did Barry Boone predominantly desire to purchase a system to suppress fires. See, Boone deposition at p 46. In transactions involving mixed goods and services, the Court is cognizant of its obligation to determine whether the contract is governed by the UCC by identifying the "predominant factor." See, Neibarger, supra, at p 534 where the Court applied the test set forth in Bonebrake v Cox, 499 F2d 951, 960 (CA 8, 1974). The test articulated by the 8th Circuit in Bonebrake and adopted by the Michigan Supreme Court in Neibarger is as follows:

> "The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved." Id. at 534.

St. Paul disputes the conclusion that the original transaction was one predominantly for the purchase of goods. In support of its position, St. Paul argues that the individual components of the fire suppression system, "have no intrinsic worth as a product" and argues that the "predominant purpose of the original transaction was to acquire fire protection with equipment incidental to and as necessary to accomplish this purpose." See, St. Paul's Brief in response to Northern's motion at pp 3-5.

The Court does not find this distinction to be meaningful. Applied in the Neibarger context, one could argue that the dairy farmer's primary purpose was to acquire milk and that the milking machines and related piping and pumps were only incidental to this primary purpose. Carried to its extreme, the sale of bats and balls to a professional baseball team would not be a transaction in goods but only a sale incidental to the predominant purpose of winning the World Series.

Similarly, the Court cannot accept the argument that the pipes, nozzles, fusible links and powders which comprise the fire suppression system have no intrinsic worth as products. Pipes, nozzles and fittings are commonly recognized as products, and markets exist for their sale independent of their incorporation into a fire suppression system. Again, by analogy, the dairy farmer in Neibarger could have similarly argued that the pipes, tubing, pumps and holding tanks were also components of no intrinsic worth apart from their incorporation within the system. This analysis was implicitly rejected by the Neibarger court.

The suggestion by St. Paul that Boone was a business neophyte and Northern's proffered distinction between dealers and manufacturers are also without merit. In describing its decision to apply the economic loss doctrine in cases where the Plaintiff

seeks to recover for commercial losses occasioned by a defective product purchased for commercial purposes and limit the Plaintiff to remedies exclusively provided by the UCC, the Neibarger court described its reasoning as follows:

> "A contrary holding would not only serve to blur the distinction between tort and contract, but would undermine the purpose of the Legislature in adopting the UCC. The code represents a carefully considered approach to governing 'the economic relations between suppliers and consumers of goods.' If a commercial purchaser were allowed to sue in tort to recover economic loss, the UCC provisions designed to govern such disputes, which allow limitation or elimination of warranties and consequential damages, require notice to the seller, and limit the time in which a suit must be filed, could be entirely avoided. In that event, Article 2 would render meaningless and, as stated by the Supreme Court in East River, supra at 866 'contract law would drown in a sea of tort.' . . .
>
> Adoption of the economic loss doctrine is consistent with the stated purposes of the UCC. The availability of a tort action for economic loss would 'only add more confusion in an area already plagued with overlapping and conflicting theories of recovery,' while preclusion of such actions will lead to the simplification, clarification, and modernization of commercial law called for by Section 1-102(2)(a). Moreover, because a majority of other jurisdictions have adopted the economic loss doctrine, our decision here will promote the uniformity called for in Section 1-102(2)(c)." Neibarger, supra, at pp 528-529.

The Michigan Supreme Court's adoption of an expansive interpretation of the economic loss doctrine was predicated on a stated policy to simplify, clarify and modernize the commercial law. Therefore, analyses concerning the doctrine's applicability cannot rely upon distinctions between commercial parties on the basis of wealth or business acumen or distinctions between manufacturers, dealers and commercial end users predicated upon the time goods may remain in inventory. Nor may a meaningful analysis of the doctrine allow a transaction in goods to be re-characterized by a higher business purpose. To do so would only invite litigation and erode the certainty and predictability ostensibly inherent to commercial transactions governed by a uniform

commercial law.

St. Paul next asserts that its subrogee's damages were not "economic losses" as that term is defined by the economic loss doctrine. Simply stated, it is St. Paul's position that Boone's damages were substantially to property other than the fire suppression system itself and not due to "qualitative defects in the product which resulted in a disappointment of economic expectation." See, St. Paul Brief at p 19. St. Paul develops this argument further by drawing the distinction between catastrophic losses which have traditionally been compensated with tort remedies as opposed to disappointed economic expectations which are amenable to compensation by UCC or contract remedies. While this Court finds those arguments to be thoughtful and significant, they have been addressed and rejected by the Neibarger court. The court described the economic loss doctrine at p 520 in the following language:

> "The economic loss doctrine, simply stated, provides that "'[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly his remedy is said to be in contract alone, for he has suffered only 'economic' losses.'" This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who were injured in a manner which has traditionally been remedied by resort to the law of torts."

There is no reasonable dispute that Barry Boone purchased a fire suppression system to avoid the very property damage and business interruption losses which underlie this litigation. The system was purchased for installation in a commercial restaurant operation and the damage caused by the system's failure was certainly within the contemplation of the parties at the time of sale. Resort to the law of torts is not necessary to provide a complete recovery given UCC remedies for direct, incidental and consequential losses, including property damage. MCL 440.2714; MSA 19.2714, MCL 440.2715; MSA 19.2715. Neibarger, supra at 532.

Quoting from the Supreme Court of Minnesota in Hapka v Paquin Farms, 458 NW2d 683, 688 (Minn, 1990), the Neibarger wrote that:

> "[t]he steady stream of litigation attempting to qualify for the exceptional treatment of damage to other property has convinced us that the exception represents a retreat to the common law in derogation of the essence of the Uniform Commercial Code: a complete and independent statutory scheme enacted for the governance of all commercial transactions." Id. at p 531.

Recognizing that a complete remedy exists within the UCC for even catastrophic commercial losses, a distinction on those grounds is likewise without merit and invites litigation inimical to the certainty and predictability anticipated by a uniform commercial law. While counsel vigorously argued the relative merits of the application of the economic loss doctrine to other property at the time of oral argument, the damage to the dairy farmer's cows, including sickness and death, precludes any argument that the Neibarger court did not apply the economic loss doctrine to damage to property other than the product itself. Perhaps the most telling statements in this regard, and the most concise description of the rule generated by the majority's opinion, are the closing remarks of Justice Levin in his dissent:

> "The principal significance of the Court's decision today may be to establish, absent personal injury, a four-year statute of limitations for commencement of an action claiming loss of property arising out of the sale of defective goods or products at least where the loss is deemed to be within the commercial or economic expectation of the parties." Id. at p 549.

A balanced reading of the Neibarger opinion leads to the inescapable conclusion that the economic loss doctrine is applicable to damage beyond that associated with the product itself. No meaningful commercial distinction can be drawn between safety equipment and other products designed to enhance the purchaser's economic expectations. One of the most significant elements of Plaintiff's damage claim is the losses occasioned by the interruption of its subrogee's business. The failure of the system to work as envisioned clearly disappointed Mr. Boone's economic expectations and occasioned property damage and lost

profits. These losses were not experienced by an individual consumer at his or her home and, fortunately, did not involve personal injury or death. The losses were commercial and economic.

St. Paul finally argues that application of the UCC statute of limitations would be manifestly unfair in that its subrogee could not have discovered the defect in the fire suppression system in a timely fashion. Unlike a product used regularly in a course of a business, the fire suppression system only operates in the fortuitous and unpredictable event of a fire. The Court disagrees with St. Paul on this question precisely because the UCC does contemplate and makes a provision for claims based upon the breach of a warranty of future performance.

The statute of limitations for claims subject to the UCC is four years. MCLA 440.2725(1); MSA 19.2725. Generally, the statute begins to run from the date goods are tendered. In relevant part, the UCC provides as follows:

> "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." Id., Section 2.

The performance of the fire suppression system could only be judged by the fortuitous event of a fire. No fire occurred until April 17, 1989, the date the cause of action accrued. St. Paul's complaint was timely filed. Northern's complaint against Ansul also was timely, but for its failure to satisfy UCC notice requirements. Thus, the Court will not grant Northern's oral request to amend its complaint to assert a cause of action for indemnification based upon a breach of implied or express warranties, including a warranty of future performance for the

reason that such an amendment would be futile.[1] Not only has Northern insisted that its claims were based solely on common liability in tort (Northern's response to Ansul's motion at p 4) but it failed to provide the requisite notice of Ansul's breach within a reasonable time. MCL 440.2607(3)(a); MSA 19.2607.

Northern has not addressed the notice requirement in its written submissions to the Court for the reason that it acknowledged that its claims against Ansul were based solely on common tort liability. The UCC's requirement of reasonably timely notice has been elaborated by appellate precedent. See, Ansul Brief at p 14. Here, although Northern knew of a possible claim against Ansul within three days of the fire and Plaintiff's subrogee was aware of such a claim within six months from the date of the fire, Northern did not provide any notice to Ansul of a possible claim until shortly after it was served with St. Paul's complaint on December 3, 1990 and then, contrary to the intent of the notice requirement, Northern wrote to Ansul on March 26, 1991 and advised it that no claim would be brought by it against Ansul. St. Paul provided no notice of a claim to Ansul until May 2, 1991. Finally, Northern's president acknowledged Northern's contractual obligation to notify Ansul of claims within 24 hours and admitted Northern's failure to do so. See, Harmer deposition of August 27, 1992 at pp 16-17.

The sole determination required by UCC 2.607(3)(a) is whether the notice was reasonable. MCLA 440.2607(3)(a); MSA 19.2607. A showing of prejudice is not necessary. Eaton Corp v Magnavox Co, 581 F Supp 1514, 1532 (ED Mich, 1984). Ansul has cited a number of cases which suggest that delays of three and one-half months to

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[1]Ansul also argues futility in its September 25, 1992 motion for summary disposition based upon St. Paul and Northern's failure to allege any defect in Ansul's products or in Ansul's installation specifications. St. Paul's claims against Northern allege active negligence and common law indemnification is not available. Ansul's arguments are well founded. A written decision will not be issued on the September 25, 1992 motion as it has been rendered moot.

eleven months are not reasonable. Here, ignoring the mixed message found within Northern's correspondence of March 26, 1991, Ansul first became aware of a possible breach twenty months after the fire. (April 17, 1989 to December 3, 1990.) This notice was not the "reasonable" notice required by the UCC. This Court's analysis is guided by that of the 6th Circuit in Ashley v Goodyear Tire & Rubber Co, 635 F2d 571, 573 (CA 6, 1980). There, in finding a twenty-two month delay to be inappropriate, the Court referred to comment 4 of Section 2.607. In relevant part, this comment describes acceptable notification as follows:

> "The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. . . 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, a thus opens the way for normal settlement through negotiation." MCL 440.2607(3)(a); MSA 19.2607, Comment 4.

Here, Ansul has suffered actual prejudice. Northern's untimely notification precluded Ansul from a thorough and independent investigation of the fire scene. Notified of a potential breach only many months after the fire itself, Ansul has been forced to rely upon the investigations of its adversaries in constructing its defense. Additionally, the correspondence of March 26, 1991 is inconsistent with effective notice to the extent it implies that the transaction is not troublesome and, therefore, not an appropriate subject of settlement negotiations. Finally, Northern violated the contractual 24-hour notice requirement intended to make 2.607 notice meaningful in a fire loss case.

In conclusion, the application of the economic loss doctrine limits St. Paul's remedies to those provided by the UCC. Count I of St. Paul's complaint does not have any foundation in the breach of an independent duty arising outside of its subrogee's contractual relationship with the Defendant Northern. Accordingly, Count I of St. Paul's complaint is dismissed. Brewster v Martin Marietta Aluminum Sales Inc, 145 Mich App 641 (1985); Rush v United Technologies, 930 F2d 453 (CA 6, 1991). MCR 2.116(C)(8). Counts

II and III were timely filed and Northern's motion for summary disposition is denied as it relates to the UCC statute of limitations. The tort statutes are inapposite to these claims. Neibarger, supra, at pp 520 and 529.

Again, because the economic loss doctrine does apply, no tort remedies may be sought from Northern and there is no basis for a contribution claim. Northern's oral request to amend and assert indemnification claims for the breach of UCC warranties is futile given the failure to timely notify Ansul of such claims. MCLA 440.2607(3)(a); MSA 19.2607. Northern's complaint against Ansul, then, will be dismissed in its entirety and with prejudice. MCR 2.116(C)(8) and (10). The Court finds no just reason for delay in the entry of a judgment consistent with this decision and order. MCR 2.604(A).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/30/92