

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|------------------------------------|---|--------------|
| HARTFORD FIRE INSURANCE COMPANY as | : | |
| Subrogee of Construction | : | CIVIL ACTION |
| Fasteners, Inc., | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | NO. 98-45 |
| | : | |
| ASSOCIATED CONSTRUCTION AND | : | |
| MANAGEMENT CORPORATION, BURKEY | : | |
| CONSTRUCTION COMPANY, BUTLER | : | |
| MANUFACTURING COMPANY, UNITED | : | |
| DOMINION INDUSTRIES, INC., | : | |
| VARCO-PRUDEN BUILDINGS, a United | : | |
| Dominion Company, VP BUILDINGS, | : | |
| INC., an LTV Company, RIEGEL | : | |
| ENGINEERING, INC., DANA W. | : | |
| GANGEWERE & ASSOCIATES, GLENDA D. | : | |
| WIECHECKI, As Executrix of the | : | |
| Estate of Dana W. Gangewere, | : | |
| Deceased, and LUDGATE ENGINEERING | : | |
| CORPORATION, | : | |
| | : | |
| Defendants. | : | |

MEMORANDUM

R.F. KELLY, J. APRIL , 2000

Presently before the Court in this subrogation action involving the partial collapse of a warehouse/manufacturing facility roof are three Motions for Summary Judgment: (1) the Motion by Defendant Burkey Construction Company ("Burkey") for Partial Summary Judgment; (2) the Joint Motion by Defendants Butler Manufacturing Company ("Butler"), Associated Construction and Management Corporation ("Associated") and Burkey for Partial Summary Judgment of the 402A Claims against them; and (3) Butler's Motion for Summary Judgment Based on the Economic Loss

Doctrine and Statute of Limitations, joined by Associated and Burkey.¹ For the reasons that follow, Burkey's Motion is granted, the Joint Motion for strict liability is granted and Butler's Motion, joined by Associated, is granted in part and denied in part.

I. FACTS.

On or about January 9, 1996, there occurred a partial roof collapse of a manufacturing/distribution facility in Wyomissing, PA owned by Construction Fasteners, Inc. ("CFI"). At all relevant times, the Plaintiff, Hartford Fire Insurance Company ("Hartford"), insured CFI against property loss and damage to its building, the contents therein, and business income loss and extra expense. Hartford paid CFI a total of \$451,799.84 for its loss under the insurance policy: \$394,012.32 for real and personal property damages, and \$57,787.52 for interruption of its business and substantial loss of business income. Hartford thereafter brought this subrogation action.

The Complaint alleges that in or around 1979, CFI contracted with Burkey to erect a pre-engineered, pre-fabricated building which was designed, engineered, fabricated, manufactured

¹Burkey Construction Company ("Burkey"), although a related company to Associated Construction and Management Corporation ("Associated"), is a separate corporate entity.

and sold by Defendant Varco-Pruden Buildings ("Varco-Pruden").² In or around 1986, CFI contracted with Associated to erect a second building in addition to the 1979 Varco-Pruden building. CFI also contracted with Defendants Dana W. Gangewere & Associates ("Gangewere") and Ludgate Engineering Corporation ("Ludgate")³ to provide engineering and architectural services in connection with the additional building and its component parts. The second building was erected by Associated and constructed of pre-engineered metal designed and fabricated by Butler. It abutted the 1979 Varco-Pruden building and its roof line was approximately ten feet higher than the roof line of the 1979 Varco-Pruden building.

In 1993, the roof of the 1979 Varco-Pruden building sustained damage and collapsed when snow drifted on the area adjacent to the higher addition. Following this collapse, CFI contracted with Associated, the company which had erected the 1979 Varco-Pruden building, for the repair, redesign and reconstruction of the warehouse/manufacturing facility and its component parts. The Complaint alleges that Associated contracted with Varco-Pruden and Butler for the design and

²Although Hartford Fire Insurance Company ("Hartford") alleges the basis for the parties' relationships is contractual in nature, no contracts have been submitted in this case.

³By stipulation and Order, the parties voluntarily dismissed Ludgate Engineering Corporation ("Ludgate") without prejudice on April 13, 1998.

engineering of the 1993 reconstruction as well as the fabrication of the materials and component parts incorporated in the reconstruction. Associated also contracted with Gangewere and Riegel Engineering, Inc. ("Riegel")⁴ to provide engineering and architectural services for the 1993 roof reconstruction. Less than three years later, on or about January 8, 1996, portions of the roof and the supporting structure of the 1979 Varco-Pruden building collapsed, causing substantial damage to the building and property located therein, and income and business losses to CFI.

Hartford compensated CFI, and on January 6, 1998, Hartford filed its sixteen-count subrogation Complaint alleging negligence (Counts I, IV, VII, X, XIII, XIV, XV and XVI), strict liability (Counts II, V, VIII and XI), and breach of warranty (Counts III, VI, IX, and XII). Negligence, strict liability and breach of warranty claims are respectively filed: (1) against Associated at Counts I, II, and III; (2) against Burkey at Counts IV, V, and VI; (3) against Butler at Counts VII, VIII and IX; and (4) against United Dominion Industries, Inc., Varco-Pruden Buildings, a United Dominion Company, and VP Buildings, an LTV Company (collectively "Varco-Pruden"), at Counts X, XI and XII. Negligence claims are also filed against Riegel Engineering, Inc.

⁴Riegel Engineering, Inc. ("Riegel") was voluntarily dismissed without prejudice by the parties on February 7, 2000.

("Riegel") at Count XIII;⁵ against Gangewere at Count XIV; against Gangewere's Estate at Count XV; and against Ludgate at Count XVI.⁶ In addition, Cross-Claims for contribution and/or indemnity were separately filed against all co-Defendants by (1) Butler; (2) Associated and Burkey; and (3) Gangewere and Gangewere's Estate.

II. STANDARD.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, Summary Judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Further, a factual dispute is material

⁵Riegel filed a Third-Party Complaint against S and S Structures, Inc. d/b/a S&S Structures, Inc. ("S&S"), the corporation that provided Riegel with engineering and design specifications for its bridging angles incorporated in the 1993 repairs. S&S was dismissed with prejudice by stipulation of all parties on January 27, 2000.

⁶Both Riegel and Ludgate were voluntarily dismissed without prejudice by the parties. See supra, nn.3, 4. Therefore, Counts XIII and XVI of Hartford's Complaint are also dismissed without prejudice.

only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat Summary Judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). The non-moving party must produce evidence such that a reasonable juror could find for that party. Anderson, 477 U.S. at 248. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION.

A. Burkey's Motion for Partial Summary Judgment.

Burkey individually moves for partial summary judgment on the basis that it did not perform construction work or repairs during the time periods relevant to this lawsuit. Hartford does not oppose this Motion and does not dispute that Burkey had no role in the construction of either the 1986 addition and/or the 1993 repair and modification of the warehouse/distribution facility and roof. Summary judgment is therefore granted in favor of Burkey. Accordingly, Counts IV, V and VI of the Complaint, as well as any cross-claims filed by or against

Burkey, are dismissed.

B. Joint Motion by Butler and Associated for Partial Summary Judgment of Hartford's 402A Claims

In its Complaint, Hartford brings claims for strict liability in tort against Associated (Count II), against Butler (Count VIII), and against Varco-Pruden (Count XI). Butler and Associated move for summary judgment on Hartford's claims for strict liability against them.⁷ Hartford filed no response to this joint motion. Nonetheless, pursuant to Federal Rule 56(e), this Court must still determine if summary judgment is warranted. FED. R. CIV. P. 56(e).

In order to prevail on a claim of strict liability under Pennsylvania law, Hartford must establish that the Defendants sold a product which was in a defective condition, unreasonably dangerous to the user or consumer. Klein v. Council of Chem. Ass'ns, 587 F. Supp. 213, 223 (E.D. Pa. 1984). Hartford's expert, Daniel M. Honig, P.E., states in his June 29, 1999 report, that:

it is my opinion, with a reasonable degree of engineering certainty, that these building failures were caused primarily by a lack of proper engineering evaluation and judgment on the part of the Butler Manufacturing Company and inadequate project coordination and

⁷Burkey joined in this Motion for Partial Summary Judgment because Count V of Hartford's Complaint alleged strict liability in tort against it. Because Counts IV, V and VI of the Complaint have been dismissed, further references to Burkey will not be made.

judgment on the part of Burkey Construction Company/Associated Construction and Management Company.

(Jt. Mot. for Partial Summ. J. (402(A) Claims) of Defs. Butler, Associated and Burkey, Ex. A at 19-20.)(emphasis added).

Although Hartford's expert opines that Butler's and Associated's services were "improper" and "inadequate," he does not state that any product provided by either Butler or Associated was defective, as required under 402(A).⁸ It is undisputed that Butler supplied purlins, a product, for the 1993 reconstruction. No evidence has been produced, however, indicating that this product was defective. In addition, no evidence has been provided that Associated "sold a product." Accordingly, Butler and Associated are granted summary judgment with respect to Hartford's strict liability claims against them and Counts II and VIII are dismissed.

C. Butler's Motion for Summary Judgment Based Upon The Economic Loss Doctrine and Statute of Limitations.

1. Counts I and VII - Negligence

Hartford's Complaint contains claims for negligence against Associated (Count I), Butler (Count VII), Varco-Pruden

⁸The Pennsylvania Supreme Court has not decided whether strict liability under the Restatement (Second) of Torts, section 402(A), is applicable to construction contracts. Restat. (Second) of Torts, § 402(A). Because this summary judgment motion is decided solely on Hartford's expert witness report, this Court will not review the existing Pennsylvania Superior Court case law briefed by Butler in support of its motion on this issue.

(Count X), Gangewere (Count XIV), and the Gangewere Estate (Count XV).⁹ Butler, joined by Associated, moves for summary judgment on the basis that the economic loss doctrine precludes Hartford's negligence claims.

The economic loss doctrine "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995). "Under Pennsylvania law, when the tort involves actions arising from a contractual relationship, the plaintiff is limited to an action under the contract." Montgomery County v. Microvote Corp., No. CIV.A.97-6331, 2000 WL 134708, at *3 (E.D. Pa. Feb. 3, 2000) (quoting Philadelphia Elec. Co. v. General Elec. Power Generation Serv. Div., No. CIV.A.97-4840, 1999 WL 1244419, at *6 (E.D. Pa. Dec. 21, 1999)). Further, damage that a product does to itself is an economic loss and cannot be recovered under theories of strict liability or negligence, but is understood as a warranty claim. REM Coal Co., Inc. v. Clark Equip. Co., 563 A.2d 128, 132 (Pa. Super. 1989).

Under Pennsylvania law, there are tests used to determine if a cause of action in tort grows out of a breach of

⁹The negligence claim against Burkey (Count IV) has been dismissed with prejudice, and the negligence claims against Riegel and Ludgate (Counts XIII and XVI) have been dismissed without prejudice.

contract. The first test is whether there was an improper performance of the contractual obligation, which is "misfeasance," rather than a mere failure to perform, which is "nonfeasance." Sun Co., Inc.(R&M) v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 370 (E.D. Pa. Feb. 5, 1996)(citing Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 208 (3d Cir. 1995)(citing Raab v. Keystone Ins. Co., 271 Pa. Super. 185, 412 A.2d 638, 639 (1979))). The second method for determining if an action should be brought in tort or in contract is the economic loss doctrine, and the third test is the "gist of the action" test. Id. at 370 n.5. Cases in which courts have followed the gist of the action test "allow a tort claim 'when the wrong ascribed to the defendant is the gist of the action, the contract being collateral.'" Id. (citations omitted)). The majority of cases have applied the gist of the action test in the context of contracts negotiated by sophisticated parties. Northeastern Power v. Balcke-Durr, No. CIV.A.97-4836, 1999 WL 674332, at *8 (citing Allied Fire & Safety Equip. Co., Inc. v. Dick Enters., Inc., 972 F. Supp. 922, 937 (E.D. Pa. 1997)). In Allied Fire, a case which involved a subcontractor suit against a general contractor, the court examined cases decided through 1997 and determined that the gist of the action test was appropriate because "the majority of cases that concern complex contracts and in particular construction contracts, negotiated by sophisticated

parties, have applied the gist of the action test." Allied Fire, 972 F. Supp. at 937.

Butler and Associated move for summary judgment in this case, however, under the economic loss doctrine. Here, Hartford seeks damages for CFI's real and personal property loss, business interruption and lost business income. Hartford contends, and Butler and Associated concede, that the Pennsylvania Supreme Court would likely conclude that the economic loss doctrine allows recovery for damage to the contents of a warehouse when the warehouse collapses. See 2-J Corp. v. Tice, 126 F.3d 539, 544 n.4 (3d Cir. 1997). Thus, Associated and Butler contend that the economic loss doctrine bars all of Hartford's damage claims other than those for CFI's warehouse inventory. Because Hartford's subrogation claim only involves economic damages, this Court must decide whether the economic loss doctrine precludes Hartford's recovery from the moving Defendants.

Hartford focuses on East River S.S. Corp. Transamerica Delaval, Inc., 476 U.S. 858 (1986), in which the United States Supreme Court examined the economic loss doctrine and held that damages which a product causes to other property are recoverable, but damages which a product causes to itself are not recoverable. Although Hartford denies that its claims are barred by application of the economic loss doctrine, Hartford sets forth an extensive analysis of "the product" which caused injury to

itself, not "other property," which would preclude recovery of damages under the economic loss doctrine.

After East River, the Supreme Court later distinguished "the product" from "other property" in Saratoga Fishing Co. v. J.M. Martinac & Co., wherein it indicated that:

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.

2-J Corp. v. Tice, 126 F.3d at 543 (citing Saratoga Fishing, 520 U.S. 875, 879 (1997)). Hartford follows this line of reasoning and contends that "the product" which caused the damages to CFI's warehouse and warehouse roof in 1993 was Butler's roofing purlins installed in 1993 as part of the roof reconstruction.¹⁰ The purlins, according to Hartford, cannot be integrated into the Varco-Pruden warehouse, because they were not purchased as components of the original 1979 warehouse and CFI did not bargain for them in 1979. (Hartford's Reply Br. at 5-6.) The Defendants argue, however, that "the product" is the entire 1993 reconstructed roof and warehouse.

Butler cites an unreported but instructive United

¹⁰Hartford later argues, rather confusingly, that "the product" was not the purlins, but the Varco-Pruden warehouse. (Hartford's Reply Br. at 5-6.)

States Court of Appeals for the Third Circuit ("Third Circuit") decision, Commercial Union Ins. Co. v. Kirby Bldg. Sys., Inc., 149 F.3d 1163 (3d Cir. Mar. 18, 1998)(TABLE, Nos. 97-7272, 97-7285), to support its theory that the economic loss doctrine precludes Hartford's recovery. In Commercial Union, the Third Circuit held that the economic loss doctrine barred a plaintiff's tort claims seeking recovery of its costs to reconstruct a building, lost profits and other incidental costs when the roof of a pre-engineered warehouse collapsed from the weight of snow and ice, causing economic loss and physical damage to the warehouse itself. Id. at 13. This case differs from Commercial Union because here, Hartford seeks recovery for the costs of a reconstructed roof, whereas the Commercial Union plaintiffs sought recovery for the costs of an initial collapse of a warehouse roof. Butler argues, nonetheless, that as in Commercial Union, the economic loss doctrine applies in this case.

Applying the Third Circuit's Commercial Union analysis here, Butler argues "the product" is the 1993 reconstructed roof and warehouse, not the roofing purlins supplied as part of the reconstruction, as Hartford claims. For further support, Butler cites Hartford's Complaint which states, "[f]ollowing the 1993 roof collapse, [CFI] contracted for the repair, redesign and reconstruction of its warehouse/manufacturing facility, including

the component parts thereof with defendant [Burkey]." (Compl. at ¶ 28.) Thus, according to Butler (joined by Associated), "the product" was the "repair, redesign and reconstruction of [CFI's] warehouse/manufacturing facility." Id.

Hartford, in response, cites Lease Navajo, Inc. v. Cap Aviation, Inc., 760 F. Supp. 455 (E.D. Pa. 1991), to support its contention that the purlins are a separate and distinct product neither integrated into the 1979 Varco-Pruden building nor into the 1986 Butler addition. In Lease Navajo, the plaintiff hired the defendant to rebuild and install an airplane engine which subsequently exploded, was rebuilt a second time and exploded again. The plaintiff's complaint alleged that the defendant breached its warranty of merchantability and fitness for its intended purpose and the defendant negligently rebuilt the engine and used defective material. Id. at 456. The defendant brought a third-party claim against the engine manufacturer, alleging it manufactured both engines, specified and supplied a connecting rod assembly which failed in the first engine and specified and supplied the rod bolt portion of the assembly which failed in the second engine. Id. In addition, the defendant alleged the manufacturer's technical manual did not provide information that the specifications for the component parts which failed had been changed. Id. at 457. The manufacturer moved for summary judgment on the theory that Pennsylvania law does not allow

recovery by a commercial purchaser against a product manufacturer for negligence in a tort-based action when the only injury is to the product itself. Id. The Lease Navajo court stated "the engines and the allegedly defective components were not purchased as integrated units. . . . Nowhere does it appear that [the defendant] purchased the engines and the components as a whole. The failure of the component caused the damage to other distinct property." Id. at 459. Here, Hartford contends that the roof purlins sold to CFI in 1993 should be likened to the rod bolt purchased by the Lease Navajo plaintiff, which was a component part purchased for installation during an overhaul of an engine held to be separate property from the engine. Butler notes, however, that the Lease Navajo court limited its holding to the facts of that case, pointing out that it was "not determining where the law would lead." Id. Butler further argues that several Third Circuit decisions after Lease Navajo analyzed in Commercial Union correctly set forth the analysis this Court should follow in determining whether "the product" was the purlins or the reconstructed roof and warehouse.

Commercial Union provides reasoning the Third Circuit might employ through an examination of four post-East River cases which "have since clarified what constitutes 'the product itself' and what constitutes 'other property.'" Commercial Union at 10. In King v. Hilton-Davis, 855 F.2d 1047, 1051-52 (3d Cir. 1988),

cert. denied, 488 U.S. 1030 (1989), decided prior to Lease Navajo, the court determined that “[t]he relevant bargain [for deciding whether other property has been damaged] is that struck by the plaintiff. It is that bargain that determines his or her economic loss and whether he or she has been injured beyond that loss.” Commercial Union at 10 (quoting King, 855 F.2d at 1051-52). The Commercial Union court further stated that:

where a plaintiff sues a component manufacturer, rather than the manufacturer of a final assembled product, King holds that a court must not look to the component part to define the product; rather, the relevant ‘product’ remains ‘what the plaintiff bargained for,’ i.e., the fully assembled product that the plaintiff ultimately purchased.

Id. (citing King, 855 F.2d at 1051-52). In the instant case, under the King analysis, the relevant product is the reconstructed roof and warehouse, not the roofing purlins.

Saratoga Fishing, the second case examined by the Commercial Union court, distinguishes “the product” from “other property” and is used by Hartford to support its argument that the roof purlins are “other property” in this case. In Saratoga Fishing, however, the Supreme Court cited King with approval, noting “a ‘product’ for purposes of the economic loss doctrine is the finished product bargained for by the buyer rather than the individual components that make up the item.” Commercial Union at 11 (citing Saratoga Fishing, 520 U.S. at 1788). Again, in the

instant case, the finished product bargained for by CFI was the reconstructed roof and warehouse.

The Commercial Union court next explains that following Saratoga Fishing, the Third Circuit held in 2-J Corp. v. Tice, 126 F.3d 539 (3d Cir. 1997), that "items added to a product purchased by the initial user constitute 'other property' even if they may be foreseeably utilized in connection with the owner's use of the product." Commercial Union at 11 (citing 2-J Corp., 126 F.3d at 544). The 2-J Corp. court established that "'the time of sale to the initial user' is 'the critical point for determining whether added features are part of the product itself or other property.'" Id. (quoting 2-J Corp., 126 F.3d at 543 (internal quotations omitted)). According to Hartford, "the product" is the 1979 Varco-Pruden building and the purlins installed in 1993 are "other property" not contemplated by the parties erecting the 1979 Varco-Pruden building. Hartford therefore contends that the economic loss doctrine does not apply in this case. Butler and Associated correctly argue, however, that "the product" was the 1993 roof reconstruction, not the 1979 Varco-Pruden building, and the purlins were an integrated part of the roof reconstruction.

The final case examined by the Commercial Union court is Sea-Land Serv., Inc. v. General Elec. Co., 134 F.3d 149 (3d Cir. 1998), in which the Third Circuit held that "every component

that was the benefit of the bargain should be integrated into the product, . . . including parts that are later installed subsequent to a purchase." Commercial Union at 12 (quoting Sea-Land, 134 F.3d at 153-154). Associated, in its Motion adopting Butler's Brief, notes that CFI contracted to have its roof and warehouse repaired and reconstructed in 1993. Butler supplied engineering services and additional purlins in 1993 to be integrated in the total roof repair and reconstruction. This Court agrees with Butler and Associated that the product which CFI purchased was the roof repair and reconstruction, and the roof purlins were component parts integrated into that product.

Because the object of the bargain in this case involves not only goods, i.e., the purlins, but also services, i.e., engineering services related to the roof repair and reconstruction, this Court must also examine the issue of whether the economic loss doctrine applies to contracts for services. Pennsylvania law reveals that this doctrine has been applied to service contracts. Valley Forge Convention & Visitors Bureau v. Visitor's Servs., 28 F. Supp.2d 947, 951 (E.D. Pa. 1998)(citing Factory Mkt., Inc. v. Schuller Int'l Inc., 987 F. Supp. 387, 397 (E.D. Pa. 1997)(economic loss doctrine bars negligence claim based on service contract); Sun Co., 939 F. Supp. 365 (economic loss doctrine applied to losses from breach of engineering services contract); Bash v. Bell Tel. Co. of Pa., 601 A.2d 825,

829 (Pa. Super. 1992)(tort recovery denied for losses resulting from phone company's failure to list commercial advertiser in phone book)); see also Palco Linings, Inc. v. Pavex, 755 F. Supp. 1269 (M.D. Pa. 1990)(where duty to recover arose from agreements, subcontractor's negligence action against architect/engineer barred by economic loss doctrine).

Accordingly, in this case, Hartford's claims for inadequate project coordination and judgment related to the 1993 roof reconstruction against Associated, its general contractor, are barred by the economic loss doctrine. Further, the court in Allied Fire also noted that the economic loss rule has also been applied when no contractual relationship exists between the parties. Allied Fire, 972 F. Supp. 922, 938 (citation omitted). Thus, the economic loss doctrine also applies to bar Hartford's negligence claim against Butler for its lack of proper engineering evaluation and judgment related to the 1993 roof reconstruction. Summary judgment is therefore granted to Associated and Butler for Hartford's negligence claims in Counts I and VII except for the value of CFI's warehouse inventory, which Butler and Associated have conceded Hartford may recover.

2. Counts III, IX and XII - Breach of Warranty.

Hartford has conceded all claims against Burkey,

including its breach of warranty claim.¹¹ See supra, section III.A. Hartford's remaining breach of warranty claims are those against Associated (Count III), against Butler (Count IX) and against Varco-Pruden (Count XII). Butler now moves for summary judgment, alleging that the statute of limitations bars Hartford's warranty claims in Count IX. Associated joins this Motion, seeking dismissal of the breach of warranty claims in Count III. "A subrogee is . . . bound by the statute of limitations as it accrues against the subrogor." School Dist. of Borough of Aliquippa v. Maryland Cas. Co., 587 A.2d 765, 769 (Pa. Super. 1991)(citations omitted). Thus, the applicable statute of limitations for Hartford's claims are the same as those for CFI's claims.

Hartford concedes its breach of warranty claims arising

¹¹In its Complaint, Hartford alleged that Burkey had sold, supplied and distributed "the pre-engineered, prefabricated building and the component parts thereof utilized in the 1993 building reconstruction, . . . conveyed certain guarantees and warranties, both express and implied, . . ." (Compl. at ¶ 66)(emphasis added). The Complaint contains a similar allegation against Associated, but alleges that Associated acted in connection with the 1986 building addition. (Compl. at ¶ 48.) Burkey's individual Motion for Summary Judgment requested dismissal on the basis of the absence of any evidence that it was involved in the 1993 repairs. See supra, section III.A. Hartford, in its Response to that Motion, conceded that Burkey had no involvement with the 1993 repairs. Id. Furthermore, Associated and Burkey state that any repairs in 1993 were performed by Associated. (Br. of Burkey and Associated in Supp. of Reply to Mot. Summ. J. by Butler at 4.) Hartford's breach of warranty claim against Associated is therefore limited to the 1993 roof repair and reconstruction.

from the sale of the building materials comprising the 1986 addition. Hartford asserts, however, that its claim for breach of warranty arising from Butler's sale of purlins in 1993 is not barred by the applicable statute of limitations and alleges that Butler is liable for breach of its implied warranty for the sale of the component parts used in the 1993 repairs. Specifically, Hartford alleges that the purlins, Butler's product, were not fit for their intended purpose and were not strong enough to bear the weight of anticipated, expected and foreseeable snowfalls.

Butler, in response, directs this Court's attention to the second page of its shipping document which accompanied the 1993 purlins, is entitled "Instructions Regarding Loss, Damages, Shortages, and Replacements," and excludes the implied warranties of merchantability and fitness for a particular purpose.

(Addendum to Mot. Summ. J. of Butler, Tab B at 2.) "Implied warranties of merchantability and fitness for a particular purpose can be waived, as long as language is clear and conspicuous." Philadelphia Elec., 1999 WL 1244419, at *8 (citing 13 Pa. C.S.A. § 2316(b), (c)). In order for a term or clause to be considered conspicuous, it must be written so "that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color." Id. (quoting Borden v.

Advent Ink Co., 701 A.2d 255, 259 (Pa. Super. 1997)). In this case, Butler's disclaimer of the implied warranties of merchantability and fitness for a particular purpose was contained in the section of the shipping document labeled "BUTLER WARRANTY." The disclaimer was underlined, in capital letters and bold type. This language was also in larger, contrasting type, therefore it was conspicuous.

Butler further limited its warranty to "a period of one year from the date of shipment . . . to correct by repair or replacement, at Butler's option, any defect in the material or workmanship in any part of a product manufactured by Butler." (Addendum to Mot. Summ. J. of Butler, Tab B at 2.) Butler states, in addition, that its warranty for the component parts supplied in 1993 was governed by the Uniform Commercial Code ("U.C.C.") and its applicable four year statute of limitations contained in 13 Pa. C.S.A. section 2725. Alternatively, Butler argues that, even if the U.C.C. did not apply to the sale of the purlins, the applicable statute of limitations is still four years under "usual contract law" codified at 13 Pa. C.S.A. section 5525. Butler states that the parts were ordered, supplied and installed in 1993. The latest an action could have been brought, therefore, under a four-year statute of limitations, was 1997. This action was not commenced until January, 1998, therefore, according to Butler, the breach of

warranty claims are time-barred under both the U.C.C. and Pennsylvania contract law.

Hartford states that “[Butler] does not contend that the sale of the purlins in 1993 was pursuant to a contract containing terms and conditions establishing an express warranty or limiting implied warranties. Rather, [it] claims that [Hartford’s] warranty claim related to the 1993 sale is barred by . . . the four-year statute of limitations.” (Pl.’s Mem. Law in Supp. Resp. to Summ. J. Mot. of Butler at 10.) This four-year statute does not apply, according to Hartford, because defects with the purlins existed in 1993 at the time of the roof system reconstruction, but were not discovered, through no fault of CFI, until the 1996 collapse. Hartford cites the unpublished opinion of Northeastern Power v. Balcke-Durr, Inc., No. CIV.A.97-CV-4836 (E.D. Pa. Aug. 20, 1999), to support its theory that its breach of warranty claim with respect to the purlins did not begin to run until 1996, when the roof collapsed. (Pl.’s Mem. Law in Supp. Resp. to Summ. J. Mot. of Butler, Ex. A.) Hartford urges this Court to analyze the instant case in the same fashion as the Northeastern Power court, stating that “[a]ccording to the Northeastern Power court, if a defect exists during the period of the warranty, a claim for breach can be brought after the expiration of the warranty so long as the defect is not discovered until after the expiration of the warranty.” (Pl.’s

Mem. Law in Supp. Resp. to Summ. J. Mot. of Butler at 11.) Thus, according to Hartford, the claim accrues when the defect is discovered. Id.

Butler counters that Hartford's reliance on Northeastern Power is misplaced because the issue in that case was the court's interpretation of a written express warranty of an air preheater sold by the defendant. The court ruled that an issue of fact existed as to whether the warranty language would allow for coverage of manifest but undiscovered defects due to the fault of the seller. (Butler's Reply in Supp. of Mot. Summ. J. at 12-13)(citing Pl.'s Mem. Law in Supp. Resp. to Summ. J. Mot. of Butler, Ex. A at 13). Butler notes, however, that the court did not change or interpret Pennsylvania law which provides that, under the U.C.C., a breach of warranty claim accrues upon tender of delivery regardless of whether there is a latent, as opposed to patent, defect. Id. at 13 (citations omitted). Here, Butler alleges, there is no proof or allegation of any issue of a defect with the purlins [between 1993 and 1996] that would cause the statute of limitations to not have run. Id.

The U.C.C. defines goods as "all things (including specifically manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action." See 13 Pa. C.S.A. § 2105. The roofing

purlins are goods moveable at the time of identification to the contract, therefore any contract for their sale is governed by the U.C.C. Section 2725(a) of the Pennsylvania Uniform Commercial Code provides the exclusive statute of limitations for claims involving contracts for the sale of goods. This provision provides that "an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." 13 Pa. C.S.A. § 2725(a). A cause of action accrues under this provision 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.

13 Pa. C.S.A. § 2725(b). This rule has been adopted because the U.C.C. "presumes that all warranties, express or implied, relate only to the condition of the goods at the time of sale."

Nationwide Ins. Co. v. General Motors Corp., 625 A.2d 1172, 1174 (1993)(citations omitted).

Courts have held under Pennsylvania law in ordinary cases that the statute of limitations begins to run on the date of delivery of the product. See Nationwide, 625 A.2d at 1174; Maddalo v. Ford Motor Co., No. CIV.A.95-1434, 1995 WL 649563, at *1 n.1 (E.D. Pa. Oct. 31, 1995). The rationale for this holding

is that an implied warranty cannot explicitly extend to future performance as required to bring it within the discovery rule exception of section 2725. Antz v. GAF Materials Corp., 719 A.2d 758, 760 (Pa. Super. 1998)(citing Nationwide, 625 A.2d at 1178). As the Third Circuit states, “[i]f we held that the warranty in this case ‘explicitly extended’ to future performance, we would allow the exception to swallow the rule. Commonplace warranties . . . all would ‘explicitly extend’ to future performance.” Commercial Union at 22 (citing Patton v. Mack Truck, 519 A.2d 959, 965 (Pa. Super. 1986), and Zawadzki v. Ethicon, Inc., No. CIV.A.92-6453, 1994 WL 77350, at *5 (E.D. Pa. Mar. 11, 1994)).

Butler argues that Pennsylvania courts have uniformly rejected “the proposition that a warranty necessarily extends to future performance when discovery of a breach must await some prospective event,” therefore Hartford’s discovery theory should be rejected by this Court. Id. (citing Patton, 519 A.2d at 965). According to Butler, even if usual contract law applies, the statute of limitations remains four years and entitles Butler to summary judgment on Hartford’s breach of warranty claims because they are barred by the Pennsylvania Uniform Commercial Code and its four year statute of limitations. See 42 Pa. C.S.A. § 5525; 13 Pa. C.S.A. § 2105. Butler cites as correct the Commercial Union court’s ruling that the U.C.C.’s four-year statute of limitations barred all breach of warranty claims because the

building components were sold more than four years before the lawsuit was filed, and the court's rejection of the argument that the discovery rule applied to toll the statute of limitations period. This Court agrees that Hartford's breach of implied warranty claims for the purlins must have been brought within four years of the date of their installation. Suit was not filed within that four-year time period, therefore Butler is granted summary judgment with respect to breach of all warranties, express and implied, for any alleged defects with the purlins.

Associated seeks summary judgment of the breach of express warranty claim against it on the basis that Hartford has not produced any evidence of express warranties provided by Associated. Hartford, in responding to Butler's Motion for Summary Judgment, does not consider Associated's argument. Nonetheless, this Court finds no evidence of record indicating that Associated provided an express warranty to CFI. Associated's Motion for Summary Judgment is therefore granted with respect to Hartford's breach of express warranty claim.

Butler states that Hartford does not, and cannot, dispute that its breach of contract claims are governed by the U.C.C.'s four-year statute of limitations. Butler bases its argument on the holdings of two unreported cases in which courts held that a U.C.C. four-year statute of limitations applies to bar claims against a manufacturer of a pre-engineered building

arising from a collapse of the building. The facts of the instant case, however, differ from those cases cited by Butler because CFI's prefabricated warehouse roof collapsed, was repaired and reconstructed by another party, and collapsed a second time.

Hartford's breach of warranty claim against Butler includes an allegation of breaches of the "warranties of merchantability and safety and fitness for use, in that said pre-engineered, prefabricated building and the component parts thereof . . . supplied for the 1993 reconstruction were not of merchantable quality and were not safe or fit for their normal and intended uses and purposes." (Compl. at ¶ 85.) Butler moves for summary judgment, contending that this claim is barred by the U.C.C.'s four-year statute of limitations. Hartford's expert, Daniel M. Honig, P.E., states in his June 29, 1999 report, that "these building failures were caused primarily by a lack of proper engineering evaluation and judgment on the part of the Butler Manufacturing Company and inadequate project coordination and judgment on the part of Burkey Construction Company/Associated Construction and Management Company." (Jt. Mot. for Partial Summ. J. (402(A) Claims) of Defs. Butler, Associated and Burkey, Ex. A at 19-20.) If Butler's engineering design work is construed as primarily a contract for services, under Pennsylvania law, no implied warranties would apply to such a

contract for services. Philadelphia Elec., 1999 WL 1244419, at *10 (citing Lane Enters., Inc. v. L.B. Foster Co., 700 A.2d 465, 471 n.6 (Pa. Super. 1997); Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 724 (Pa. Super.), appeal denied, 546 A.2d 645 (Pa. 1996); Whitmer v. Bell Tel. Co., 522 A.2d 584, 587 (Pa. Super. 1987)). Pennsylvania law provides, however, "a cause of action for breach of implied warranties of fitness for a particular purpose in commercial construction contracts". . . .and "such implied warranties are also applicable to the design of the structure." City of Allentown v. O'Brien & Gere Eng'rs, Inc., No. CIV.A.94-2384, 1997 WL 256050, at *2 (E.D. Pa. May 8, 1997)(citing Cluett, Peabody & Co. v. Campbell, Rea, Hayes, 492 F. Supp. 67 (M.D. Pa. 1980) and Pittsburgh Nat'l Bank v. Welton Becket Assocs., 601 F. Supp. 887 (W.D. Pa. 1985)). Hartford also alleges that Associated is liable to it for breach of the implied warranties of merchantability and fitness for a particular purpose. Under the facts presented, Associated was the general contractor for the 1993 roof repair and reconstruction. Associated adopts the reasoning set forth in Butler's Motion for Summary Judgment, contending that Hartford's claim against it for breach of implied warranties is barred by expiration of the four-year statute of limitations. In making this argument, Associated specifically "do[es] not admit or infer that the U.C.C. is applicable with respect to the construction of the buildings at

issue." (Br. of Burkey and Associated in Supp. of Reply to Mot. for Summ. J. by Butler at 4.)

Because resolution of the breach of warranty issue involves an analysis of the contracts regarding the initial roof repair and reconstruction in 1993 and no contracts or contract details have been provided to guide the Court in its analysis, Butler's and Associated's motions for summary judgment with respect to the breach of implied warranties for services provided to CFI must be denied.

D. CONTRIBUTION AND INDEMNITY.

Cross-claims for contribution and indemnity were filed by (1) Butler, (2) Associated and Burkey, and (3) Gangewere and Gangewere's Estate against all co-Defendants. Butler, in its proposed Order granting its Motion for Summary Judgment on Plaintiff's 402(A) claims requests relief from the cross-claims against it, but does not brief this issue. In addition, all cross-claims filed by or against Burkey were dismissed because Burkey provided no goods or services during the applicable time period of this cause of action. See supra section III.A.

No party has addressed the cross-claims in the motions for summary judgment. Butler and Associated, although granted summary judgment on the claims against them for negligence, strict liability and breach of express warranty, remain in this case for breach of implied warranty. In addition, the cross-

motions of Gangewere and the Gangewere Estate also remain.

IV. CONCLUSION.

This Court has granted Burkey's Motion for Summary Judgment because it did not have a role in constructing or repairing CFI's property which is the subject of this case. In addition, the Joint Motion by Butler and Associated for Partial Summary Judgment of Hartford's 402(A) claims is also granted because Hartford has not proven that either Butler or Associated sold a defective product. Lastly, Butler and Associated's Motions for Summary Judgment are granted in part and denied in part. The economic loss doctrine bars Hartford's negligence claims against both Butler and Associated. Butler and Associated have conceded, however, that Hartford is entitled to recover the loss of the inventory stored in the warehouse. Butler is also granted partial summary judgment for Hartford's breach of warranty claims against it in Count IX for its roofing purlins. Butler is denied summary judgment, however, for other breach of implied warranty claims in Count IX. Further, Associated is also granted partial summary judgment for Hartford's breach of express warranty claim in Count III but denied summary judgment as to breach of implied warranties in Count III of Hartford's Complaint.

Hartford's remaining claims, therefore, are: Breach of Warranty (Implied) against Associated (Count III); Breach of

Warranty (Implied) against Butler (Count IX); Negligence, Strict Liability and Breach of Warranty against Varco-Pruden (Counts X, XI and XII);¹² Negligence against Gangewere (Count XIV); and Negligence against Gangewere's Estate (Count XV).

An appropriate Order follows.

¹²In its Sur-Reply Brief, Butler states that "In fact, plaintiff stipulated to the dismissal of Varco-Pruden in this case." (Sur-Reply Br. of Butler at 2.) Because no such stipulation has been filed of record with the Court, the Court assumes that the claims against Varco-Pruden remain.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|------------------------------------|---|--------------|
| HARTFORD FIRE INSURANCE COMPANY as | : | |
| Subrogee of Construction | : | CIVIL ACTION |
| Fasteners, Inc., | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | NO. 98-45 |
| | : | |
| ASSOCIATED CONSTRUCTION AND | : | |
| MANAGEMENT CORPORATION, BURKEY | : | |
| CONSTRUCTION COMPANY, BUTLER | : | |
| MANUFACTURING COMPANY, UNITED | : | |
| DOMINION INDUSTRIES, INC., | : | |
| VARCO-PRUDEN BUILDINGS, a United | : | |
| Dominion Company, VP BUILDINGS, | : | |
| INC., an LTV Company, RIEGEL | : | |
| ENGINEERING, INC., DANA W. | : | |
| GANGEWERE & ASSOCIATES, GLENDA D. | : | |
| WIECHECKI, As Executrix of the | : | |
| Estate of Dana W. Gangewere, | : | |
| Deceased, and LUDGATE ENGINEERING | : | |
| CORPORATION, | : | |
| | : | |
| Defendants. | : | |

ORDER

AND NOW, this day of April, 2000, upon consideration of the Motions for Summary Judgment filed by Defendants Burkey Construction Company ("Burkey"), Butler Manufacturing Company ("Butler"), and Associated Construction and Management Corporation ("Associated"), and any Responses thereto, it is hereby ORDERED that:

1. Burkey's Motion for Summary Judgment is GRANTED as unopposed and Counts IV, V and VI of the Complaint are dismissed;
2. the Joint Motion by Butler, Associated and Burkey

for Partial Summary Judgment of the Plaintiff's 402(A) Claims is GRANTED and Counts II and VIII of Hartford's Complaint are dismissed; and

3. Butler's Motion for Summary Judgment based on the Economic Loss Doctrine and Statute of Limitations joined by Associated and Burkey is GRANTED in part and DENIED in part. Counts I and VII of Plaintiff's Complaint are dismissed and Counts III and VI are partially dismissed.

BY THE COURT:

Robert F. Kelly,

J.