

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

<b>BERG CHILLING SYSTEMS, INC.,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>HULL CORPORATION, et al.,</b>	:	<b>NO. 00-5075</b>
<b>Defendants.</b>	:	

**MEMORANDUM AND ORDER**

**SCHILLER, J.**

**November , 2002**

The underlying source of the dispute in this matter is freeze drying equipment shipped to a company in China that an arbitration panel found not to conform to agreed upon specifications, resulting in an arbitration award against Plaintiff Berg Chilling Systems, Inc. (“Berg”). Berg commenced this action against Defendant Hull Corporation (“Hull”), which had assembled the freeze drying equipment, and Defendant SP Industries, Inc. (“SPI”), Hull’s alleged successor in interest. Subsequently, Hull filed a third party complaint against Alfa Laval Inc. (“Vicarb”), claiming that Vicarb had manufactured component parts to the freeze drying equipment that were not in compliance with contract specifications. Presently before the Court are Berg’s Motion for Partial Summary Judgment against Hull, SPI’s Motion for Summary Judgment against Berg and Hull, and Vicarb’s Motion for Summary Judgment against Hull.<sup>1</sup>

---

<sup>1</sup> SPI seeks summary judgment against two individual Defendants, Mr. John Hull and Mr. Lewis Hull. Although the distinction between the individual Hull Defendants and Hull Corporation will be relevant at trial, for present purposes it is not necessary to specifically address the parties’ claims as they relate to the individual Hull Defendants.

## **I. BACKGROUND**

In March 1995, China National Overseas Trading Company, on behalf of Huadu Meat Products Company (“Huadu”), entered into a contract with Plaintiff Berg for the purchase of equipment to be used for the preparation of meat products and freeze dried food products at Huadu’s facility in Beijing. (Contract for Supply of Food Freeze Drying System (“Equipment Contract”) at BC490, 512.) Several weeks thereafter, Berg issued a purchase order to Hull which provided that Hull would supply certain component freeze drying units and related equipment in connection with Berg’s contract with Huadu. (Berggren Aff. ¶ 4.) In order to assemble these components, Hull ordered heat exchange platens, or plate coils, from Third Party Defendant Vicarb. (John Hull Dep. at 58.)

Because of delays apparently attributable to Huadu, Berg and Huadu entered into a subsequent agreement that amended the delivery dates set forth in the Equipment Contract, establishing a later shipping deadline of June 15, 1996. (Berggren Aff., Ex. D.) Prior to executing this agreement, Berg met with Hull to determine Hull’s ability to meet the revised dates, and Hull agreed that it would meet the revised schedule. (Berggren Aff. ¶ 15.) Despite the extended deadline, Hull did not ship much of the equipment to Huadu until mid-October 1996. (Berggren Aff. ¶ 16.)

After Huadu received the equipment, engineers from Berg, Hull, and other suppliers conducted preliminary tests of their respective equipment at Huadu’s facility in China during April and May 1997. A Hull employee was unable to “start up” the equipment, and Huadu refused to accept the equipment. (Berggren Aff. ¶ 19.) Berg and Hull developed a joint plan for making the

necessary modifications to the equipment, and Berg and Hull entered into a new agreement, dated October 8, 1997. (Berggren Aff., Exs. G, H.) This agreement included provisions related to preliminary testing, modification, and final acceptance of the equipment. (Berggren Aff., Ex. H.) In particular, the agreement provided that Berg and Hull were responsible for making modifications to the equipment in order for “final acceptance” to occur before the end of March 1998. (*Id.*)

It became evident, however, that the modification work would not be completed by March 1998, and Huadu agreed to two further extensions of the deadline. (Berggren Aff. ¶ 25-26, Exs. I, K.) Despite efforts to complete the modification work and the extensions of time, Huadu rejected the equipment, allegedly because the equipment failed to satisfy the performance requirements set forth in the Equipment Contract. (Pl.’s Am. Compl. ¶¶ 56-58.) On March 29, 1999, Huadu submitted an arbitration claim against Berg to the Arbitration Institute of the Stockholm Chamber of Commerce. (Berggren Aff., Ex. N (Arbitral Award at 7).) An arbitration tribunal rendered a decision in favor of Huadu and against Berg in December 2000. (*Id.* at 30.)

While the events described above were unfolding, Hull and SPI began negotiations that culminated in a transaction styled as an asset purchase agreement, the closing of which occurred on October 15, 1997. (Partridge Decl. ¶ 7.) Additionally, in October 2000, Berg filed suit in this Court against Hull and SPI.

## **II. STANDARD OF REVIEW**

Because all of the pending motions seek summary judgment or partial summary judgment, the same standard of review is applicable. That is, summary judgment must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When weighing the evidence offered by the parties on a motion for summary judgment, courts must review the evidence and all inferences drawn from that evidence in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Here, Berg’s motion for partial summary judgment and Vicarb’s motion for summary judgment have not been opposed by Hull. Under Federal Rule of Civil Procedure 56(e), a court may grant an unopposed motion for summary judgment only when “appropriate.” The Third Circuit has given guidance regarding the nature of a district court’s review of an unopposed motion for summary judgment:

Where the moving party has the burden of proof on the relevant issues . . . the district court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law. Where the moving party does not have the burden of proof on the relevant issues . . . the district court must determine that the deficiencies in the opponent’s evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law.

*Anchorage Assocs. v. Virgin Islands Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990).

### **III. BERG’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

In its motion for partial summary judgment, Plaintiff Berg asserts that Hull is bound by the findings and determinations of the arbitration proceedings. More specifically, Berg contends that during the arbitration proceedings, Huadu raised various claims against Berg that related exclusively to Hull’s failure to perform as necessary for the timely delivery of properly-functioning freeze drying equipment as set forth in the relevant purchase order. Moreover, Berg requested in writing that Hull

participate in the arbitration proceeding, but Hull declined to take part in the proceedings. Under the doctrine of voucher, Berg argues, Hull is now precluded from relitigating the issues decided by the arbitration tribunal.

**A. Berg's Correspondence to Hull Regarding the Arbitration Proceedings**

Huadu submitted its claim against Berg for arbitration in late March 1999. By letter dated April 21, 1999, Berg notified Hull of the pending arbitration, requesting that Hull “cooperate . . . in defending against Huadu’s claim and asserting an appropriate counterclaim. . . .” (Berggren Aff., Ex. M (Letter from Berggren to Hull of 4/21/99 at SPI-7747).) Berg sent a second letter to Hull nearly two months later, reiterating its request: “Clearly, it is in Hull’s best interests that Huadu’s claims be dismissed or otherwise successfully defended in the first instance. That objective can best be achieved by Hull participating in the Arbitration commenced by Huadu as a respondent along with Berg. . . .” (*Id.* (Letter from Berggren to Hull of 6/15/02 at BC1474).)

Approximately one year later, Berg’s counsel informed Hull that the company was “obliged to participate in the arbitration and defend its equipment” and that Berg would “rely on Hull’s refusal to defend the claimant’s allegations as precluding it from subsequently raising any such defense. . . .” (*Id.* (Letter from McPherson to Hull of 5/24/00).) On October 3, 2000, Berg sent an additional letter, again “request[ing] that [Hull] come in and defend the arbitration proceeding . . . [or] be bound in any action . . . to any determination of fact made in the Arbitration Proceeding common to the two litigations.” (*Id.* (Letter from Soroko to Hull of 10/3/00).)

It is undisputed that Hull did not participate in the arbitration proceedings. On December 7, 2000, a tribunal of the Arbitration Institute rendered its arbitral award in favor Huadu and against

Berg. (Arbitral Award at 21.)

## **B. Voucher Doctrine**

Berg argues that because Hull refused to participate in the arbitration proceedings, and because the claims on which Huadu prevailed at arbitration arose from the equipment assembled by Hull, under the doctrine of voucher,<sup>2</sup> Hull should be held liable to Berg in the instant litigation. Because issues of material fact remain in dispute, I deny Berg's motion.

The Third Circuit has described the doctrine of voucher as follows:

The common law vouching in requirements grew up as a means of providing defendants with notice of impending actions which ultimately might affect them. The point of vouching in was to notify the original vendor that the buyer (in this case, Step-Saver) would seek to hold it liable in indemnity for the defect being tried in the customer suit. Vouching in was also meant to encourage the original vendor, upon whom ultimate liability rests, to bear the costs of litigation.

*Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 651 (3d Cir. 1990). In *Step-Saver*, the Third Circuit also noted that U.C.C. § 2-607 “was intended as a codification of the common law vouching in rules.” *Id.*<sup>3</sup> Berg contends that under either the common law doctrine, U.C.C. § 2-607, or both,

---

<sup>2</sup> “Voucher” or “vouching in” is a term derived from the English common law procedural device of “vouching to warranty.” See 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1441 (2d ed. 1990). Under this procedure, a defendant in a lawsuit had the option of extending an opportunity to a third party to defend the action. See *id.* If, however, the third party failed to accept the offer, the defendant could later commence a second suit against the third party, and “the third party was bound by the judgment in the first action, and defendant only had to prove the attempt to vouch in [the third party].” *Id.* This procedural device, formalized by an order of the English Judicature Act of 1873, eventually became the basis for various forms of third-party practice in the United States federal courts. See *id.*

<sup>3</sup> The parties' failure to meaningfully address what forum's laws apply to the issue of voucher does not affect my decision to deny Berg's motion. Both Pennsylvania and New Jersey have adopted the relevant U.C.C. provision, see 13 PA. CONS. STAT. § 2607(e)(1); N.J. STAT. ANN. § 12A:2-607(5)(a), and the common law principles of voucher do not appear to be state-specific.

it vouched in Hull, and Hull is bound by the results of the arbitration proceedings. Pointing to Berg's correspondence with Hull discussed above, Berg contends that:

[T]here can be no dispute of fact that Berg Chilling gave proper notice to Hull Corporation of the Arbitration Proceeding, that Berg Chilling requested that Hull Corporation defend Berg Chilling and the Hull Equipment in the Arbitration Proceeding, and that Berg Chilling advised Hull Corporation that if Hull Corporation failed to defend Berg Chilling, Hull Corporation would be bound by the results of the Arbitration Proceeding.

(Berg's Mot. for Summ. J. at 16.) Berg, however, has not cited any case law that addresses with specificity what constitutes proper notice under the voucher doctrine. Moreover, a review of the correspondence Berg sent to Hull reveals that Berg has overstated its efforts to vouch in Hull. First, in the various letters, there is no mention of the voucher doctrine or U.C.C. § 2-607. *See Bergren Aff., Ex. M.* Second, "[i]f the [vouchee] exercises the right to defend the [voucher], he assumes the position of one who controls an action brought against another." RESTATEMENT (SECOND) OF JUDGMENTS § 57, note a (1982) (discussing effect on indemnitor of judgment against indemnitee). Here, Berg's correspondence merely asks for Hull's "participation" and "cooperation" in defending "along with" Berg. *See Bergren Aff., Ex. M.* Such language does not establish that Berg, as a matter of law, vouched in Hull to the arbitration proceedings. For both reasons, Berg has not proven, for purposes of summary judgment, that it satisfied the voucher doctrine's notice requirements.

Summary judgment is not warranted for an additional reason. "Where vouching is used but the indemnitor declines to assume the defense of an action, the indemnitor is bound by the result only when its interests have been adequately represented in the original action by the indemnitee. *SCAC Transport (USA), Inc. v. S.S. "Danaos,"* 845 F.2d 1157, 1162 (2d Cir. 1987) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 57 (1982)). Despite conclusory statements to the contrary, Berg has not

provided evidentiary support for its position that it adequately represented Hull's interests in the arbitration proceedings. In fact, there is deposition testimony that calls into question the adequacy of Berg's representation of Hull's interests. *See* Berggren Dep. at 541-42.

In view of the genuine issues of material fact with respect to the notice Berg provided Hull and the adequacy of Berg's representation of Hull's interests in the arbitration proceedings, I am precluded from entering partial summary judgment in favor of Berg.

#### **IV. SPI'S MOTION FOR SUMMARY JUDGMENT**

In 1997, after the equipment had been shipped to Huadu, Hull began negotiating a business transaction with SPI. These negotiations resulted in the parties entering into an "Asset Purchase Agreement" on August 25, 1997. (SPI's App. to Summ. J. Mot., Ex. 10 ("A.P.A.")). Under the terms of this agreement, Hull Corporation agreed to sell, and SPI agreed to buy, "substantially all of [Hull's] assets, properties, rights and businesses used in or related to the conduct" of Hull's customized vacuum drying and freeze drying business. (A.P.A., Recital B at 1.) Additionally, as provided by the agreement, SPI continued many of Hull Corporation's operations through a division named "Hull Company," employing many of the same employees. (Partridge Dep. at 119-21.) Citing these facts, and others, Berg claims that SPI succeeded to the liabilities Hull incurred in connection with the Huadu project. In moving for summary judgment, SPI contends that it cannot be held liable as a matter of law under the terms of the asset purchase agreement, and that there is no factual basis for holding SPI liable under any of the successor liability theories asserted by Berg.

##### **A. Choice of Law**

Berg argues that the issue of successor liability is controlled by New Jersey law, whereas SPI contends that Pennsylvania law governs. Because this is a diversity case, I apply the choice of law principles of Pennsylvania, the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). Pennsylvania courts generally honor the intent of the contracting parties and enforce a contract's choice of law provision. *See Smith v. Commonwealth Nat'l Bank*, 557 A.2d 775, 777 (Pa. Super. 1989). Here, the asset purchase agreement contains a broadly-worded choice of law provision: "This Agreement shall be governed and controlled as to validity, enforcement, interpretation, construction, effect and in all other respects by the internal laws of the State of New Jersey applicable to contracts made in that State." (A.P.A. § 10.6.) In addition, courts have found that contractual choice-of-law provisions determine which forum's laws will apply to issues of successor liability. *See Wheat, First Sec., Inc. v. Green*, 993 F.2d 814, 821 (11th Cir. 1993); *Prison Health Servs. v. Umar*, Civ. A. No. 02-2642, 2002 U.S. Dist. LEXIS 12288, at \*32 n.15 (E.D. Pa. July 2, 2002). *But see Arachnid, Inc. v. Valley Rec. Prods., Inc.*, Civ. A. No. 98-50282, 2001 U.S. Dist. LEXIS 21534, at \*35-37 (D. Ill. Dec. 28, 2001). Accordingly, I apply New Jersey law to determine whether SPI may be liable to Berg as Hull's successor.<sup>4</sup>

---

<sup>4</sup> Even in the absence of the choice of law provision in the contract, Pennsylvania law would not control this action. Pennsylvania employs a "flexible [choice-of-law] rule which permits analysis of the policies and interests underlying the particular issue before the Court." *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 805 (Pa.1964). As the first step in Pennsylvania's choice of law analysis, "the court must look to see whether a false conflict exists." *See LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir. 1996). A false conflict is one where only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law. *See id.* Here, there is only a false conflict; Pennsylvania's interests would not be impaired by the application of New Jersey law. Although Hull is a Pennsylvania corporation with its principle place of business in Pennsylvania (Berg's Am. Compl. ¶ 4), neither Berg nor SPI has its principle place of business in, or is incorporated under the laws of, Pennsylvania (*Id.* ¶¶ 2,6). Because Berg's claims, as they relate to successor liability, are aimed at expanding the scope of the liability of SPI, New Jersey law applies for this reason as well.

## **B. Genuine Issues of Material Fact Surround the Hull/SPI Agreement**

Under New Jersey law, as a general rule, where one company sells or otherwise transfers its assets to another company the latter is not responsible for the debts and liabilities of the transferor. *See Ramirez v. Amsted Indust., Inc.*, 431 A.2d 811, 815 (N.J. 1981). However, there are four common exceptions to this rule, and a purchasing corporation will be held responsible for the debts and liabilities of the selling corporation where: (1) the purchasing corporation expressly or impliedly agreed to assume such debts and liabilities; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape responsibility for such debts and liabilities. *Id.*

Berg contends, *inter alia*, that the deal SPI and Hull entered into, although styled as an asset purchase agreement, should be deemed a de facto merger. In determining whether this exception applies, the factfinder must consider whether stock was part of the purchase price for the assets; whether there was a continuity of business, control or management between the two corporations; and whether the alleged successor corporation assumed the debts of the predecessor corporation. *See Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 73 (3d Cir. 1993). “Not all of these factors need be present for a de facto merger . . . to have occurred.” *Id.*

In analyzing these factors, “[t]he crucial inquiry is whether there was an ‘intent on the part of the contracting parties to effectuate a merger or consolidation rather than a sale of assets.’” *Id.* (quoting *McKee v. Harris-Seybold Co.*, 264 A.2d 98, 104 (N.J. Law Div.1970)). In addition, courts “should determine whether the purchaser holds itself out to the world as the effective continuation

of the seller.” *Bowen Eng’g v. Estate of Reeve*, 799 F. Supp. 467, 488-89 (D.N.J. 1992) (quotation omitted), *aff’d*, 19 F.3d 642 (3d Cir. 1994).

Although there is considerable support for SPI’s contentions that the agreement at issue was in fact an asset purchase, a substantial dispute exists regarding whether the parties’ intended to effectuate a merger rather than an asset transfer. For example, in a letter to Berg, Hull stated: “If Hull’s freeze drying division should be transferred to another entity, Hull’s responsibility will of course be assumed by the successor. Referring to the news release of ‘Discussions’ being held by Hull and SP Industries, Inc., the proposed *merger* will not necessarily take place.” (Berg. App. in Opp. to SPI’s Mot for Summ. J., Ex. K (Letter from L. Hull to Berggren of 9/9/97)(emphasis added).)<sup>5</sup> Around the same time, Hull informed its employees: “The management of Hull Corporation and of SP Industries believe that the *merger* greatly benefits Hull Corporation shareholders as well as SPI shareholders.” (*Id.*, Ex L (Memo. of L. Hull to Hull Employees of 9/3/97) (emphasis added).)

Also supporting Berg’s arguments is evidence that the companies held themselves out as merged companies. An SPI press release stated: “John W. Partridge, President and CEO of SP Industries and Lewis W. Hull, Chairman of the Hull Corporation, announced today that their firms *have entered into a merger agreement . . .*” (*Id.*, Ex L (SPI Press Release of 9/4/97)(emphasis added).) Mr. Partridge explained in his deposition that this press release was an attempt “to convey to the marketplace that we were talking about putting two companies together on an equal basis.”

---

<sup>5</sup> Mr. Bernard Kashmer of SPI was aware of Mr. Lewis Hull’s statement to Berg that Hull’s successor would assume responsibility incurred in connection with the Huadu project, but Mr. Kashmer did not advise Berg that SPI disagreed with this statement. (Kashmer Dep. Vol. 2 at 186-88.)

(Partridge Dep. at 103.) As this evidence indicates, the nature of the agreement Hull and SPI entered has not been established, raising the possibility that SPI succeeded to Hull's liabilities incurred in connection with the Huadu project. Consequently, I find that there are genuine issues of material fact regarding whether the agreement was a de facto merger, and I deny SPI's motion for summary judgment.

## **V. VICARB'S MOTION FOR SUMMARY JUDGMENT**

In its Third Party Complaint, Hull claims that problems with the freeze drying equipment to Huadu were attributable to Vicarb, which shipped Hull component parts that were allegedly defective. Having moved for summary judgment, Vicarb argues that Hull's claims against it fail because Hull's claims are time-barred, and Hull's indemnity claim fails as a matter of law. Vicarb also contends it is entitled to recover the balance owed on the plate coils. For the reasons stated below, I find that Vicarb is entitled to summary judgment against Hull, except with respect to the amount of damages to which Vicarb is entitled on its counterclaim.

### **A. Vicarb's Role in the Huadu Project**

In connection with the Huadu project, Hull ordered a set of plate coils from Vicarb in January 1996. (Hull Corp.'s Third Party Compl. ¶ 12.) Responding to Hull's order, Vicarb manufactured a set of plate coils that Hull found unacceptable. (John Hull Dep. at 58-63.) Vicarb then manufactured a second set of plate coils – it is this set of plate coils that are at issue in this case. (*Id.* at 59.) In early July 1996, on Hull's behalf a Berg representative inspected the plate coils before they were shipped from Vicarb's facility in Ontario, Canada. (Kashmer Dep. at 132-33; Berg's Resp. to

Vicarb's Requests for Admission and Interr. ¶ 1 (6/7/02).) After this inspection, the plate coils were transported to Hull's plant in Hatboro, Pennsylvania. (Hull Corp.'s Third Party Compl. ¶ 16; Fay Dep. at 81-82, 326; John Hull Dep. at 391.) Shortly after the plate coils arrived at Hull's facility, Hull employees incorporated the plate coils into the freeze drying equipment. (Hull Corp.'s Third Party Compl. ¶ 16; Fay Dep. at 81-82; John Hull Dep. at 391.) Berg shipped the freeze drying equipment, with the plate coils incorporated, to Huadu in or about September 1996. (Hull Corp.'s Third Party Compl. ¶ 17.)

## **B. Statute of Limitations**

Under Pennsylvania law,<sup>6</sup> Hull's claims for breach of contract and breach of warranty are subject to the four-year statute of limitations for contract claims arising out of the sale of goods. *See* 13 PA. CONS. STAT. § 2725(a) (2002). Furthermore, such "[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. . . ." 13 PA. CONS. STAT. § 2725(b). In the instant case, it is undisputed that the plate coils arrived at Hull's facility in July 1996. (Hull Corp.'s Third Party Compl. ¶ 16; Fay Dep. at 81-82, 326.) According to his own testimony, John Fay, Hull's chief engineer for the Huadu project, observed that the plate coils did not conform to specifications "within a couple of days after [Hull] received them." (Fay Dep. at 325-26.) Thus, because Hull

---

<sup>6</sup> In its opposition to Vicarb's motion to dismiss, Hull's legal analysis proceeds under Pennsylvania law, and no argument is advanced that the law of any forum other than Pennsylvania applies to Hull's claims against Vicarb.

discovered the alleged defects in July 1996 but did not file suit until March 2001, Hull's claims for breach of contract and breach of warranty are outside of the four-year limitations period.

In opposing Vicarb's motion to dismiss, Hull contended that facts might be proven that would require the invocation of an exception to the general rule that actions for damages arising from contracts for the sale of goods must be filed within four years of the date tender of delivery is made. In particular, Hull argued that the discovery rule or repair doctrine might apply to its claims. After discovery, however, there is no basis in the record for finding under either the discovery rule or the repair doctrine that Hull's claims are not time-barred.

Under the discovery rule, claims do not accrue until the party bringing the claims discover a product's errors or defects. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385-86 & n.5 (3d Cir. 1994).<sup>7</sup> Simply, the record prevents me from accepting any argument that Hull's claims are not time-barred. Within several days of the receipt of the plate coils Hull knew the plate coils did not conform with specifications; as such, the discovery rule would not save Hull's claims.

Similarly, in light of the facts of the case, there is no basis for finding that the repair doctrine tolled the statute of limitations. "Under this doctrine, the statute of limitations will be tolled only where 'evidence reveals that repairs were attempted; representations were made that the repairs would cure the defects; and the plaintiff relied upon such representations.'" *Keller v. Volkswagen of America, Inc.*, 733 A.2d 642, 646 (Pa. Super. 1999) (quoting *Amodeo v. Ryan Homes, Inc.*, 595

---

<sup>7</sup> I note that precedent supports Vicarb's argument that the discovery rule does not apply to a commercial transaction, absent a warranty explicitly extending to future performance of the goods. *See, e.g., Fireston & Parson, Inc. v. Union League of Phila.*, 672 F. Supp. 819, 822 (E.D. Pa.) (finding that U.C.C. precluded application of discovery rule to commercial transaction in question), *aff'd*, 833 F.2d 304 (3d Cir. 1987).

A.2d 1232, 1237 (Pa. Super. 1991). In this case, the record reveals that Hull, not Vicarb, made repairs to the heat coils, and there is an absence of any evidence showing that Vicarb made any representations that it would cure any defects. (Fay Dep. at 84-85.) Consequently, like the discovery rule, the repair doctrine does not apply, and Hull's claims for breach of warranty and breach of contract are time-barred.

### **C. Indemnity**

Count III of Hull's Third-Party Complaint asserts that Hull is entitled to indemnification from Vicarb. Certain courts have found that a purchaser of goods can obtain indemnity from a supplier for damages the purchaser was forced to pay by reason of an alleged breach of warranty, even though the purchaser did not file its indemnification action until after the statute of limitations had run on the underlying cause of action. *See, e.g., Titanium Metals Corp. v. Elkem Mgmt.*, 87 F. Supp. 2d 429, 431-33 (W.D. Pa. 1998); *McDermott v. City of New York*, 406 N.E.2d 460, 461 (1980) ("Indemnification claims generally do not accrue for the purpose of the Statute of Limitations until the party seeking indemnification has made payment to the injured person."). *But see, e.g., Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 217 (Utah 1984) (holding that Uniform Commercial Code § 2-725 bars a separate period of limitation for indemnity claims based on breach of warranty); *PPG Indus., Inc. v. Genson*, 217 S.E.2d 479, 481 (Ga. Ct. App. 1975) (same).

This split in authority apparently reflects a conflict between two competing considerations. On the one hand, the plain language of U.C.C. § 2-725, 13 PA. CON. STAT. § 2725, prohibits any action for breach of warranty commenced more than four years after delivery of the goods. On the other hand, application of this rule would, in some cases, have the arguably unfair result of rendering an intermediate seller of a malfunctioning good liable to a purchaser but time-barred from recovering

from the original manufacturer. *See generally* Paul J. Wilkinson, *An Ind. Run Around the U.C.C.: The Use (or Abuse?) of Indemnity*, 20 Pepp. L. Rev. 1407 (1993).

Under the facts of the instant case, however, there is no genuine conflict between these two considerations. It is well-settled that indemnity is an equitable remedy. *See, e.g., Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997). Furthermore, the decision to impose an equitable remedy requires close attention to the facts of the particular case. *See Oshiver*, 38 F.3d at 1392 (discussing factual inquiry necessary for determining whether equitable tolling is appropriate); *see also Central Wash. Refrigeration, Inc. v. Barbee*, 946 P.2d 760, 764 n.12 (Wash. 1997) (noting, in discussing application of U.C.C.’s statute of limitations, “that indemnity may not be available when equity does not so require”). For this reason, indemnity may be appropriately available in certain cases, such as one involving a party that neither knew of, nor could reasonably have discovered, a product’s defect. *See City of Clayton v. Grumman Emergency Prod., Inc.*, 576 F. Supp. 1122, 1127 (E.D. Mo. 1983). In this regard, Judge Smith’s statement in *Titanium Metals* is significant:

*I am hesitant in the absence of guidance from the courts of Pennsylvania to adopt a rule that would leave an innocent party without any remedy for claims that may be asserted beyond the original statute of limitations, [and] I will follow the line of cases holding that an indemnity claim is separate from an action for breach of warranty, and as such, the claim here accrued when [the underlying liability case against plaintiff was settled].*

87 F. Supp. 2d at 433 (emphasis added). Here, Hull is not an “innocent” party because, unlike the plaintiff in *Titanium Metals*, *id.* at 430, it has taken the position that it discovered nonconformities in the product at issue prior to selling that product to another party. Thus, Vicarb is entitled to summary judgment on Hull’s claim for indemnification.

#### **D. Vicarb’s Counterclaim**

With discovery completed, it is undisputed that Vicarb delivered the plate coils to Hull in July 1996. Hull then welded the plate coils into its freeze drying equipment, and shipped the equipment to Huadu, despite Hull's recognition of alleged nonconformities in the plate coils. Moreover, deposition testimony reveals that Hull accepted the plate coils:

Q. Did Hull accept the second set of plates?

A. The plates arrived, they were taken by Hull, they were used in the system. Did we accept them on the basis of inspection, no. Did we accept them on the basis that they were in hand, yes.

(John Hull Dep. at 391.)

Hull has also acknowledged that it never rejected the plate coils:

Q. Did anyone from Hull reject the second set of coils?

A. No.

(*Id.* at 390.)

Under Pennsylvania law, acceptance of goods can occur in three circumstances, namely when the buyer:

(1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity;

(2) fails to make an effective rejection (section 2602(a)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(3) does any act inconsistent with the ownership of the seller; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

13 PA. CON. STAT. § 2606(a). Hull accepted the plate coils under at least two of the provisions of section 2606. First, because Hull admits that it did not reject the goods, acceptance of the plate coils occurred under section 2606(a)(2). *See Pratt v. Winnebago Industries, Inc.*, 463 F. Supp. 709, 714 (W.D. Pa. 1979) (finding that buyer who received goods had accepted goods after reasonable time

for inspection unless buyer seasonably and unequivocally rejects goods); *see also Koppers Co., Inc. v. Brunswick Corp.*, 303 A.2d. 32, 38 (Pa. Super. Ct. 1973) (“buyer’s right to reject goods must be exercised promptly and unequivocally” (quoting *Comfort Springs Corp. v. Allancraft Furniture Shop*, 67 A. 818, 820 (Pa. Super. Ct. 1949))). Additionally, Hull acted inconsistently with Vicarb’s ownership of the plate coils, further showing Hull’s acceptance of the goods. That is, by incorporating Vicarb’s product in the freeze drying equipment and shipping the equipment to Huadu, Hull’s actions show Hull’s acceptance of the goods under section 2606(a)(3). *See Commonwealth Propane Co. v. Petrosol Int’l, Inc.*, 818 F.2d 522, 527 (6th Cir. 1987) (act of reselling goods “is so inconsistent with the seller’s ownership as to constitute acceptance” under Ohio Uniform Commercial Code).

Furthermore, “[a]cceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. . . .” Because Hull knew of nonconformities when it accepted the plate coils (Fay Dep. at 82-85 (discussing “nonconformities”)), and there is no evidence that Hull assumed these nonconformities would be cured, it is barred from revoking its acceptance. Moreover, because its breach of warranty and breach of contract claims are time-barred, and Hull admits that it has not paid the balance owed for the plate coils (Vicarb’s Summ. J. Mot., Ex. H (Hull’s Answers to Interr. ¶ 4), Vicarb is entitled to summary judgment on its counterclaim with respect to Hull’s liability. *See* 13 Pa. Con. Stat. § 2607(a). However, the evidence of record related to the amount of the balance owed indicates that this amount is contested. Without any evidence establishing the amount of Hull’s liability, or even

an indication of the exact amount Vicarb is seeking to recover, I cannot enter summary judgment with respect to the amount of damages that Vicarb is entitled to on its counterclaim.

## **VI. CONCLUSION**

For the foregoing reasons, I deny Berg's motion for partial summary judgment and SPI's motion for summary judgment. However, I grant Vicarb's motion for summary judgment against Hull on Hull's claims against Vicarb. I also grant in part Vicarb's motion for summary judgment on its counterclaim; Vicarb is entitled to summary judgment with respect to Hull's liability, but not with respect to the amount of damages to which Vicarb is entitled.<sup>8</sup>

An appropriate order follows.

---

<sup>8</sup> The amount of damages to which Vicarb is entitled presents discrete legal and factual issues, making severance of Vicarb's counterclaim appropriate under Federal Rule of Civil Procedure 21.

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

<b>BERG CHILLING SYSTEMS INC.,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>HULL CORPORATION, et al.,</b>	:	<b>NO. 00-5075</b>
<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, this      day of **November, 2002**, upon consideration of Plaintiff Berg Chilling Systems, Inc.'s Motion for Partial Summary Judgment Against Hull Corporation, Defendant SP Industries, Inc.'s Motion for Summary Judgment, Third Party Defendant Alfa Laval Inc.'s Motion for Summary Judgment, and all the responses and replies thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Plaintiff Berg Chilling Systems, Inc.'s Motion for Partial Summary Judgment Against Hull Corporation (Document No. 105) is **DENIED**.
2. Defendant SP Industries Inc.'s Motion for Summary Judgment (Document No. 104) is **DENIED**.
3. Third Party Defendant Alfa Laval Inc.'s Motion for Summary Judgment (Document No. 106) is **GRANTED IN PART AND DENIED IN PART**. Alfa Laval Inc.'s Motion is **GRANTED** to the extent it seeks summary judgment against Hull Corporation on Hull Corporation's claims against Alfa Laval Inc.'s and to the extent it seeks a finding of liability against Hull Corporation on Alfa Laval Inc.'s

counterclaim. Alfa Laval Inc's Motion is **DENIED** with respect to the amount of damages it may recover from Hull Corporation on its counterclaim. On a date for which trial in this matter is scheduled, the Court shall conduct a hearing to assess the amount of damages that Alfa Laval Inc. is entitled to on its counterclaim.

**BY THE COURT:**

---

**Berle M. Schiller, J.**