

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

GLOBAL GROUND SUPPORT, LLC	:	CIVIL ACTION
	:	
v.	:	
	:	
GLAZER ENTERPRISES, INC. t/a	:	NO. 05-4373
ELLIOTT EQUIPMENT CO.	:	
O'NEILL, J.		JANUARY 23, 2005

MEMORANDUM

Plaintiff, Global Ground Support, LLC, filed a praecipe to issue a writ of summons on June 15, 2005 in the Court of Common Pleas for Philadelphia County. Plaintiff subsequently filed a complaint on August 3, 2005 alleging that defendant, Elliott Equipment Co. (alleged to be designated incorrectly as “Glazer Enterprises, Inc., trading as Elliott Equipment Co.”), violated its contractual obligations: (1) by failing to design and manufacture its deicing equipment to withstand the stresses of its normal operation or in accordance with the contractual specifications; (2) by failing to name plaintiff as an insured in its insurance policy as required by contract; and (3) by breaching its express warranty and implied warranty of merchantability and fitness for a particular purpose. Plaintiff also asserts a products liability theory by alleging that defendant: (a) failed to design the deicing equipment to withstand the stresses associated with its normal usage; (b) failed to manufacture the equipment in accordance with specifications outlined in plaintiff’s purchase order; (c) failed to manufacture the boom with the proper welds for such equipment; and (d) failed to apply the welds so that air voids remained inside and weakened the welds. Lastly, plaintiff asserts a claim for contribution and indemnity from defendant for any successful claims against it by Robert Emerson and US Airways. Defendant removed this case to

this Court on August 16, 2005, pursuant to 28 U.S.C. §§ 1441 & 1446, asserting diversity jurisdiction, 28 U.S.C. § 1332. Before me now is defendant's motion to dismiss or, in the alternative, motion for summary judgment, plaintiff's response, defendant's reply, plaintiff's surreply, and defendant's supplemental reply. As stated in my September 22, 2005 Order, I will consider defendant's pending motion as a motion for summary judgment.

#### BACKGROUND

In January 2001 various entities, including Global and Elliott, entered into contracts for the installation of twelve boom assemblies and associated deicing equipment at the Philadelphia International Airport. On January 23, 2001, Global entered into a purchase order agreement with Elliott to purchase fixed base pedestals and boom assemblies which could extend towards various aircraft during deicing activities. Under the contract, Elliott agreed to design and manufacture the pedestals and boom assemblies according to specifications provided by the airport and applicable industry standards. The general contractor of this project, Fluidics, Inc., purchased the deicing equipment from Global, and in turn, the City of Philadelphia purchased the equipment from Fluidics. Fluidics installed the pedestals and boom assemblies and they were operational as of December 2002. The City of Philadelphia accepted the equipment in April 2003.

On February 28, 2005,<sup>1</sup> Robert Emerson, an employee at US Airways, allegedly fell to the ground and sustained personal injuries when one of the boom assemblies collapsed as he was operating one of deicing units on a US Airways Airbus 330. Specifically, the boom sustained a

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<sup>1</sup>Elliott asserts that the date was February 29, 2005. This discrepancy does not create a genuine issue of material fact.

structural failure and collapsed, causing the enclosed cab, containing Emerson, to fall to the ground. Emerson has commenced an action against Global and other entities, including Elliott, alleging that these entities were responsible for his injuries. Additionally, when the boom collapsed, it allegedly fell onto the aircraft causing approximately three million dollars worth of damage to the aircraft. Global alleges that US Airways intends to pursue a claim against Global and others for this damage. Following this incident, the City of Philadelphia and the airport required the deicing equipment to be recertified and, where necessary, repaired.

### STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c) (2004). The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e) (2004).

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material only if the dispute over the facts “might affect the outcome of the suit under the governing law.” Id.

In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts.

Id. However, the nonmoving party may not rest upon the mere allegations or denials of the party's pleading. See Celotex, 477 U.S. at 324. The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, mere suspicions. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

## DISCUSSION

Global generally asserts that Elliott should be responsible for the recertification and repair of the deicing equipment that Global was required to undertake by the City of Philadelphia, any damages that may have been sustained by Emerson and US Airways, and any damages that Global may have sustained as a result of the incident. Elliott refuses to accept responsibility for the failure of the equipment or reimburse Global for its losses

### I. Breach of Contract

#### A. Design and Manufacture of Equipment

In the first count, Global asserts that Elliott breached its contract with Global by failing to provide deicing equipment that was designed and/or manufactured to withstand the normal stresses born by such equipment and manufactured in accordance with the contractual specifications. Elliott argues that each of Global's breach of contract claims are precluded by the North Carolina statute of limitations.

1. Choice of Laws

Initially, I note that there is a conflict of law question as to which state's law applies to Global's contract claims. Where, as here, federal jurisdiction is based on diversity of citizenship, I must apply the choice of law rules of the forum state, here Pennsylvania. St. Paul Fire & Marine Ins. Co. v. Lewis, 935 F.2d 1428, 1431 n. 3 (3d Cir. 1991) citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). "Pennsylvania courts generally honor the intent of the contracting parties and enforce choice of law provisions executed by them." Kruzits v. Okuma Mach. Tool, Inc., 40 F.3d 52, 55 (3d Cir. 1994) citing Smith v. Commonwealth Nat'l Bank, 557 A.2d 775, 777 (Pa. Super. Ct. 1989). The parties have agreed to have the agreement "governed and interpreted in accordance with the laws of the state of North Carolina, irrespective of the place of execution hereof or the location at which any work or services hereunder are performed." Purchase Order Terms and Conditions ¶ 17.1.

2. Statute of Limitations

Under North Carolina law, "the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." Pharmaresearch Corp. v. Mash, 594 S.E.2d 148, 151-52 (N.C. Ct. App. 2004). However, where as here the statute of limitations is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law. Elliott asserts that North Carolina law provides a three year statute of limitations for any action brought "[u]pon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1)." N.C. Gen. Stat. § 1-52 (2006); Pharmaresearch, 594 S.E.2d at 152. "A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and

maintain a suit arises.” Id. quoting Penley v. Penley, 332 S.E.2d 51, 62-63 (N.C. 1985) (“The statute begins to run on the date the promise is broken. The right to institute an action commenced, when defendant broke [its] promise or took action inconsistent with the promise.”). Therefore, in a contract action, “to determine if plaintiff’s lawsuit is barred by the three year statute of limitations, this Court must first determine when the breach occurred which caused the cause of action to accrue.” Id. quoting Pearce Highway Patrol Vol. Pledge Comm., 312 S.E.2d 421, 424 (N.C. 1984) (internal quotations omitted).

With respect to Global’s breach of contract claims--that Elliott failed to design and/or manufacture the deicing equipment to withstand the normal stresses of its usage or according to the contract specifications, that Elliott failed to name Global as an additional insured, and that Elliott breached its express and implied warranties--Elliott argues that any breach of contract occurred on the date that the allegedly defective equipment was delivered. Elliott argues that the statute of limitations began to run on the date that Elliott completed delivery of the deicing equipment, September 1, 2001, and ran out three years later, on September 1, 2004. Because this action was filed in June 2005, Elliott argues that Global’s contract claims are time barred.

Global argues that while North Carolina law governs the instant contract action North Carolina law provides that the statute of limitations period is determined by the law of the state in which the action is commenced, here Pennsylvania. See Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp., 304 S.E.2d 773, 777 (N.C. Ct. App. 1983) (“remedies are governed by the laws of the jurisdiction where the suit is brought. The *lex fori* determines the time within which a cause of action shall be enforced.”) quoting Sayer v. Henderson, 35 S.E.2d 875, 876 (N.C. 1945). Global further argues that the booms and pedestals are “goods” within the meaning of

Uniform Commercial Code, as adopted by Pennsylvania, 13 Pa. Cons. Stat. Ann. § 2101 et seq. (2006). I agree. The booms and pedestals are “things . . . which are movable at the time of identification to the contract for sale.” 13 Pa. Cons. Stat. Ann. § 2105(a); Duffee v. Judson, 380 A.2d 843, 846 (Pa. Super. Ct. 1977) (“Generally, under the UCC, ‘goods’ has a very extensive meaning and embraces every species of property which is not real estate, choses in action, or investment securities or the like.”). I also note that the purchase order terms and conditions refers to the booms and pedestals as “goods.” The UCC, as adopted by Pennsylvania, provides a four year statute of limitations with respect to actions for breach of contract relating to goods. 13 Pa. Cons. Stat. Ann. § 2725(a) (“An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.”).<sup>2</sup> Section 2725 further provides:

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.

13 Pa. Cons. Stat. Ann. § 2725(b).<sup>3</sup> Adopting the completed delivery date as the date of breach,

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<sup>2</sup>The UCC statute of limitations for breach of contract actions is consistent with Pennsylvania’s general statute of limitations for all actions based upon breach of contract. See 42 Pa. Cons. Stat. Ann. § 5525(a); Packer Soc. Hill Travel Agency, Inc. v. Presbyterian Univ. of Pa. Med. Ctr., 635 A.2d 649, 652 (Pa. Super. Ct. 1993).

<sup>3</sup>The UCC principle as to when a cause of action accrues in a breach of contract action is also consistent with Pennsylvania’s general principle as to when a cause of action accrues. See 42 Pa. Con. Stat. Ann. § 5502(a) (“The time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, from the time the cause of action accrued”); Packer, 635 A.2d at 652 (“The statute of limitations begins to run on a claim from the time the cause of action accrues. In general, an action based on contract accrues at the time of breach.”) (internal citations omitted).

Global argues that under the four year statute of limitations for breaches of sales of goods contracts the statute of limitations did not begin to run until September 1, 2001 and did not run out until four years later on September 1, 2005. Thus, Global timely filed its praecipe to issue a writ of summons on June 15, 2005 and complaint on August 3, 2005. Global similarly argues that North Carolina's adoption of the UCC's statute of limitations for "goods" is identical to Pennsylvania's. See N.C. Gen. Stat. Ann. § 25-2-725 (2006). Therefore, irrespective of whether the Pennsylvania or North Carolina UCC four year statute of limitations applies, Global timely filed this action.

Elliott counters that "Pennsylvania courts generally honor the intent of the contracting parties and enforce a choice of law provision in a contract," Maiocco v. Greenway Capital Corp., No. 97-0053, 1998 WL 48557, at \*4 (E.D. Pa. Feb. 2, 1998) citing Smith v. Commonwealth Nat'l Bank, 557 A.2d 775, 777 (Pa. 1989), and will incorporate the statute of limitations into a choice of law provision where the contract contains an express statement of intent. See Maiocco, 1998 WL 48557, at \*4. Elliott argues that the parties expressed an intent to incorporate North Carolina's three years statute of limitations by agreeing to be subject to the jurisdiction of the courts of North Carolina: "Seller [Elliott] hereby agrees to attourn<sup>4</sup> [sic] to the Jurisdiction of the courts in the state of North Carolina, in the event of any disputes or claims whatsoever arising hereunder or as a result of any work or services performed pursuant to this Agreement." Purchase Order Terms and Conditions ¶ 17.2. I disagree. This language does not demonstrate an

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<sup>4</sup>Black's Law Dictionary defines "attorn" to mean "[t]o turn over; to transfer to another money or goods; to assign to some particular use or service. To consent to the transfer of a rent or reversion. To agree to become tenant to one as owner or landlord of an estate previously held of another, or to agree to recognize a new owner of a property or estate and promise payment of rent to him." Black's Law Dictionary 128 (6th ed. 1990).

intent to incorporate North Carolina's three year statute of limitations for breaches of contract because it does not expressly reference N.C. Gen. Stat. § 1-52 or a three year limitations period. See Maiocco, 1998 WL 48557, at \*4 (holding that the Court will not apply a procedural statute of limitations different from that reached via a substantive choice of law analysis because the party seeking to incorporate the different statute could not produce any evidence, beyond the general language of the choice of law provision, that the parties intended to incorporate that different statute of limitations).<sup>5</sup> The statute of limitations does not bar Global's breach of contract claims.

Elliott's summary judgment motion with respect to Global's claim that Elliott breached its contract with Global by failing to provide deicing equipment that was designed and/or manufactured to withstand the normal stresses born by such equipment and manufactured in

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<sup>5</sup>With respect to this jurisdictional contract language, Elliott also argues:

Since the parties expressly agreed that the forum jurisdiction would be North Carolina, this Court must apply the North Carolina statute of limitations to this matter. Plaintiff should not be able to avail itself of whatever statute of limitations is most favorable to it when it originally agreed that any suit would be brought in the State of North Carolina, thus imposing the North Carolina statute of limitations. To hold otherwise would make paragraph 17.2 of the Contract superfluous and without effect.

Elliott further argues in a footnote:

Pursuant to the plain terms of the contract that Plaintiff drafted, Plaintiff should have commenced the within action in North Carolina. Plaintiff has not offered any explanation for why it did not commence this action in North Carolina. Therefore, it is presumed that Plaintiff forum shopped and filed in Pennsylvania, presumably to try to take advantage of Pennsylvania's longer statute of limitations on contract actions.

Elliott misreads Paragraph 17.2. This paragraph does not require the parties to adjudicate claims arising out of this contract in North Carolina; it merely subjects each party to the jurisdiction of North Carolina should a party choose to file its claims in that state.

accordance with the contractual specifications will be denied.

B. Failure to Name Global as Insured

In the second count, Global asserts that Elliott breached its contract with Global by failing to identify and/or name Global as a joint or additional insured under its insurance policy as required by contract. “In diversity cases . . . state substantive law controls the construction of a contract.” Cooper Labs., Inc. v. Int’l Surplus Lines Ins. Co., 802 F.2d 667, 672 (3d Cir. 1986).

As discussed above, the contract at issue is governed by North Carolina law.

The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made, and to do this consideration must be given to the purpose to be accomplished, the subject-matter of the contract, and the situation of the parties. The intention of the parties is to be gathered from the entire instrument and not from detached portions. An excerpt from a contract must be interpreted in context with the rest of the agreement. When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit. It is the province of the courts to construe and not to make contracts for the parties. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense. A court cannot grant relief from a contract merely because it is a hard one.

Weyerhaeuser Co. v. Carolina Power & Light Co., 127 S.E.2d 539, 540 (N.C. 1962) (internal citations omitted); Mayo v. N.C. State Univ., 608 S.E.2d 116, 120 (N.C. Ct. App. 2005). Both parties assert and I agree that the language of this portion of the contract is clear and unambiguous. I therefore turn to the language of the contract.<sup>6</sup>

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<sup>6</sup>I find it difficult to rely on the language of the Purchase Order Terms and Conditions as a true contract or as the expression of the parties intent for four reasons: (1) the “contract” is not signed by the parties or, at least, neither party has submitted a copy of the signature page; (2) the “contract” is labeled as “Annex E” or, at least, neither party has submitted the main contract to which Annex E is attached; (3) the “contract” is written in many different fonts and type sizes; and (4) the “contract” is not in correct page or paragraph order. However, because neither party disputes its validity or raises any of these concerns, I will not address them here.

Paragraph 8.3 provides: “Seller [Elliott] shall furnish to GGS [Global] certificates of insurance showing that the contractual obligations contained herein are covered by Seller’s insurance with respect to liability arising therefrom. GGS shall be named as a joint or additional insured under Seller’s policies of insurance.” Purchase Order Terms and Conditions ¶ 8.3. It is therefore clear that Elliott was required to provide Global with certificates of insurance showing that its contractual obligations to Global were covered by its insurance policy. However, a question remains as to which contractual obligations do the words “contractual obligations contained herein” and “liability arising therefrom” refer.

Elliott focuses on the words “contractual obligations contained herein” and argues that its insurance obligations only extended to liability arising from the contractual obligations listed in Section “8. Indemnification and Insurance,” generally, and Paragraph 8.1, specifically.

Paragraph 8.1 provides:

In the event Seller [Elliott] is required to enter premises owned, leased, occupied by or under the control of GGS [Global] during the performance of services ordered hereunder, or during delivery or installation of the Goods, parts thereof, materials or other goods herein contemplated, or during the performance of services otherwise required to be furnished by Seller hereunder, Seller shall indemnify and hold harmless GGS, its directors, officers and employees from any loss, cost, damage, expense or liability by reason of property damage or bodily injury or whatsoever nature or kind arising out of, as a result of, or in connection with the performance of such services and/or installation occasioned by Seller’s acts or omissions or the acts or omissions of its agents, employees, subcontractors or lower tier subcontractors while on the premises of GGS.

Purchase Order Terms and Conditions ¶ 8.1. Elliott therefore argues that Paragraph 8.1 limits the scope of its insurance coverage to its delivery and installation of the goods. In other words,

Elliott argues that the plain language of the contract only required it to provide coverage for Global regarding claims arising during its delivery and installation of the deicing equipment and while Elliott was on site at the airport.<sup>7</sup>

Global focuses on the words “liability arising therefrom” and argues that Elliott’s contractual obligations broadly include all liabilities arising from the subject matter of the contract. Global argues that the language limiting Elliott’s obligation to indemnify Global during the period of delivery and installation in Paragraph 8.1 does not limit its obligations to list Global as an additional insured under Paragraph 8.3 of the contract. In other words, Global argues that Elliott’s obligations under Paragraph 8.3 are separate and distinct from those under Paragraph 8.1 and refer to all liabilities that may arise under the contract. Global interprets the required insurance coverage to include all liability which could have arisen out of the subject matter of the contract, as typically provided in a completed operation coverage provision.

The plain language of the contract supports Elliott’s argument that it did not have any insurance coverage or indemnification obligations once the delivery and installation of the deicing equipment was completed. As stated above, Paragraph 8.3 provides: “Seller [Elliott] shall furnish to GGS [Global] certificates of insurance showing that the contractual obligations contained herein are covered by Seller’s insurance with respect to liability arising therefrom.

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<sup>7</sup>In support of this argument, Elliott attaches a copy of a certificate of liability insurance issued by Columbia Casualty Co. and Fireman’s Fund Insurance Co., naming Elliott as the insured and listing Global as the additional insured to demonstrate that Elliott in fact maintained liability insurance to cover potential liabilities that may have occurred during the course of the equipment’s delivery and installation. However, I note that the certificate of insurance expires on May 1, 2001, well before Elliott completed delivery of the deicing equipment, on September 1, 2001. Therefore, it is possible that Elliott breached its contract terms under its own construction of the contract. However, because neither party has raised this issue, I will not discuss it here.

GGs shall be named as a joint or additional insured under Seller's policies of insurance."

Purchase Order Terms and Conditions ¶ 8.3. The language "liability arising therefrom" refers to liabilities arising from the "contractual obligations contained herein." The parties' use of the words "contractual obligations contained herein" at most refers to the liabilities discussed in the whole contract and most likely only refers to the liabilities discussed in Paragraph 8.1. There are two contractual provisions which contain language to suggest that the parties foresaw liability external to the contract to which Global would be exposed and for which Elliott would provide insurance coverage: Section "8. Indemnification and Insurance" and Section "12. Patent Indemnity."

Paragraph 8.1 only requires Elliott to indemnify and hold harmless Global for any liabilities arising out of the delivery and installation of the booms and pedestals and during such delivery and installation. Paragraph 12.1 requires Elliott to defend, indemnify, and hold harmless Global for any patent, trademark, or copyright infringement in connection with the deicing equipment. Neither of these provisions suggest that Elliott had a duty to provide insurance coverage for any liability resulting from the operation of the booms and pedestals beyond the period and activity of their delivery and installation. The contract does not contain any completed operation coverage provision or other similar language to suggest that Elliott had a contractual obligation to provide insurance coverage for Global during the full operational lifetime of the booms and pedestals. I therefore hold that Elliott was required to obtain insurance naming Global as an additional insured only during the time period that Elliott was delivering and installing the deicing equipment and only for liabilities arising out of those activities.

Elliott's summary judgment motion with respect to Global's claim that Elliott breached its contract with Global by failing to identify and/or name Global as a joint or additional insured under its insurance policy as required by contract will be granted.

C. Breach of Warranty

1. Express Warranty

In the third count, Global asserts that Elliott breached a five year express warranty on the deicing equipment. Elliott argues the contract only provides for a twelve month warranty of the deicing equipment, which expired on September 1, 2002. The UCC, as adopted by North Carolina law, provides that express warranties by the seller may be created in one of three ways:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

N.C. Gen. Stat. Ann. § 25-2-313(1); Sharrard, McGee & Co., P.A. v. Suz's Software, Inc., 396

S.E.2d 815, 818 (N.C. Ct. App. 1990). In Section "7. Warranty," Elliott specifically warranted:

each Item, parts thereof, spare parts and repaired or replacement parts manufactured or modified to Seller's [Elliott's] detailed design and specifications, be free from defects in material, workmanship, process of manufacture and design and be suitable for the intended purpose.

Purchase Order Terms and Conditions ¶ 7.1. However, in Paragraph 7.2, Elliott "agree[d] that its warranty, with respect to defects in material, workmanship, process of manufacture and design shall extend as outlined and will be warranted for a period of not less than 12 months." Purchase Order Terms and Conditions ¶ 7.2.

Global argues that the contractual language “no less than 12 months” set a minimum time period for a nonspecific length of the warranty and that Elliott warranted its equipment for a total of five years in a separate warranty. As discussed above, the role of the Court in contract interpretation is to ascertain the intention of the parties at the moment of its execution and a contract that is plain and unambiguous on its face will be interpreted as a matter of law. Cleland v. Children’s Home, Inc., 306 S.E.2d 587, 589 (N.C. Ct. App. 1983).

If an agreement is ambiguous, on the other hand, and the intention of the parties unclear, interpretation of the contract is for the jury. If the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court.

Id. (internal citations and quotations omitted); Mayo, 608 S.E.2d at 120. Global argues that the unspecified warranty period creates an ambiguity that requires the Court to review extrinsic evidence. Elliott argues that the contract is not ambiguous because the contractual provisions limits the contract terms to the language of the contract itself. In support of this argument, Elliott cites Paragraph 15.1 of the contract which states:

It is accepted that this Agreement, with the respected Annex(es) attached hereto embodies the entire agreement of the parties hereto with regard to the matters dealt with herein and that no misunderstandings or agreements written or otherwise exist between the parties, except as herein expressly set out.

Purchase Order Terms and Conditions ¶ 15.1. Paragraph 15.2 further states that “[n]o change or modification to this Agreement, or Annex(es) shall be valid unless in writing and signed on behalf of each party hereto by their duly authorized representatives.” Purchase Order Terms and Conditions ¶ 15.2. Therefore, because there is no provision in the contract that extends the warranty beyond twelve months Elliott argues that its warranty obligations ceased after one year after delivery of the equipment, on September 1, 2002. However, I find the language providing

that the warranty will extend “for a period of no less than 12 months” to be ambiguous because it does not set a definite time period for the length of the warranty. This language merely sets a minimum time period for an as yet undefined length of the warranty. I will therefore review Global’s proffered extrinsic evidence.

Global asserts that Elliott provided a five year warranty with respect to structural components of the equipment via a separate warranty document. This warranty states, in relevant part:

Elliott Equipment Company hereby warrants all equipment manufactured by Elliott Equipment Company to be free from defects in material and workmanship at the time of shipment from the Elliott Equipment Company plant. Elliott Equipment Company will replace at its plant, any equipment which shall, within TWELVE (12) MONTHS after delivery to the original customer from Elliott Equipment Company, be returned to Elliott Equipment Company’s plant and be found by Elliott Equipment Company to have been defective at the time of original shipment from Elliott Equipment Company.

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The following structural components have a FIVE (5) YEAR parts only warranty after date of shipment from Elliott Equipment Company: Subframe, Turret and Structural Components of all steel booms. The FIVE (5) YEAR warranty requires an annual service inspection by an Elliott Equipment Company distributor and all replacement parts to be original equipment parts from Elliott Equipment Company. The above listed components shall have a three (3) year parts only warranty if the annual service inspection is performed by an approved entity other than an authorized Elliott Equipment Company distributor. All replacement parts are to be original equipment parts from Elliott Equipment Company. (Warranty specifically excludes seals, gaskets, hydraulic components and exterior coatings.)

Warranty ¶ 1 & 3. Global argues that the five year parts only warranty operates to cover replacement of the structural components of the booms and that Elliott failed to honor this warranty by not inspecting the booms and make repairs to the remaining booms at the airport. Elliott argues that this warranty language cannot form the basis of Global’s breach of express warranty claim because the five year warranty is not signed by either of the parties and the five

year warranty does not refer to the contract and the contract does not reference the warranty.<sup>8</sup>

Elliott further argues that the twelve month all equipment warranty is consistent with the twelve month warranty provision in the contract. I find that this warranty document creates a genuine issue of material fact as to whether Elliott had warranted the structural components for a period of five years.

Elliott similarly argues that the UCC's parol evidence rule, as adopted by North Carolina, bars the admission of any contemporaneous oral agreements or any prior agreements which contradict the terms of the parties' final written agreement. N.C. Gen. Stat. § 25-2-202; Mayo, 608 S.E.2d at 121. The parol evidence rule "prohibits the admission of parol evidence to vary, add to, or contradict a written instrument intended to be the final integration of the transaction." Mayo, 608 S.E.2d at 121 (internal quotations omitted). However, "[t]he rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract, or when a contract is ambiguous, parol evidence is admissible to show and make certain the intention behind the contract." Id. As discussed above, I find that the language providing that the warranty will extend "for a period of no less than 12 months" to be ambiguous. Such ambiguity allows a review of Global's parol evidence and precludes summary judgment on this claim.

Lastly, Elliott asserts that the five year warranty language is inapplicable because Global fails to allege, and cannot allege, that the deicing equipment was annually inspected by Elliott or that Elliott approved Global to conduct an annual service inspection on its behalf. Global disputes this claim and argues that pursuant to the Preferred Supplier Agreement, Distribution

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<sup>8</sup>Elliott also asserts that the five year warranty may stem from Global's other business dealings with Elliott, separate and apart from the fixed pedestal deicer booms at the airport.

Agreement, and Jim Glazer's representations Global was an Elliott approved distributor of all Elliott products and specifically designated as a distributor of the fixed based pedestal booms manufactured by Elliott.<sup>9</sup> Global further asserts that it performed the annual inspections of the booms each year after they were installed. Elliott responds that the Preferred Supplier Agreement does not designate Global as a distributor of the booms, but rather designates Elliott as the preferred supplier of Global. Elliott thus argues that the five year warranty period does not apply to the deicing equipment. I find there is a genuine issue of material fact as to whether Global was an Elliott approved distributor and therefore whether the five year warranty applies to the allegedly defective parts of the deicing equipment.

Elliott's motion for summary judgment with respect to Global's claim that Elliott breached a five year express warranty on the deicing equipment will be denied.

## 2. Implied Warranty

Global also appears to assert a claim for breach of implied warranties of merchantability and fitness. Elliott argues that it did not make any implied warranties to Global. Under the UCC, as adopted by North Carolina:

a plaintiff must prove, first, that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result.

Cockerham v. Ward, 262 S.E.2d 651, 658 (N.C. Ct. App. 1980); N.C. Gen. Stat. Ann. §

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<sup>9</sup>Elliott similarly argues that the proffered Preferred Supplier Agreement cannot support Global's breach of warranty claim because the Preferred Supplier Agreement is extrinsic to the contract at issue and does not reference any warranties. In support of this argument, Elliott cites Paragraph 1.4 of the contract, which states: "In the event of conflict between the provisions of the Agreement or any other document referred to herein, the provisions of the Agreement shall prevail." Purchase Order Terms and Conditions ¶ 1.4.

25-2-314. Moreover, “[t]he burden is upon the purchaser to establish a breach by the seller of the warranty of merchantability by showing that a defect existed at the time of the sale.” Id. Global does not present any evidence to suggest that the equipment was subject to an implied warranty of merchantability in the contract. Rather, Global appears to rely on the five year warranty to support its implied warranty claims. However, this warranty expressly states in the eighth paragraph:

DISCLAIMER: THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND IS ALSO IN LIEU OF ANY OTHER OBLIGATIONS ON THE PART OF ELLIOTT EQUIPMENT COMPANY.

Warranty ¶8. The UCC, as adopted by North Carolina, provides that “[r]emedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy.” N.C. Gen. Stat. Ann. 25-2-316(4); Byrd Motor Lines, 304 S.E.2d at 776. Therefore, this disclaimer is sufficient under North Carolina law to limit Global’s breach of limited warranty claims.

Elliott’s summary judgment motion with respect to Global’s claim of breach of implied warranties of merchantability and fitness will be granted.

## II. Products Liability

In the fourth count, Global asserts that Elliott failed to design the deicing equipment to withstand the stresses associated with its normal usage, to manufacture the equipment in accordance with specifications outlined in Global’s purchase order, to manufacture the boom with the proper welds for such equipment, and to apply the welds so that air voids did not remain inside and weaken the welds. North Carolina’s product liability law provides that one may

institute a claim for products liability if he or she has suffered “personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product.” N.C. Gen. Stat. Ann. § 99B-1(3); Moore v. Coachmen Indus., Inc., 499 S.E.2d 772, 777 (N.C. Ct. App. 1998). “A products liability plaintiff may base the claim on various causes of action, including negligence (negligent design, manufacture, assembly, or failure to provide adequate warnings) and breach of warranty.” Moore, 499 S.E.2d at 777. North Carolina courts have not adopted the doctrine of strict liability in products liability actions. Fowler v. Gen. Elec. Co., 252 S.E.2d 862, 845 (N.C. Ct. App. 1979). Global appears to assert a products liability claim under a theory of negligence.

A products liability claim grounded in negligence requires a plaintiff to prove: “(1) the product was defective at the time it left the control of the defendant, (2) the defect was the result of defendant’s negligence, and (3) the defect proximately caused plaintiff damage.” Red Hill Hosiery Mill, Inc. v. MagneTek, Inc., 530 S.E.2d 321, 326 (N.C. Ct. App. 2000). Under such a claim, “a manufacturer has the duty to use reasonable care throughout the manufacturing process, including making sure the product is free of any potentially dangerous defect in manufacturing or design.” Id.; see also Cockerham, 262 S.E.2d at 654 (“The general rule concerning manufacturer negligence is that the manufacturer may be held liable for which it was made if, in its manufacture, the manufacturer has failed to exercise due care in its manufacture, failing to recognize, when he should have, that, if negligently manufactured, the product’s proper use would involve an unreasonable risk of harm to those using it for the purpose it was

manufactured.”). Therefore, “[i]n an action to recover for personal injuries resulting from manufacturer’s negligence, plaintiff must present evidence which tends to show that the product manufactured was defective at the time it left the defendant-manufacturer’s plant, and that the defendant-manufacturer was negligent in its design of the product, in its selection of materials, in its assembly process, or in inspection of the product.” Sutton v. Major Prods. Co., 372 S.E.2d 897, 898 (N.C. Ct. App. 1988).<sup>10</sup>

Elliott argues that Global has failed to provide any evidence to show: (a) that any product manufactured by Elliott was defective at the time the equipment left Elliott’s plant between June and September of 2001; (b) that Elliott was negligent in the design of the equipment, selection of materials, assembly process, or installation activities; (c) that the equipment did not comply with the contractual specifications. However, a manufacturer’s negligence may be inferred from evidence of an actual defect in the product and “a product defect may be inferred from evidence of the product’s malfunction, if there is evidence the product had been put to its ordinary use.” Red Hill Hosiery, 530 S.E.2d at 326. Elliott does not dispute that the boom collapsed or assert that the boom was used improperly. It can therefore be inferred and there remains a genuine issue of material fact as to whether the product was defective. Elliott’s motion for summary judgment with respect to Global’s products liability claim will be denied.

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<sup>10</sup>A products liability claim grounded in warranty requires the plaintiff to prove: “(1) the defendant warranted the product (express or implied) to plaintiff, (2) there was a breach of that warranty in that the product was defective at the time it left the control of the defendant, and (3) the defect proximately caused plaintiff damage.” Red Hill Hosiery, 530 S.E.2d at 326.

### III. Contribution and Indemnity

In the fifth count, Global asserts that Elliott is responsible for any claims against it asserted by Robert Emerson or US Airways. Elliott argues that such claims are premature because neither Emerson nor US Airways has obtained a judgment against Global. Claims for indemnity and contribution are premature where no judgment for damages has been rendered. Empresa Lineas Maritimas Argentinas S.A. v. United States, 730 F.2d 153, 158 (4th Cir. 1984).

With respect to Global's claim for indemnity, "there is no right to sue for indemnity until after the judgment is paid or satisfied by settlement." Ingram v. Nationwide Mut. Ins. Co., 129 S.E.2d 222, 226 (N.C. 1963). With respect to Global's claim for contributions, the Uniform Contribution Among Tortfeasors Act, as adopted by North Carolina, provides that "[t]he right to contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability." N.C. Gen. Stat. Ann. § 1B-1(b); Sterling v. Gil Soucy Trucking, Ltd., 552 S.E.2d 674, 679-80 (N.C. Ct. App. 2001). Thus, "in order to seek contribution, a joint tort-feasor must show it has paid more than its pro-rata share." Sterling, 552 S.E.2d at 679-80. Because Global has not paid any damages to Emerson or US Airways, it has suffered no harm and the issue of contribution and indemnity is not ripe for resolution.

In an attempt to avoid this conclusion, Global argues that, notwithstanding the title "Count V - Contribution and Indemnity" in its complaint, it is not seeking indemnity or contribution from Elliott but rather a declaratory judgment that Elliott is responsible for any damages rendered in the prospective claims brought by Emerson and US Airways against Global. However, Count V can be read only as seeking contribution and indemnity from Elliott for any of its liabilities to Emerson and US Airways.

Even if Count V were recharacterized as a declaratory judgment claim, I would exercise my discretion to stay the declaratory judgment aspect of this action pending resolution of Emerson's action against Global and any action filed by US Airways against Global. While state law is applied to Global's underlying substantive claims, a declaratory judgment action is procedural in nature and properly controlled by federal procedural law in federal court.

Nationwide Mut. Fire Ins. Co. v. Salkin, 163 F. Supp. 2d 512, 515 (E.D. Pa. 2001); Fischer & Porter Co. v. Moorco Int'l Inc., 869 F. Supp. 323, 326 (E.D. Pa. 1994). The federal Declaratory Judgment Act provides, in relevant part:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a) (2006). Emerson has filed an action against both Elliott and Global, inter alia, with respect to this incident in the Philadelphia Court of Common Pleas. In such circumstances, the Supreme Court has cautioned:

Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942). Where a parallel action is pending in a state court, a district court's decision to entertain a declaratory action is discretionary and district courts are under no compulsion to exercise it. Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995) ("Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close."). A district court

has greater discretion under the Declaratory Judgment Act than under traditional abstention doctrines. Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1223-24 (3d Cir. 1989).

The Supreme Court has advised that in exercising this discretion a district court should: (i) “ascertain whether the questions or controversy between the parties to the federal suit . . . can better be settled in the proceeding pending in the state court”; (ii) assess “the scope of the pending state proceeding and the nature of the defenses open there”; and (iii) evaluate “whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, [and] whether such parties are amenable to process in that proceeding, etc.” Brillhart, 316 U.S. at 495. The Court of Appeals has suggested that these considerations counsel: (a) a general policy of restraint when the same issues are pending in a state court; (b) avoidance of duplicative litigation; and (c) a state’s interest in determining issues of its own state law. State Auto Ins. Co. v. Summy, 234 F.3d 131, 134-35 (3d Cir. 2000). The Court of Appeals has identified four additional factors to consider when deciding whether to exercise jurisdiction over a declaratory judgment action: “(1) the likelihood that the declaration will resolve the uncertainty of obligation that gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in a settlement of the uncertainty of obligation; and (4) the availability and relative convenience of other remedies.” Terra Nova, 887 F.2d at 1224.

This case involves questions of state law only. Jurisdiction in this case is based exclusively on diversity of citizenship. There is no federal interest in this action. By contrast, the state court has an important interest in deciding issues of its own state law. Also, the same legal claims and factual issues lie at the heart of Emerson’s state court action. Emerson asserts essentially the same claims against Global and Elliott, along with a number of other claims

against the City of Philadelphia and Fluidics for injuries arising out of the same incident. See Summy, 234 F.3d at 135 (holding that a federal court should decline to exercise its discretionary jurisdiction “when doing so would promote judicial economy by avoiding duplicative and piecemeal litigation.”). Although it appears that US Airways has not yet filed suit against Global or Elliott, I would decline to indulge in such gratuitous interference with Emerson’s state court proceeding. Moreover, Emerson and US Airways are not parties to the instant action and neither Global nor Elliott has made any effort to join them. By contrast, Emerson, Global, and Elliott--but not US Airways--are all parties to the state court action. “[W]here the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy.” Wilton, 515 U.S. at 288 n. 2.

An appropriate order follows.

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

GLOBAL GROUND SUPPORT, LLC	:	CIVIL ACTION
	:	
v.	:	
	:	
GLAZER ENTERPRISES, INC. t/a	:	NO. 05-4373
ELLIOTT EQUIPMENT CO.	:	

ORDER

AND NOW, this 23th day of January, upon consideration of defendant's motion to dismiss or, in the alternative, motion for summary judgment, plaintiff's response, defendant's reply, plaintiff's surreply, and defendant's supplemental reply, and for the reasons set forth in the accompanying memorandum, it is ORDERED as follows:

1. Defendant's motion for summary judgment with respect to plaintiff's claim that defendant breached its contract with plaintiff by failing to provide deicing equipment that was designed and/or manufactured to withstand the normal stresses born by such equipment and manufactured in accordance with the contractual specifications is DENIED;
2. Defendant's motion for summary judgment with respect to plaintiff's claim that defendant breached a five year express warranty on the deicing equipment is DENIED;
3. Defendant's motion for summary judgment with respect to plaintiff's products liability claim is DENIED.

4. Defendant's motion for summary judgment with respect to all other claims is GRANTED and judgment is entered in favor defendant, Elliott Equipment Co., and against plaintiff, Global Ground Support, LLC, with respect to those claims.

s/ Thomas N. O'Neill, Jr. \_\_\_\_\_  
THOMAS N. O'NEILL, JR., J.