

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

PHILIPS BROTHERS ELECTRICAL CONTRACTORS, INC.,	:	CIVIL ACTION
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE SOLOMON CORPORATION,	:	
	:	
Defendant.	:	NO. 96-694

MEMORANDUM - ORDER

AND NOW, this 30th day of December, upon consideration of the cross motions for summary judgment by plaintiff Philips Brothers Electrical Contractors, Inc. (“Philips Brothers”) (Document No. 14) and defendant The Solomon Corporation (“Solomon”) (Document No.13), and the responses thereto (Document Nos. 16 and 17), and upon review of the pleadings, depositions, affidavit, and discovery of record, and having found and concluded in determining that the motions will be denied that:

1. PECO Energy Company (“PECO”), the public electric utility in Philadelphia, determines the rate it charges commercial users of electricity for eight months of the year based on a ratchet charge. The ratchet charge is determined by a commercial customer’s highest usage on any particular day during the summer months. Thus, a day in the summer in which a commercial consumer uses a high level of electricity can impact the rate it has to pay for electricity during the off-summer months.

In 1995, Philips Brothers contracted with the City of Philadelphia to install a peak shaving operation at Veterans Stadium. The value of a peak shaving operation is that it reduces the ratchet charge assessed against the consumer by reducing the energy it purchases from PECO during the peak summer months. Philips Brothers agreed to install generators, a transformer, and other electrical equipment so that the City of Philadelphia could generate some of the energy needed for activities in Veterans Stadium, particularly Philadelphia Phillies night baseball games, instead of buying all of its electricity from PECO.

As a part of the contract between Philips Brothers and the City of Philadelphia, Philips Brothers agreed to accept responsibility for any excess electricity charges incurred by the City of Philadelphia due to a failure in the peak shaving operation. (O'Connell dep. Ex. 12 at ¶ 4.4.1);

2. After starting the peak shaving operation with a rented transformer and generators in June of 1995, Philips Brothers decided to purchase the equipment necessary for the Veterans Stadium project. When Philips Brothers solicited bids from various suppliers, Solomon sent a quote to Philips Brothers with the price of a transformer and the statement "Warranty: 12 months." (Pl.'s Complaint Ex. A). Philips Brothers and Solomon did not discuss the terms or limitations of the warranty. (Kroeker dep. at 28-29). Philips Brothers decided to purchase a reconditioned transformer from Solomon;

3. On July 12, 1995, a few hours before a Phillies game, Philips Brothers installed the transformer at Veterans Stadium. The transformer failed to operate when Philips Brothers' employees attempted to energize it. Because the peak shaving operation did not work that night, the City of Philadelphia purchased electricity from PECO which exceeded the demand level allowed to take advantage of the lower electricity rate. As a result, the City of Philadelphia incurred excess electricity charges of \$97,929.62, which the City of Philadelphia withheld from the price it paid Philips Brothers under their contract. (O'Connell dep. at 92, 130).

Soon after the transformer failure, Solomon provided Philips Brothers with a temporary replacement transformer and repaired the faulty transformer. Philips Brothers has not paid Solomon for this equipment. Ken Puetz ("Puetz"), Solomon's engineering manager, determined that the transformer which Solomon sold to Philips Brothers failed because water had leaked into it before Solomon acquired it and the reconditioning process performed by Solomon did not fix the problem. (Puetz dep. at 36-38);

4. Philips Brothers filed a complaint in this Court against Solomon alleging claims for breach of warranty and breach of contract. Solomon filed a counterclaim against Philips Brothers for payment for the transformer it repaired and the temporary replacement transformer it provided to Philips Brothers. In addition to the \$97,929.62 which the City of Philadelphia withheld from it, Philips Brothers claims it incurred damages of \$1,350.00 for removal of the defective transformer, \$340.00 to unload the transformer at Philips Brothers' location, and \$1,835.00 to install the temporary unit which Solomon provided. (Philips Aff. ¶ 2). Philips Brothers claims that the value of the repaired transformer is \$14,435.00 and the value of the temporary transformer is \$7,500.00. (Philips Aff. ¶ 3). Philips Brothers claims it is entitled under a theory of recoupment to keep the two transformers and apply

their value toward the damages owed to them by Solomon;

5. Solomon presents three arguments in its motion for summary judgment: (1) excess electrical charges are not recoverable as consequential damages under Pennsylvania law; (2) even if such damages were recoverable, the standard in the transformer industry is such that a seller is not liable to pay excess electricity charges; thus, these damages are not foreseeable; and (3) Philips Brothers did not tell Solomon it had assumed liability for such charges with the City of Philadelphia; thus, the charges were not foreseeable nor specifically bargained for by the parties. To support its second argument, Solomon contends that it is entitled to judgment as a matter of law because John Philips, president of Philips Brothers, acknowledged in his deposition that it is the industry standard that suppliers of transformers are not responsible for consequential damages. In support of its third argument, Solomon claims that assumption of liability for excess electrical charges is unusual, and John Philips could not recall in his deposition any other contract under which his company had to pay for these charges. In addition, Solomon seeks summary judgment on its counterclaim that Philips Brothers owes Solomon for the two transformers it provided to Philips Brothers;

6. Philips Brothers argues in its motion for summary judgment and its response to Solomon's motion that the excess electricity charges were foreseeable as a matter of law. Philips Brothers contends that the assumption of liability for excess electricity charges is not unusual, and it points out that Solomon paid consequential damages to buyers in the past arising from the failure of its equipment. Further, Philips Brothers contends that Solomon proffered insufficient evidence to establish that the industry standard is such that sellers of transformers are not liable for excess electricity charges;

7. This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1332, as the parties are diverse and the amount in controversy exceeds the jurisdictional requirement;

8. Rule 56(c) of the Federal Rules of Civil Procedure provides that "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" then a motion for summary judgment may be granted.

The moving party has the initial burden of illustrating for the court the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-161 (1970). The movant can satisfy this burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case;" the movant is

not required to produce affidavits or other evidence to establish that there are no genuine issues of material fact. Celotex, 477 U.S. at 323-25.

Once the moving party has made a proper motion for summary judgment, the burden switches to the nonmoving party. Under Rule 56(e), [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court is to take all of the evidence of the nonmoving party as true and to draw all reasonable inferences in his favor in determining if there is a genuine issue of material fact. See Adickes, 398 U.S. at 158-59. In order to establish that an issue is genuine, the nonmoving party must proffer evidence such that a reasonable jury could return a verdict in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A proper motion for summary judgment will not be defeated by merely colorable or insignificantly probative evidence. See id. at 249-50;

9. The parties agree that Pennsylvania law applies and that the excess electricity charges that Philips Brothers claims are consequential damages. The recovery of consequential damages is governed by a Pennsylvania statute that mirrors the Uniform Commercial Code. The statute provides that “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise”¹ may be recoverable as consequential damages. 13 Pa. Con. Stat. Ann. § 2715(2)(a).

In R.I. Lampus Co. v. Neville Cement Products Corp., the Pennsylvania Supreme Court rejected its earlier tacit agreement test for an objective foreseeability test to determine when a seller is liable for consequential damages springing from its breach. 378 A.2d 288, 291 (Pa. 1977). “If a seller knows of a buyer’s general or particular requirements and needs, that seller is liable for the resulting consequential damages whether or not that seller contemplated or agreed to such damages.” Id. at 292. The comments to § 2715 indicate that “[p]articular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.” See also Lampus, 378 A.2d at 292. The seller need not contemplate the particular damages or

¹ Solomon did not argue that Philips Brothers could have prevented the excess electricity charges through efforts to cover or otherwise.

tacitly agree to assume liability for such damages; a plaintiff only needs to show that the damages were “reasonably foreseeable at the time the agreement was entered into.” AM/PM Franchise Association v. Atlantic Richfield Co., 584 A.2d 915, 921 (Pa. 1990).

If the consequential damages were foreseeable, the seller can avoid liability for the damages by producing an agreement that limits its exposure to damages, through either an express agreement or course of dealing or trade usage. See Kunststoffwerk Alfred Huber v. R.J. Dick, Inc., 621 F.2d 560, 560 (3d Cir. 1980). Under 13 Pa. Con. Stat. Ann. § 1205(3), a usage of trade may be used to “give particular meaning to and supplement or qualify terms of an agreement.” See also Posttape Associates v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976). The burden of proof rests with the party seeking to benefit from a trade usage. See Huber, 621 F.2d at 564 (holding in a case in which there was insufficient evidence to establish an express agreement to limit damages that seller did not satisfy its burden to establish a course of dealing that would serve to limit the seller’s liability for consequential damages);²

10. This Court finds that a genuine issue of material fact remains as to the reasonable foreseeability of the excess electricity charges, precluding a grant of summary judgment to either party. Solomon contends that Philips Brothers has produced no evidence to indicate that the excess electricity charges were a foreseeable consequential damage to Solomon, thus entitling it to summary judgment. Philips Brothers argues that it has presented evidence to establish the foreseeability of the charges as a matter of law. While Philips Brothers has proffered evidence of the objective foreseeability of the excess electricity charges to Solomon sufficient to defend against Solomon’s motion, Philips Brothers has not established that the damages were objectively foreseeable as

² Even though the City of Philadelphia incurred the actual excess electricity charges, Philips Brothers seeks recovery for these charges. More specifically, the damage suffered by Philips Brothers was not the excess electricity charges themselves, but a reduction in its contract price by the City of Philadelphia in the amount of the excess electricity charges. This reduction of contract price is a loss of profits to Philips Brothers, and as such, a consequential damage to Philips Brothers as a result of Solomon’s breach of its contract. Under the Lampus test, a buyer does not need to have even a tacit agreement with the seller that the seller will be liable for consequential damages; liability is imposed on the seller if the damages are objectively foreseeable. It would be anomalous to require that the seller have a contractual relationship with or knowledge of the contract’s impact on a third party for a buyer to recover consequential damages from a seller. “[C]onsequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach.” Ebasco Services, Inc. v. Pennsylvania Power & Light, 460 F. Supp. 163, 214 n. 63 (E.D. Pa. 1978) (quoting Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp., 372 F. Supp. 503, 508 (E.D.N.Y. 1974) (noting that Pennsylvania has “traditionally considered expenses incurred or gains prevented beyond the immediate buyer-seller transaction to be consequential damages”). See also Farrey’s Inc. v. Supplee-Biddle Hardware Co., 103 F. Supp. 488 (E.D. Pa. 1952) (allowing buyer to recover from the seller the amount of a judgment entered against buyer in favor of a customer which was directly attributable to shortage in length of barbed wire provided by seller and resold by buyer to customer).

a matter of law. John Philips asserted in his deposition that he told Bryan Kroeker (“Kroeker”), regional manager of Solomon, that the transformer Philips Brothers wanted to purchase from Solomon was to be used in a peak shaving operation at Veterans Stadium and that the transformer would be providing approximately one third of the stadium’s electrical demand during the weekday games for a “demand curtailment function.” (Philips dep. at 92-93). As further evidence of foreseeability, Philips Brothers points to the deposition testimony of Puetz in which he stated he knew that a transformer could be used in peak shaving operations and that a failure could result in excess electricity charges. (Puetz dep. at 24-25). However, Kroeker denies that John Philips told him that the transformer would be used in a peak shaving operation. (Kroeker dep. at 34). Solomon further argues that John Philips admitted that he never gave Solomon a copy of Philips Brothers contract with the City of Philadelphia nor discussed with Kroeker the potential exposure for excess electrical charges that the contract imposed on Philips Brothers. (Philips dep. at 93-94). Indeed, Kroeker’s deposition testimony reveals that prior to the contract between Philips Brothers and Solomon, Kroeker was not familiar with peak shaving operations. (Kroeker dep. at 34-35). As evidence for its argument that liability for such consequential damages was unusual and thus, not foreseeable, Solomon points to the deposition testimony of John Philips in which he states that Philips Brothers itself had never assumed liability for excess electricity charges before the contract with the City of Philadelphia. (Philips dep. at 164). This contradicting deposition testimony proffered by both sides presents a triable issue of fact as to the foreseeability of the excess electricity charges;

11. Solomon also argues that it is entitled to summary judgment because the industry standard shields a seller from liability in this situation. However, Solomon did not proffer evidence sufficient to establish a usage of trade or industry standard shielding it from liability for the excess electricity charges as a matter of law. The only evidence of a usage of trade or industry standard proffered by Solomon is the deposition testimony of John Philips in which he acknowledged that warranties in the transformer industry usually contain the term “limitation of liability for consequential damages.” (Philips dep. at 81). However, John Philips explained that his understanding of the limitation was that it did not have “any effect whatsoever on the business transaction. If a company has fouled up a piece of equipment and it’s caused me, the contractor that buys that commodity routinely, problems, they’re going to take care of my problems.” (Philips dep. at 81-82). Philips Brothers has proffered evidence sufficient to create a genuine issue of material fact as to the presence of an industry standard that shields Solomon from liability for the excess

electricity charges;³

it is hereby **ORDERED** that, based on the foregoing analysis and consideration of the pleadings, depositions, affidavit, and other evidence of record, the motions are **DENIED**.

IT IS FURTHER ORDERED that the parties shall submit a joint report to the Court no later than January 26, 1998 as to the status of settlement. If the parties need the assistance of the Court in facilitating settlement negotiations, the report should so indicate. By said date, plaintiff shall contact the Deputy Clerk to arrange a date for a final scheduling conference.

LOWELL A. REED, JR., J.

³ Solomon's paraphrasing of this passage of John Philips' deposition testimony and of the holding of several cases it cites in support of its position would best be described as tortured. (Def.'s Mem. at 7-8). Although the fragments of testimony quoted by Solomon in its memorandum appear to lend support to Solomon's arguments, close inspection of the full deposition testimony, particularly the sections not quoted by Solomon but only represented by ellipses, reveals that the testimony does not support Solomon's argument. The holdings stated and passages quoted by Solomon from New York State Electric & Gas Corporation v. Electric Corporation, 564 A.2d 919, 925 (Pa. Super. Ct. 1989) and Ebasco Services, Inc. v. Pennsylvania Power & Light, 460 F. Supp. 163, 226 (E.D. Pa. 1978) were misleading and taken out of context.

In addition, Solomon contends in its memorandum in opposition to Philips Brothers motion for summary judgment that "Philips Brothers can not offer a document, a conversation, a course of dealings or an industry practice to support its argument that Solomon Corporation should have expected to be responsible for excess electrical charges." (Def.'s Mem. at 9). This argument is flawed because it is the seller, not the buyer, who has the burden to prove a usage of trade that would shield it from liability for consequential damages.

Finally, Solomon's third argument that liability for excess electricity charges was not a part of the contract between Philips Brothers and Solomon misses the mark as well; under the Lampus test that has been the law in Pennsylvania since 1977, the presence of an agreement as to a seller's liability for consequential damages is no longer a prerequisite to recovery by the buyer for such damages.