

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

HORIZON UNLIMITED, INC. : CIVIL ACTION  
& JOHN HARE :  
 :  
 v. :  
 :  
 RICHARD SILVA & SNA, INC. : NO. 97-7430

MEMORANDUM and ORDER

Norma L. Shapiro, J.

August 12, 1997

Plaintiff Horizon Unlimited, Inc. ("Horizon") and John Hare ("Hare"), alleging violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1 et seq., filed an action against defendants Richard Silva ("Silva") and SNA, Inc. ("SNA"). Defendants filed a counterclaim, alleging breach of contract. Plaintiffs have filed a motion to dismiss the counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, plaintiffs' motion to dismiss the counterclaim will be granted.

FACTS

Plaintiffs purchased Seawind airplane kits manufactured by SNA, of which Silva is president. Plaintiffs allege their Seawind airplanes did not "perform according to specifications and building times" printed in the promotional materials. Their claim for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1, et seq., is based on alleged misrepresentations in SNA's promotional brochures.

Defendants have filed a counterclaim alleging plaintiffs have breached the purchase agreement by filing this action. The contract to purchase the Seawind airplane kits, signed by both parties, provided that plaintiff would purchase each kit for \$37,900. The contract also provided a hold harmless clause in the aircraft design integrity section, stating:

Purchaser acknowledges and agrees that he is solely responsible for any loss and agrees to hold SNA, Inc. harmless, from any loss resulting from his or her failure to fully comply with the SNA, Inc. instruction manual or any other instructions received from SNA, Inc. or any modification or substitution of components of the Aircraft.

The counterclaim asserts that plaintiffs breached the contract by filing this action and should be held responsible for the damages and costs of defense. Plaintiffs move to dismiss the counterclaim, alleging: 1) defendants fail to state a claim upon which relief can be granted; and 2) the allegations in the complaint are not sufficiently clear to give plaintiffs fair notice of the claim and its basis.

## **DISCUSSION**

### **I. Standard of Review**

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn

v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45 (1957).

When deciding a motion to dismiss, the court properly may consider "matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); see Williams v. Stone, 923 F. Supp. 689, 690 (E.D. Pa. 1996), aff'd, 109 F.3d 890 (3d Cir.), cert. denied, 118 S. Ct. 383 (1997). When the plaintiff attaches an exhibit to the complaint and incorporates it therein, he is bound by the contents of the exhibit. See Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990). The court need not convert the motion to dismiss into a motion for summary judgment in order to consider the contents of an attached exhibit. See id.; Kolimaga v. Bartle, 871 F.2d 331, 340 n.3 (3d Cir. 1989).

## II. Indemnification Clause

The contract provides that it shall be "construed and enforced in accordance with, and the rights of the parties hereto shall be governed by, the laws of the Commonwealth of Pennsylvania." (Agreement of Sale, ¶ 9.)

"When interpreting a contract, the court's paramount goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." Bethlehem Steel Corp. v. MATX, Inc., 703 A.2d 39, 42 (Pa. Super. 1997); see Halpin v. LaSalle University, 639 A.2d 37, 39 (Pa. Super. 1994), appeal denied, 668 A.2d 1133 (1995). "When the language of a writing is clear and unequivocal ... its meaning must be determined by its contents alone." Bethlehem Steel Corp., 703 A.2d at 42.

The agreement of sale, attached to plaintiff's original complaint, contains language that defendants would be held harmless for any injuries or damages that occurred if the kit instructions were modified in any way during construction. Defendants rely on affidavits that plaintiffs did not follow the instruction manual and made substantial modifications when constructing their kits. See Defendant's Brief at 2.

In Pennsylvania, an indemnification agreement may require one party to defend and indemnify claims arising against the other if that is the clear intent of the contract. See

Pennsylvania Engineering Corp. v. McGraw-Edison Co., 459 A.2d 329 (Pa. 1983). "The intent to indemnify against claims ... must clearly appear from the terms of the agreement." Bethlehem Steel Corp., 703 A.2d at 43. If the agreement is clearly worded and negotiated between two sophisticated business entities, the parties can allocate responsibility for loss or damages to one party and the court will uphold it. See Pennsylvania Engineering Corp., 459 A.2d at 332. An indemnitee may recover attorney's fees and costs in defense of litigation covered by an indemnity agreement. See Boiler Engineering and Supply Co. v. General Controls, Inc., 277 A.2d 812, 814 (Pa. 1971).

The contract manifests an intent by the parties to hold SNA, Inc. harmless from loss resulting from plaintiffs' not following the directions included in the instructional brochures. A common sense reading of the indemnity clause suggests the parties intended for plaintiffs to indemnify SNA for any liability imposed by third-parties when the harm occurred because plaintiffs failed to build the kits according to the instructions. That is the typical situation contemplated by an indemnity clause. See, e.g., Pennsylvania Engineering Corp., 459 A.2d at 332 (indemnity clause required indemnitor to indemnify indemnitee for all claims brought by third-parties); Boiler Engineering, 277 A.2d at 813 (indemnity clause required indemnitor to reimburse indemnitee for costs and fees incurred in

defending suit by third-party); Bethlehem Steel Corp., 703 A.2d at 43 (indemnity clause required indemnitor to indemnify indemnitee for its liability in personal injury action by third-party). Plaintiffs must indemnify SNA for any liability imposed on SNA by a third-party, including attorney's fees SNA incurred in defending itself.

The agreement does not specify whether the parties intended the indemnity clause to cover litigation expenses incurred in defending an action filed by the buyers themselves, as in this action. The clause states plaintiffs agree to be solely responsible for any "loss" caused by their failure to comply with the SNA instruction manual. The hold harmless clause may provide an effective defense to plaintiffs' action, but it is not clear and specific enough for a separate cause of action against plaintiffs for attorney's fees and costs.<sup>1</sup> Plaintiffs' motion to dismiss the counterclaim will be granted.<sup>2</sup>

An appropriate Order follows.

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<sup>1</sup> The court expresses no view on whether, if defendants ultimately are successful, they would have a right to attorney's fees under 28 U.S.C. § 1927.

<sup>2</sup> Because the court is dismissing the counterclaim for failure to state a claim, the court need not reach plaintiffs' additional argument that the counterclaim fails to set forth a well-pleaded claim.

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ORDER

AND NOW, this 12th day of August, 1998, upon consideration of plaintiffs' motion to dismiss defendants' counterclaim, defendants' response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that plaintiffs' motion to dismiss the counterclaim is **GRANTED**.

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Norma L. Shapiro, J.