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

BOONE INTERNATIONAL, INC.	:	CIVIL ACTION
v.	:	
MEMOLINK, INC. and DAVID ASSEOFF	:	NO. 98-1171

MEMORANDUM AND ORDER

HUTTON, J. June 7, 1999

Presently before the Court are the Motion of Plaintiff Boone International, Inc. for Summary Judgment (Docket No. 10), the Answer in Opposition of Defendants Memolink, Inc. and David Asseoff (Docket No. 11), and the Plaintiff's Reply-Brief (Docket No. 17). For the reasons stated below, the Plaintiff's Motion for Summary Judgment is **GRANTED in part** and **DENIED as part**.

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. Plaintiff, Boone International, Inc. ("Boone") is in the business of providing specialized printing services for commercial and retail customers throughout the United States, including defendants Memolink, Inc. ("Memolink") and David Asseoff ("Asseoff") (collectively, "Defendants" or "Memolink"). Memolink solicits advertising from businesses located near college campuses, and contracts to have these advertisements printed on

"dry-erase" memoboards tailored to the geographic area of each college campus. Memolink subsequently distributes the memoboards to college students upon their arrival at college in the fall. Dry-erase memoboards are designed to be written on with a special marker, and then easily erased with a dry paper towel or tissue, making them well-suited for college dormitories and other group-living environments.

In this regard, Memolink supplied Boone with the artwork for each college, as well as any advertising inserts for each particular memoboard design. Boone had the artwork printed on the the dry-erase memoboard, shrink-wrapped for protection and shipped to the appropriate college, where Memolink representatives distributed the memoboards to students. In exchange for providing the dry-erase memoboards to each student free of charge, Memolink required each student to complete a survey designed by Memolink. Memolink collects the data from the survey, inputs the information into a central databank and subsequently sells the data to third-party data collectors, such as credit card companies and other direct mail solicitors.

The Complaint stems from the Defendants' alleged failure to fulfill their monetary obligations to Boone under a contract for services. Boone and Memolink entered into an agreement whereby Boone provided to Memolink approximately 48,000 memoboards for the fall of 1997. The agreement provides that Boone is entitled to 2%

interest per month for each Boone invoice that remained unpaid for longer than 45 days. The aggregate amount of Boone's unpaid invoices to Memolink is $73,797.58.

Defendants Memolink and Asseoff acknowledge that they have not provided payment to Boone for its services. The Defendants claim, however, a right to set-off the amount owed to Boone as a result of general damages to Memolink from accepting non-conforming goods, as well as a right to set-off incidental and consequential damages to Memolink that resulted from the non-conformity of the memoboards. In particular, Memolink claims that the non-conformity consisted of: (1) delivering certain memoboards without adhesive mounting tape; (2) exceeding the margin of error of 2.5% on certain orders; (3) shipping certain orders on separate shipping dates; (4) improperly delivering Penn State's memoboards to Michigan State and vice versa; and (5) delivering the memoboards in an untimely manner.

Memolink claims incidental damages in the amount of $7,550 for having to provide extra distribution staffing at locations that were delayed. Furthermore, as consequential damages, Memolink claims to have lost future business from advertisers who no longer wished to continue doing business with Memolink as a result of the non-conforming memoboards. Memolink calculates its lost future business for five years to be approximately $106,000.

The memoboards were distributed to students for free in exchange for each student completing an informational survey prepared by Memolink. Memolink received no monetary compensation from the students to whom the memoboards were distributed. No student refused a memoboard because it lacked adhesive mounting tape or because the adhesive mounting tape was provided separately from the memoboard. Memolink received a completed survey for each memoboard it distributed. Memolink only visited each school once to distribute the memoboards on campus in the fall of 1997.

Boone exceeded the margin of error of 2.5% on deliveries to only three schools; St. Louis University (968/1000); Washington University, St. Louis (928/1000); and University of Virginia (944/1000). Boone inadvertently shipped the Michigan State memoboards to Penn State and the Penn State memoboards to Michigan State. This was immediately cured by Boone upon notification by Memolink. No documents exist from any of the non-party advertisers nor does any testimony by any of the non-party advertisers that their decision to do business with Memolink in 1998 was affected by the distribution of non-conforming product or the timeliness of the distribution of non-conforming product in 1997.

The Plaintiff seeks monetary damages in the amount of $73,797.58 plus 2% contractual interest for Memolink's alleged failure to satisfy Boone invoices that date back to October of 1997. Boone also seeks the costs and attorneys' fees it has

incurred in requiring Memolink to meet its obligations under the contract. Conversely, the Defendants have filed a counterclaim against Boone, in which they seek the following monetary damages: (1) $20,000 for non-conforming goods; (2) $7,550 for extra distribution costs for partial and late shipments; (3) $105,900 for loss of income from lost revenues; (4) $12,902.04 for Stephens Group Damages; and (5) interest charge--deducted, not severable (calculation).

On December 2, 1998, the Plaintiff filed this Motion pursuant to Federal Rule of Civil Procedure 56, moving the Court to grant summary judgment in its favor with respect to the Complaint, as well as the Counterclaim filed by the Defendants. On December 16, 1998, the Defendants filed their Answer to Plaintiff's Motion for Summary Judgment. The Plaintiff filed a Reply-Brief on February 9, 1999. Because the instant motion is ripe for review, the Court now considers Plaintiff's Motion for Summary Judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "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). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S.

317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

In its motion, the Plaintiff moves the Court for an Order granting it summary judgment on the following claims: (1) Plaintiff's breach of contract claim against the Defendants, as pled in the Complaint; and (2) Defendants' counterclaim for breach of contract, as pled in the Answer to the Complaint. The Court

considers both Plaintiff's claim for breach of contract and Defendants' counterclaim for breach of contract.

A. Standard

In order to prove a breach of contract under Pennsylvania law, a plaintiff must show: (1) the existence of a valid and binding contract to which the plaintiff and defendants were parties; (2) the contract's essential terms; (3) that plaintiff complied with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) damages resulting from the breach. See Gundlach v. Reinstein, 924 F. Supp. 684, 688 (E.D. Pa. 1996) (listing elements required in breach of contract case between university and student), aff'd without op., 114 F.3d 1172 (3d Cir. 1997).

B. Plaintiff's Breach of Contract Claim

It is undisputed that the Defendants entered into an agreement with the Plaintiff for printing services in the fall of 1997. It is also undisputed that, but-for the amount that the Defendants believe should be set-off, which is discussed below, the Defendants acknowledge that Boone's charge to Memolink of $73,797.58 plus 2% interest per month is proper for the printing services that Boone provided to Memolink.

> Q. For the 1997 program year, Boone has alleged that the amount of balance for services rendered based on the purchase orders and the appropriate shipment with that totals $73,797.58. Do you have any reason to

> believe that that is not a correct number based on your purchase orders?
>
> A. Without evaluating it further at this point, I believe that number is accurate.

(Asseoff dep. at 19.) (See also Def.'s Answer to Mot. for Summ. J. ¶ 3.) Thus, the Court finds that no genuine issue of material fact exists as to the Complaint. Accordingly, the Plaintiff is entitled to summary judgment on liability under its agreement for services with Memolink, and is entitled to summary judgment on damages in the amount of $73,797.58 plus 2% interest per month minus the "set-off" amount determined from Defendants' Counterclaim. See infra Part III.C.

C. Defendants' Counterclaim for Breach of Contract

The Defendants' Counterclaim seeks to set-off the amount in the Complaint those damages that have resulted from the Plaintiff's delivery of non-conforming goods. It is undisputed that Boone shipped memoboards to Memolink that failed to conform with the requirements set forth in the contract. Thus, the Court's inquiry is focused solely on the damage element of the prima facie case. In this regard, the Defendants have raised six basis of damage. First, the Defendants contend that Boone's failure to supply adhesive mounting tape directly on the back of certain memoboards devalues the memoboards by $1.00 per memoboard. Second, the Defendants claim that Boone's exceeding the margin of error of 2.5% on deliveries to certain schools caused damages. Third, the

Defendants allege that Boone's multiple shipments of memoboards to certain schools caused Memolink to incur additional distribution costs. Fourth, the Defendants assert that Plaintiff's "mix-up" between Penn State's memoboards and Michigan State's memoboards caused damage to Memolink. Fifth, the Defendants contends that Boone failed to pay one of their distribution groups, the Stephen's Group, a 7% commission for each Memolink board that they distributed. Sixth, and finally, the Defendants claim that the Plaintiff's delivery of memoboards in an untimely manner caused Memolink to spend more time distributing the memoboards.

Such a cause of action is governed by the Uniform Commercial Code ("UCC"), which Pennsylvania has adopted. See 13 Pa. Stat. Ann § 1101, et seq. Section 2714 of the UCC, entitled "Damages of buyer for breach in regard to accepted goods," provides, in pertinent part:

> (a) Damages for nonconformity of tender.--Where the buyer has accepted good and given notification (section 2607(c)) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the breach of the seller as determined in any manner which is reasonable....
> (c) Incidental and consequential damages.--In a proper case any incidental and consequential damages under section 2715 (relating to incidental and consequential damages of buyer) may also be recovered.

13. Pa. Stat. Ann § 2714. Section 2715, relating to incidental and consequential damages, allows incidental damages for reasonable expenses incident to the delay or other breach, 13 Pa. Stat. Ann § 2715(a)(3), and allows an aggrieved party to receive consequential

damages for lost future profits in certain situations. 13 Pa. Stat. Ann. § 2715(b).

In AM/PM Franchise Assoc. v. Atlantic Richfield Co., 526 Pa. 110 (1990), the Pennsylvania Supreme Court analyzed the basis for the recovery of damages by a buyer that has accepted non-conforming goods under the UCC. Under Pennsylvania law, such a buyer is allowed general damages (the difference between the value of the goods as promised and the value of the goods as delivered) and under certain conditions, consequential damages in the form of lost future profits. Id. at 131. The injured party, however, must be able to remove the lost profit calculation from "the realm of speculation and be submitted to the jury with a rational basis from which the amount can be inferred." Id. at 131 n.20.

In this case, the Court is unable to decide this matter on the record before it. There is simply a lack of affidavits, depositions, and other properly considered evidence before the Court.

An appropriate Order follows.

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O R D E R

AND NOW, this 7th day of June, 1999, upon consideration of the Motion of Plaintiff Boone International, Inc. for Summary Judgment (Docket No. 10), the Answer in Opposition of Defendants Memolink, Inc. and David Asseoff (Docket No. 11), and the Plaintiff's Reply-Brief (Docket No. 17), IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is **GRANTED in part** and **DENIED as part**.

IT IS FURTHER ORDERED that:

(1) On Plaintiff's Complaint, Judgment is **ENTERED** in favor of the Plaintiff and against the Defendants in the amount of $73,797.58 plus 2% interest per month from October 1997; and

(2) Defendants' Counterclaim is **NOT DISMISSED**.

BY THE COURT:

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HERBERT J. HUTTON, J.