

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

ASCO HEALTHCARE, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. ) CIVIL ACTION No. 99-2329  
 )  
 THE COUNTY OF CHESTER, )  
 )  
 Defendant. )

**MEMORANDUM**

**Padova, J.**

April , 2000

Plaintiff, ASCO Healthcare, Inc. (ASCO), brings this diversity breach of contract action against the County of Chester (County) for alleged failure to pay agreed prices for medical supplies sold by Plaintiff. Before the Court is a Motion for Summary Judgment filed by Defendant. For the reasons discussed below, the Court will grant in part and deny in part the instant Motion.

**I. BACKGROUND**

ASCO is a Maryland corporation with its principal place of business in Baltimore, Maryland. ASCO sells medical and nursing supplies to long term care facilities. In 1992, ASCO purchased Suburban Medical Services, Inc. (“Suburban”), a Pennsylvania corporation engaged in a similar business. ASCO continued to operate Suburban as one of its divisions. Beginning in 1996, ASCO began using the name “NeighborCare” as a trade name in some of its transactions.

The County of Chester purchases medical and nursing supplies for its long term care facilities from contractors who submit competitive bids to the County. For the years 1993-1998, the County

awarded six contracts to Suburban, two to ASCO, and one to NeighborCare. Suburban signed the 1993-1995 Artromick Unitdose Medication Delivery System (“Artromick”) contract, the 1996-1998 Artromick contract, and the 1993, 1994, and 1995 General Medical and Nursing Supply contracts. ASCO signed the 1996 and 1997 General Medical and Nursing Supply contracts. NeighborCare signed the 1998 General Medical and Nursing Supply contract.

On May 6, 1999, ASCO filed the instant action against Defendant for inadequate payment for supplies sold under the terms of the two “Artromick” contracts. The Court granted leave to file an amended complaint on January 20, 2000, which Plaintiff subsequently filed on January 24, 2000. The Amended Complaint asserts claims for inadequate payment under all eight contracts. Defendant filed its Motion for Summary Judgment on March 10, 2000.

## II. LEGAL STANDARD

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only “material” if it might affect the outcome of the case. Id. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett,

477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

### III. DISCUSSION

Defendant bases its Motion for Summary Judgment on two arguments. First, because Suburban Medical Services and not ASCO signed five of the eight contracts at issue, and NeighborCare signed the sixth, ASCO is not the real party in interest with respect to those contracts. Therefore, Defendant concludes that ASCO cannot state any contractual claims against Defendant based on those agreements. In addition, Defendant argues that the remaining two contracts signed by ASCO do not meet the amount in controversy requirement for federal court jurisdiction in a diversity matter. Second, Defendant characterizes these contracts as installment contracts, and argues that the value of each entire contract would be substantially impaired by breach of any individual installment. Thus, because alleged breaches of the 1993-1995 contracts occurred more than four years before the initiation of the instant action, Defendant insists that the statute of limitations bars all claims on these contracts.

In response, Plaintiff provides documents and the deposition of ASCO Senior Vice President Morton Silverman to show that Suburban Medical Services acted as an agent for its disclosed

principal, ASCO. According to Plaintiff, this relationship makes ASCO the real party in interest with respect to contracts signed by Suburban. ASCO also contends that NeighborCare is merely a trade name which ASCO began using in late 1996, and therefore ASCO is the real party in interest in the contract signed by NeighborCare. Regarding the statute of limitations, Plaintiff acknowledges that the four-year statute of limitations applicable to the instant suit bars its claims on invoices billed prior to May 6, 1995. However, Plaintiff argues that it is not suing for overall breach of each contract and therefore only claims on particular invoices, not on the contracts in their entirety, are time-barred.

A. Real Party in Interest

Under Pennsylvania law, “a person cannot enforce contractual rights unless that person was a party or a privy to . . . the contract giving rise to those rights.” Delor v. ATX Telecommunications Services, Ltd., No CIV. A. 96-2462, 1996 WL 355334, at \*2 (E.D. Pa June 25, 1996) (citing Borough of Berwick v. Quandel Group Inc., 665 A.2d 606 (Pa. Super. 1995)). However, an entity that is neither a party or a privy to a contract may still be bound by the acts of its agent provided that the agent has either actual or apparent authority to bind the principal. S.K.A. Steel Trading, Inc. v. Penn Terminals, Inc., No. CIV. A. 96-4687, 1998 WL 967587, at \*3 (E.D. Pa. Oct. 13, 1998) (citing Volunteer Fire Co. v. Hilltop Oil Co., 602 A.2d 1348, 1351 (Pa. Super. 1992)). In such a situation, the agent must disclose the identity of the principal so that a third party may determine who is liable on the contract. Pilots Association for the Bay and River Delaware v. Lavino Shipping Co., No. CIV. A. 87-7463, 1988 WL 102652, at \*1 (E.D. Pa. Sept. 27, 1988).

“It is well settled under Pennsylvania law that whether an agency relationship exists is a question of fact and the party asserting the relationship has the burden of proving it by a fair

preponderance of the evidence.” S.K.A. Steel Trading, Inc., 1998 WL 967587, at \*3 (citing Volunteer Fire Co., *supra*). Here, the non-moving party, ASCO, asserts the agency relationship and thus carries the burden of proof. The factual elements that must be shown under Pennsylvania law to prove an agency relationship are: (1) a manifestation by the principal that the agent shall act for him; (2) the agent’s acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking. Dennis v. Horizon Service Company, No. CIV. A. 93-5881, 1994 WL 135435, at \* 2 (E.D. Pa. April 15, 1994) (citing Volunteer Fire Co., *supra*).

In summary judgment motions where the non-moving party has the burden of proof, “the burden on the moving party may be discharged by ‘showing’ -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party’s case.” S.K.A. Steel Trading, Inc., 1998 WL 967587, at \*2 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Here, the moving party, Defendant Chester County, has met its Celotex burden simply by pointing out that “nothing resembling proof of [an agency] relationship is offered [by Plaintiff].” (Def. Reply at 5.)

To meet its Celotex burden, ASCO submits the “Qualification of Bidder” document for the 1993-1995 Artromick contract to buttress its claim that Suburban acted as its agent and disclosed its identity to Chester County. This document states, “Suburban Medical Services, Inc., is a division of ASCO Healthcare, Inc., a wholly owned subsidiary of Genesis Health Ventures, Kennett Square, Chester County, Pennsylvania.” (Plf. Ex. C.) While this document by itself is not enough to prove an agency relationship, ASCO also provides the affidavit of ASCO Senior Vice President Morton Silverman in support of its contention. Silverman states that ASCO included the Qualifications of Bidder Supplement to reveal that Suburban was owned and operated by ASCO. (Plf. Ex. J.) He

further asserts that he contacted Chester County officials “numerous times” from 1993 onward and made it known that ASCO had assumed the business of Suburban. (Id.) He points out that he was never questioned about the fact that numerous invoices were issued in the name of ASCO rather than Suburban. (Id.) He also states that he prepared the 1996-1998 Artromick Contract listing ASCO as the contracting party, but the agreement prepared by Chester County used the name Suburban instead of ASCO. (Id.) He declares that he did not attempt to change the contract because he believed the supporting bid documentation made the relationship between ASCO and Suburban clear to the County. (Id.)

The Court concludes that Silverman’s affidavit establishes that genuine issues of material fact remain regarding whether the alleged principal, ASCO, by its conduct led Chester County to believe that Suburban was an agent acting for it. Regarding the lone contract signed by NeighborCare, the Courts finds that NeighborCare is a mere trade name used by ASCO, the real party in interest in that contract. Therefore, the Court will deny Chester County’s Motion for Summary Judgment on this issue.

B. Statute of Limitations

Section 2725 of the Pennsylvania Uniform Commercial Code provides that “an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.” 13 Pa. Cons. Stat. Ann. § 2725(a). A cause of action for breach of a contract for the sale of goods “accrues when the breach occurs.” 13 Pa. Cons. Stat. Ann. § 2725(b). In the case of an installment contract, breach of the whole contract occurs “[w]henver nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract.” 13 Pa. Cons. Stat. Ann. § 2612(c). Whether the breach of one installment substantially impairs the value

of the whole contract “calls for examination of all of the facts of the case.” 13 Pa. Cons. Stat. Ann. § 2612(c) Historical and Statutory Notes.

In the instant case, ASCO acknowledges that claims on all invoices billed before May 6, 1995, are barred by the four-year statute of limitations. By characterizing ASCO as suing for breach of the 1993-1995 Artromick Contract in its entirety, Defendant argues that all claims on this contract are time-barred, regardless of the date of the invoices. Defendant insists that the refusal by Defendant to pay the full amount invoiced under this contract in October 1993 constituted breach of the entire contract. The Court finds, however, that Defendant has not met its Celotex burden to show the absence of any genuine issue of material fact regarding whether breach of an individual installment substantially impaired the value of the 1993-1995 Artromick contract as a whole.

Finally, Defendant contends that breach of the 1993, 1994, and 1995 Nursing and Medical Supply Contracts “necessarily must have occurred within the year in which the contract was valid.” (Def. Mem. at 31.) These supply contracts specify, however, that “[p]ayment shall be made to the Contractor as soon as possible after receipt of invoice” without specifying when such invoices must be generated. (1995 Nursing and Medical Supply Contract ¶ 19.) The contracts further specify that Defendant may purchase items on an as needed basis. (Id. Special Conditions ¶ 2.) Thus, for example, supplies ordered by Defendant in June 1995 pursuant to the 1995 contract certainly could not have been invoiced by ASCO prior to the May 6, 1995 cut-off date. This contract, therefore, could have been breached within four years of the institution of this action. For both the General Supply Contracts and the Artromick Contracts, the Court, therefore, will grant summary judgment only on claims pertaining to invoices generated before May 6, 1995, and will deny summary judgment as to these contracts in their entirety.

For the foregoing reasons, the Court will grant in part and deny in part Defendant's Motion for Summary Judgment. An appropriate Order follows.



BY THE COURT:

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John R. Padova, J.