

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

AMSAN, LLC,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
PROPHET 21, INC.,	:	
	:	
Defendant.	:	NO. 01-1950
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PROPHET 21, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
AMSAN, LLC,	:	
	:	
Defendant.	:	NO. 01-1954

Reed, S.J.

October 15, 2001

MEMORANDUM

Now before the Court is the motion of defendant Prophet 21, Inc., to dismiss for failure to state a claim pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure (Document No. 9), the response of plaintiff Amsan, LLC (Document No. 11), and the reply thereto (Document No. 13). This action arises out of a licensing agreement, executed by the parties on or about June 28, 2000 (“Licensing Agreement”) under which defendant was to provide computer software to plaintiff.¹ Plaintiff Amsan claims that the software has never performed as promised, that Prophet 21 failed to fix problems with the software despite numerous requests from Amsan, and that Amsan lost a substantial amount of money in its efforts to remedy the defects.

¹ All facts are taken as true from the complaint, as required by law.

Prophet 21 argues that plaintiff's claim for breach of warranties and recovery of consequential damages are precluded under the limitation of liability clause in the Licensing Agreement. Prophet 21 also contends that plaintiff's fraud and fraudulent inducement claims are merely contract claims disguised as tort allegations. Plaintiff counters that the limitation on liability clause does not defeat its claims, and that its fraud claims are viable. This Court previously resolved a similar motion to dismiss nearly identical claims asserted against Prophet 21 in Caudill Seed & Warehouse Co., Inc. v. Prophet 21, Inc., 123 F. Supp. 2d 826 (E.D. Pa. 2000). For reasons articulated in Caudill Seed and reiterated below, the motion to dismiss will be granted in part and denied in part.²

Rule 12 (b) of the Federal Rules of Civil Procedure provides that "the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12 (b) (6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843 (1969). Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a). A motion to dismiss should be granted only if "it is clear that no relief could be granted

² Because the parties are diverse and the amount in controversy exceeds \$75,000, this action is properly before the Court under 28 U.S.C. § 1332. Both parties acknowledge that Pennsylvania law controls here, and therefore, my task as a federal district court sitting in diversity is to apply substantive state law as interpreted by the Supreme Court of Pennsylvania. See Connecticut Mut. Life Ins. Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983). In the absence of a definitive ruling by the state's highest court, this Court must predict how the Supreme Court of Pennsylvania would rule if presented with the question. See Robertson v. Allied Signal, Inc., 914 F.2d 360, 378 (3d Cir. 1990). In so doing, the court "must consider and give due regard to the decisions of intermediate appellate courts as well as other state courts as indicia of how the state's highest court would decide a matter." Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 553 n.3 (3d Cir. 1985) (citing Wyman, 718 F.2d at 65; Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1167 (3d Cir. 1981)).

under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229 (1984).

Warranty Clause, Disclaimer of Damages, and Failure of Exclusive Remedy

Prophet 21 has moved to dismiss plaintiff Amsan’s claims for breach of warranties and consequential damages based on the limitation of liability clause contained in the Licensing Agreement.³

Under the section titled “LIMITATION OF LIABILITY,” the Licensing Agreement states, in pertinent part:

In no event shall Prophet 21 be liable for any direct, indirect, consequential or resulting damages or injury due to failure of, or otherwise arising out of the Software, or for any lost profits, time, business, records, or other monetary damages, nor for any claim or demand against Licensee by any other person. . . . LICENSEE’S SOLE AND EXCLUSIVE REMEDY FOR ANY FAILURE OF THE SOFTWARE SHALL BE THE WARRANTIES CONTAINED HEREIN AND THESE ARE IN LIEU OF ANY AND ALL OTHER WARRANTIES. THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE EXCEPT AS HEREIN EXPRESSLY PROVIDED. UNDER NO CIRCUMSTANCES WILL PROPHET 21’S LIABILITY EXCEED THE COST OF THE SOFTWARE SET FORTH ON THE SCHEDULE.

(Amsan Exh. A, Software License Agreement, at ¶ 17.) Prophet 21 argues that the limitation on liability clause, to which Amsan agreed when it signed the contract, limits Amsan to recovery under the limited warranty of the License Agreement and prevents Amsan from recovering direct, indirect compensatory damages, consequential damages, or punitive damages related to the alleged failure of the software.

Under Pennsylvania law, limitation of liability clauses in commercial contracts generally

³ Prophet 21 has moved to dismiss the breach of any warranties not expressly contained within the Licensing Agreement. In its responsive papers, Amsan acknowledged that the limitation on liability clause in the licensing agreement effectively disclaims any warranties of merchantability and fitness, and accordingly withdrew its claim for breach of implied warranty under Count IV of the complaint. (Amsan Br. at 11.) Thus, the motion to dismiss plaintiff’s claim for breach of implied warranty will be granted as unopposed.

are valid and enforced by the courts. See 13 Pa. C.S.A. § 2719; see also Valhal Corp. v. Sullivan Assocs., 44 F.3d 195, 204 (3d Cir. 1995). Nevertheless, section 2719(b) of the Pennsylvania Commercial Code sets forth an exception to that general rule, providing that “[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.” Plaintiff’s claims fall within this exception. The warranty clause referred to in the above-quoted limitation on liability provision provides, in pertinent part, that “Prophet warrants that . . . (iii) if the licensed Software fails to function in accordance with the then current Documentation, Prophet 21 will . . . make all corrections required to make the Software operate” (Amsan Exh. A, Software License Agreement, at ¶ 13.) In other words, the exclusive remedy under the Licensing Agreement was limited to the repair or replacement of defective software. Plaintiff Amsan has asserted that defendant refused to repair or replace the software at issue, and has otherwise alleged that the exclusive remedy under the warranty provisions failed in its essential purpose. (Complaint at ¶ 24, 26, 28, 30, 39, 40.) I conclude that Amsan has adequately stated a claim that the exclusive remedy for the breach of warranty in the Licensing Agreement failed in its essential purpose.

This Court has previously predicted that the Supreme Court of Pennsylvania would conclude that when the exclusive remedy in a limitation on liability provision failed in its essential purpose, the damages disclaimer within the remaining contractual clause is rendered inoperative and the buyer may invoke all remedies available under the UCC. See Caudill Seed, 123 F. Supp. 2d at 832-33. Prophet 21 has presented no new arguments to persuade me to change this prediction. Accordingly, because Amsan has adequately stated a claim that defendant’s conduct resulted in the failure of the essential purpose of the exclusive remedy for

breach of the warranty in the Licensing Agreement, I further conclude that Amsan may, at this stage, seek the full range of damages available under the UCC, including consequential and incidental damages.

Fraud Claim

Prophet 21 contends that plaintiff's fraud and fraudulent inducement claims are, essentially, a breach of contract claim in disguise, and should be dismissed under the "gist of the action" test.⁴ "When a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is 'collateral' to conduct that is primarily tortious." See Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999) (citing cases). The gist of the action test requires the court to determine from the complaint the essential nature of the claim alleged by distinguishing between contract and tort claims on the basis of source of the duties allegedly breached; if the claim essentially alleges a breach of duties that flow from an agreement between the parties, the claim is contractual in nature, whereas if the duties allegedly breached were of a type imposed on members of society as a matter of social policy, the claim is essentially tort-based. See Phico Ins. Co. v. Presbyterian Medical Servs. Corp., 444 Pa. Super. 221, 229, 663 A.2d 753 (1995).

Turning to the case at hand, the fraud claims asserted by Amsan essentially appear to be a

⁴ This Court continues to predict on the basis of the holdings of the Superior Court of Pennsylvania in Phico Ins. Co. v. Presbyterian Medical Servs. Corp., 444 Pa. Super. 221, 227-30, 663 A.2d 753 (1995) and Redevelopment Auth. v. International Ins. Co., 454 Pa. Super. 374, 391-95, 685 A.2d 581 (1996), that the Supreme Court of Pennsylvania will adopt the gist of the action test. See Caudill Seed, 123 F. Supp. 2d at 833.

restatement of the breach of contract claim. Plaintiff alleges that Prophet 21 made numerous representations that its software would work, that plaintiff entered into an agreement to purchase the software according to certain specifications, and that defendant failed to deliver the promised software. The duties that plaintiff alleges defendant breached were created by and grounded in the Licensing Agreement. The success of the fraud claim turns on the insufficiency of defendant's performance under the terms of the Licensing Agreement. Hence, the gravamen of plaintiff's complaint sounds in contract.

Amsan fails to distinguish its fraud claims from those asserted by the plaintiffs in Caudill Seed. In its responsive papers, plaintiff highlights its allegation regarding Prophet 21's misrepresentations of another party's Active Server Pages as defendant's own (Complaint at ¶ 17), and argues that this alleged misrepresentation constituted fraud collateral to the contract. However, the purpose of this allegation was to support plaintiff's ultimate claim of fraud in Count I of the complaint, which alleges that defendant failed to deliver software that would provide for full integration with the Prophet 21 back-end database as required under the dictates of the Licensing Agreement. (Complaint at ¶ 46f.) Thus, plaintiff has not alleged that defendant has breached any duty other than its duty arising under the Licensing Agreement. Plaintiff has not pleaded facts that would establish the contract claim as collateral to its claims of fraud or fraudulent inducement. I conclude, based on the foregoing, that plaintiff's fraud and fraudulent inducement claims merely duplicate its breach of contract claim and must be dismissed.⁵

⁵ Plaintiff's claim for punitive damages, which appears only in the fraud claims, is dismissed along with plaintiff's fraud claims.

Conclusion

Defendant has moved to dismiss plaintiff's breach of warranties, claims for consequential damages, and claims of fraud and fraudulent inducement on the grounds that (1) the limitation on liability clause in the Licensing Agreement prevents plaintiff from recovering beyond the limited warranty within the contract, and precludes recovery of any consequential damages, and (2) the fraud counts fail on the ground that plaintiff did not state claims upon which relief could be granted. I am persuaded only by the latter argument as to the fraud counts. Accordingly, Count I and II of the complaint will be dismissed. In addition, Count IV of the complaint will be dismissed as to implied warranties.

An appropriate Order follows.

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AMSAN, LLC,	:	
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Defendant.	:	NO. 01-1954

ORDER

AND NOW, this 15th day of October, 2001, upon consideration of the motion of defendant Prophet 21, Inc., to dismiss pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure (Document No. 9), the response of plaintiff Amsan, LLC (Document No. 11), and the reply thereto (Document No. 13), and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the motion of defendant is **GRANTED** as to Counts I and II and **GRANTED IN PART** as to Count IV, and **DENIED** as to Count III and **DENIED IN PART** as to Count IV. Accordingly, Counts I and II, and claims for breach of implied warranties in Count IV, of the complaint in Civil Action 01-1950 are **DISMISSED**.

IT IS FURTHER ORDERED that Prophet 21, Inc. shall answer the remaining allegations of the complaint no later than November 20, 2001.

LOWELL A. REED, JR., S.J.