

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

LONGPORT OCEAN PLAZA	:	
CONDOMINIUM, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ROBERT CATO & ASSOCIATES, INC.,	:	CIVIL ACTION
	:	
Defendant/Third Party Plaintiff,	:	No. 00-CV-2231
	:	
v.	:	
	:	
THE WINDOWS ASSOCIATES, INC., et. al.	:	
	:	
Third Party Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

March 18, 2002

Plaintiff Longport Ocean Plaza Condominium, Inc. (“Longport”) brings this action against Defendant/Third Party Plaintiff Robert Cato & Associates, Inc. (“Cato”), alleging breach of construction contracts and warranties therein. As Third Party Plaintiff, Cato in turn asserts various tort and contract causes of action against numerous Third Party Defendants, including EFCO Corporation, Inc., (“EFCO”). Claims and cross claims for indemnification and/or contribution against EFCO are also asserted by Third Party Defendants The Windows Associates, Inc. (“Windows”), O’Donnell & Nacarrato, Inc., Melrose Enterprises, Inc., and Jerome Solomon Associates; Fourth Party Defendants Construction Specialty, Inc., Design Equipment Co., Frank X. Tobin & TRS Construction, Inc., and Falcon Glass, Inc.; and Fifth

Party Defendant Mapes Industries, Inc. (the “parties seeking indemnification and/or contribution”). Presently before the Court is EFCO’s Motion for Summary Judgment on all claims against it based on application of the economic loss doctrine. For the reasons stated below, the motion is GRANTED.

## **I. FACTS**

Longport operates and manages a residential ocean-front condominium in Longport, New Jersey (“the building”). Longport contracted with Cato to develop and manage the implementation of a plan to perform repairs and renovations required to make the building water- tight, structurally sound, and aesthetically pleasing. However, according to Longport, numerous problems developed with the repairs, including, *inter alia*, leakage of water into the building due to faulty selection, manufacture and/or installation of new sliding glass doors and windows. As a result, Longport filed the original complaint in this action in May 2000, alleging breach of contract and breach of express warranty against Cato.

As Third Party Plaintiff, Cato then sued EFCO and a number of other parties, asserting various tort and contract claims against them. In Count Five of its complaint, Cato asserted tort causes of action against EFCO for negligently designing and manufacturing defective windows and doors that were installed in the building. Subsequently, the parties seeking indemnification and/or contribution asserted claims and cross-claims against EFCO, relying on the causes of action in Cato’s complaint.

## II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates “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). A genuine issue of material fact exists when “a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The nonmoving party, however, cannot “rely merely upon bare assertions, conclusory allegations or suspicions” to support its claim. Fireman’s Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the nonmoving party’s position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the

burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, “[t]he moving party is ‘entitled to a judgment as a matter of law’ because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

### **III. DISCUSSION**

The economic loss doctrine bars recovery in tort for commercial parties who purchase defective products that cause damage only to the product itself (not personal injury or damage to other property) and when the damages suffered are solely economic in nature. See East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). In such situations, “a manufacturer in a commercial relationship has no duty under either a negligence or a strict products liability theory to prevent a product from injuring itself.” Id. at 871. Instead, the commercial party “who suffers only economic loss must look to the Uniform Commercial Code rather than tort law for the basis for its recovery.” Easling v. Glen-Gery Corp., 804 F. Supp. 585, 587 (D.N.J. 1992). The doctrine has evolved from courts’ recognition that contract and tort claims are grounded in different principles and are better suited to resolving certain types of claims. In recognizing the economic loss doctrine, the New Jersey Supreme Court explained:

The purpose of a tort duty of care is to protect society’s interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society’s interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract

principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

Spring Motors Distributors v. Ford Motor Co., 489 A.2d 660, 672 (N.J. 1985). See also Alloway v. General Marine Indus., L.P., 695 A.2d 264, 267-268 (N.J. 1997).<sup>1</sup>

#### **A. Cato's Complaint Against EFCO**

In its motion, EFCO asserts that the causes of action in Count Five of Cato's complaint against it sound solely in tort, and that Cato seeks to recover only for economic damage to the product itself. Therefore, under the economic loss doctrine, Cato's claims against it must be dismissed. The various parties who oppose the motion (the "opponents"), including Cato, collectively argue to the contrary. First, the opponents assert that a breach of warranty claim has been pled against EFCO by Cato. (The parties agree that a breach of warranty cause of action is not barred by the economic loss doctrine.) Therefore, they argue, the economic loss doctrine is inapplicable and summary judgment inappropriate. Second, they also contend that summary judgment is not warranted because the damages sought by Cato include damage to "other property," which falls outside the scope of the economic loss doctrine. Summary judgment based on the application of the economic loss doctrine turns on these two issues, and is appropriate only if there are only tort claims asserted against EFCO and the damages sought do not include damage to "other property."

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1. The parties assumed that New Jersey law governs this question, and the Court therefore applies New Jersey law.

## 1. Causes of Action Asserted by Cato Against EFCO

EFCO asserts that the causes of action against it in Cato's complaint sound solely in tort and are therefore subject to the economic loss doctrine. Count Five is the only count that is directed toward EFCO. In that count, Cato alleges, *inter alia*, that EFCO "failed to exercise reasonable care in the design and manufacture" of its products and that the products were "defectively manufactured and designed." Cato's Complaint, ¶¶ 44, 41. There is no allegation in this count that EFCO breached a contract or breached any implied or express warranty. Neither the word "contract" nor "warranty" appears at all. Furthermore, there is no mention of the Uniform Commercial Code or state statutes which enact it. The complaint simply does not assert a breach of contract or breach of warranty claim against EFCO.<sup>2</sup>

Cato argues that it intended to allege that EFCO breached implied warranties, and the opponents collectively twist Cato's complaint in an attempt to find some warranty claim against EFCO in order to defeat summary judgment. However, these tortured interpretations cannot make one appear. First, the opponents argue that language directly within Count Five should have put EFCO on notice of a breach of implied warranty claim. They point to ¶¶ 43, 45 and 46, which respectively allege that EFCO "knew or should have known the use to which their products were put," "placed [its] products in the stream of commerce," and sold them "in a defective condition." However, as noted supra, there is plainly no mention of implied warranties, the Uniform Commercial Code, or relevant state statutes. These allegations could not have placed EFCO on notice of a breach of warranty claim against it.

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2. In contrast, however, there are breach of contract and breach of warranty claims set forth in other counts of the complaint that illustrate that, when Cato wanted to, it knew how to clearly set forth such causes of action. See Cato's Complaint, ¶¶ 25 (breach of warranty against Windows), 30 (breach of contract against Windows).

Second, the opponents argue that a warranty claim is asserted against EFCO because Count Five's ¶ 38 incorporates all previous paragraphs, and Count One's ¶ 24 alleges that "under the terms of the warranty and guarantee, the said third party defendant must replace all defective work, materials and products." However, this count of the complaint is directed to Windows, and it is clear from the next paragraph and the alleged "terms of the warranty" that it refers to the *express* warranty contained in Cato's subcontract with Windows. Even Cato itself does not allege in its response that it intended to assert a breach of *express* warranty claim against EFCO.

Third, the opponents argue that Cato's complaint asserts a warranty claim against EFCO based upon still *other* paragraphs outside of Count Five (but incorporated into it), in conjunction with an alleged agency relationship between EFCO and Windows. The opponents point out that ¶ 10 of the complaint alleges that Windows was acting as EFCO's agent, and therefore "was able to bind" EFCO to Windows' contracts with Cato. In addition, Count One's ¶ 24 (which, again, is directed at Windows) alleges that "under the terms of the warranty and guarantee, the said third party defendant must replace all defective work, materials and products." Therefore, the opponents argue, the complaint alleges a breach of express warranty claim against EFCO. Nevertheless, in Count Five, Cato simply failed to follow up and set forth any warranty cause of action against EFCO. Also, as noted supra, such an interpretation also assumes that Cato intended to assert a cause of action for breach of an *express* warranty. However, in its response, Cato only indicated the intent to assert breach of *implied* warranties.

Alternatively, but again relying on an alleged agency relationship, the opponents argue that Count Three's ¶ 33 asserts breach of contract and breach of warranty claims against

EFCO because, in addition to clearly asserting such claims against Windows, that paragraph alleges that Windows acted through its agents. However, there is no allegation in the complaint that *EFCO* was *Windows*' agent. And again, the referenced warranties appear to be express warranties, which apparently were not contemplated by Cato.

Finally, the opponents claim that simply because EFCO was on notice that its windows were leaking, these factual contentions should automatically provide EFCO notice of a breach of implied warranty claim, since its products were obviously not merchantable. It is certainly well settled that the Federal Rules of Civil Procedure "do not require a plaintiff to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8 (a)(2)). However, a defendant has the right to reasonable notice of the legal causes of action against it – and a tort claim is simply not the same as a breach of warranty claim. To hold that a breach of warranty claim was asserted against EFCO solely because the complaint alleges that its products were not performing adequately would effectively eviscerate the requirement that plaintiffs provide adequate notice of their claims. For all the reasons stated above, Cato's complaint does not assert a breach of contract or breach of warranty

cause of action against EFCO.<sup>3</sup> Therefore, because the only claims asserted sound in tort, these claims are subject to the economic loss doctrine.

## 2. Damages Sought by Cato

In order for Cato's claims against EFCO to be barred by the economic loss doctrine, however, the plaintiff must *also* seek damages *only* for an alleged defective product itself, as opposed to damage to "other property." Courts have considered this question in the context a construction litigation. In Easling, supra, the most analogous case to the one at bar in which a court applied New Jersey law, the court held that water damage to the studs in the wall of a building resulting from allegedly defective bricks used on its exterior was not damage to "other property." Easling, 804 F. Supp. at 589-590. Therefore, the court applied the economic loss doctrine to dismiss a tort claim against the seller of the bricks. Id. at 590.

The most recent decisions in other jurisdictions on this point have also held that damage to the attendant structure of a building as a result of products used in construction does not constitute damage to "other property," at least not where there is no risk of physical harm to

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3. In the alternative, in its response Cato requests leave to amend its complaint to more specifically include breach of implied warranty claims against EFCO. Under Fed. R. Civ. P. 15 (a), leave to amend is to be "freely given when justice so requires." However, a court may deny leave to amend where there has been undue delay, bad faith or dilatory motive on the part of the movant; where the amendment would prejudice the non-movant; or where the amendment would be futile. See Foman v. Davis, 371 U.S. 178, 182 (1962).

In this case, Cato requests to amend its complaint over a year after its filing, and provides no reason whatsoever for this delay. Clearly, it has long known the basic facts upon which its proposed breach of warranty claim is based. Furthermore, Cato failed to bring this issue to the Court's immediate attention by filing a separate motion for leave to amend. At this point, if the amendment were permitted, EFCO would be entitled to discovery directed to a breach of warranty claim. However, after numerous deadline extensions, this Court ordered that discovery was to be completed in this case by December 31, 2001. Requiring EFCO to engage in additional discovery on this claim well after the close of discovery and to adjust its trial preparation at this late date would be prejudicial to it. Similar prejudice is commonly cited as a sufficient reason to deny requests to amend. See, e.g., Johnston v. City of Philadelphia, 158 F.R.D. 352, 353 (E.D. Pa. 1994). In light of the above, justice does not require the Court to permit the amendment, and the Court denies Cato's request. Such a denial is particularly appropriate when, in an answer to a summary judgment motion, leave is requested to file an amended complaint that would defeat the motion. See Beckman v. United States Postal Serv., 79 F. Supp.2d 394, 406-409 (S.D.N.Y. 2000).

persons or additional other property. In so holding, these courts have applied the economic loss doctrine to bar tort claims in such situations. See Calloway v. City of Reno, 993 P.2d 1259, 1267-1269 (Nev. 2000) (water intrusion, damage to floor and ceilings, and structural and wood decay not recoverable in tort against subcontractors who used allegedly defective roofing and siding under economic loss doctrine); Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc., 659 A.2d 267, 271 (Me. 1995) (water damage resulting from allegedly defective windows and doors not recoverable in tort against manufacturer under economic loss doctrine); Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993) (damage to reinforcing steel resulting from allegedly defective concrete not recoverable in tort against supplier under economic loss doctrine); Washington Courte Condominium Ass'n-Four v. Washington-Golf Corp., 510 N.E.2d 1290, 1293-1294 (Ill. App. Ct. 1986) (water damage to insulation, walls, ceilings, floor and electrical outlets resulting from allegedly defective sliding glass windows and doors not recoverable in tort from subcontractors under economic loss doctrine). Notably, the New Jersey Supreme Court cited both Casa Clara and Oceanside with approval when it extended the economic loss doctrine to cover most consumer (in addition to commercial) transactions, although the court was not specifically considering what constitutes "other property." See Alloway, 695 A.2d at 272-273.

The reasoning behind these decisions is sound. In determining whether a product has injured only itself in an action in which a component part manufactured by a defendant causes injury to the product of which it is a part, a court should look not to the product manufactured by the defendant, but the product purchased by the plaintiff. See King v. Hilton-Davis, 855 F.2d 1047, 1051 (3d. Cir. 1988). These courts reason that the product purchased by

the plaintiff in these cases – the subject of the bargain – is the successfully completed building, not simply its component parts. See Calloway, 993 P.2d at 1268-1269; Oceanside, 659 A.2d at 271; Casa Clara, 620 So. 2d at 1247; Easling, 804 F. Supp. at 588. Therefore, to the extent products used in construction prove defective and result in harm to a building itself, these damages should not be considered damage to “other property.”

This interpretation of “other property” is also consistent with the analytical distinctions between contract and tort. The dispute in these cases is principally that the plaintiffs did not receive the benefit of their bargain. This is a foreseeable issue of quality for which the parties can, and usually do, allocate risk in contract. In contrast, in general these are not cases in which the plaintiff alleges personal injury or a risk thereof. Furthermore, they are not cases in which a sudden, calamitous event occurred. See Easling, 804 F. Supp. at 590. Therefore, the safety concerns that form the basis for tort law are not implicated.

This line of cases is analogous to the case at bar. First, Longport’s complaint specifically alleges that it contracted for a “water tight, structurally sound, and aesthetically pleasing building” from Cato. Cato then effectively sought to purchase this finished product from a variety of other parties. Therefore, like the cases described supra, the entire successfully renovated building should be considered the purchased product. Secondly, the damages sought are similar as well. The damages from water infiltration that form the gravamen of Longport’s complaint are virtually identical to those for water damage in many of the cases described supra. Although Longport’s complaint also appears to refer to damage to individual tenants’ personal property, EFCO attaches a deposition transcript in which counsel for Longport indicates that it is not pursuing these damages in this lawsuit, and Longport has not disputed this contention by

filing a response to EFCO's motion. No party has alleged that there is any risk of injury to persons in this case. As such, as the cases supra have held, the damage sought is not damage to "other property," but is properly considered damage to the renovated building – the bargained-for product. Therefore, these claims are subject to the economic loss doctrine.

In Cato's response, it simply asserts that damage to "other parts of the building," which occurred as a result of the water infiltration, should be considered damage to "other property." However, in light of the case law set out supra, this vague assertion fails to sustain its claim as a matter of law. Furthermore, the cases cited by Cato do not apply New Jersey law, and, in any case, are inapposite. Under the facts of Saratoga Fishing Co. v. J. M. Martinac & Co., 520 U.S. 875 (1997), a ship sank as a result of an allegedly faulty hydraulic system. While the parties agreed that the economic loss doctrine barred a tort claim against the ship's manufacturer for loss of the vessel itself, the Supreme Court, applying admiralty law, held that extra equipment added to the ship by a subsequent owner after its purchase was "other property" not subject to the economic loss doctrine. Id. at 884-885. However, as explained above, the damage to "other parts of the building" as a result of water damage claimed in this case is properly considered damage to the bargained-for product, and for which the relevant parties could bargain to allocate risk. Of course, the extra equipment in Saratoga Fishing could not be so considered, since it was added by a previous owner after the ship was purchased.

The inapplicability of 2-J Corp., supra, is just as apparent. In that case, inventory inside a warehouse was damaged when the warehouse structure collapsed. Applying Pennsylvania law, the Third Circuit held that the damage to the inventory was "other property" not subject to the economic loss doctrine. Id. at 542-544. However, again, in this case Longport

does not seek damages for harm to the personal property of condominium owners. In some respects, this property might be considered analogous to the warehouse's inventory, since clearly neither were the subject of the bargain between the parties. However, damage to "other parts of the building" to which Cato refers is more like damage to the warehouse itself in 2-J Corp., for which there was no doubt that a tort claim could not be maintained. Furthermore, that case presented an obviously sudden and violent turn of events, absent here, in which safety considerations at the heart of tort law were implicated.

As a result, because Cato asserted only tort causes of action against EFCO and seeks damages only for the defective product itself, the Court will grant summary judgment against Cato and in favor of EFCO on the basis of the economic loss doctrine.

**B. Claims and Cross Claims Asserted by the Parties Seeking Indemnification And/Or Contribution**

As noted supra, the economic loss doctrine bars recovery in tort for commercial parties who purchase defective products that cause damage only to the product itself (not personal injury or damage to other property) and when the damages suffered are solely economic in nature. Under New Jersey law, contribution is a right that exists among joint tortfeasors. See N.J. Stat. Ann. § 2A:53A-2 (2001). Common law indemnity, like contribution, is also a right that depends on a party's status as a tortfeasor. See Ramos v. Browning Ferris Indus. of South Jersey, 510 A.2d 1152, 1158-1159 (N.J. 1986); Cartel Capital Corp. v. Fireco of New Jersey, 410 A.2d 674, 683 (N.J. 1980); Adler's Quality Bakery v. Gasteria, Inc., 159 A.2d 97, 110 (N.J. 1960).

The parties seeking indemnification and/or contribution have asserted these claims against EFCO, relying on the allegations in Cato's complaint.<sup>4</sup> However, as discussed supra, the only causes of action asserted in Cato's complaint are tort claims which are barred by the economic loss doctrine. Therefore, related claims against EFCO for contribution and indemnification – which depend on EFCO's status as a tortfeasor – cannot be maintained. See HCB Contractors v. Rouse Assoc., No. 91-5350, 1992 U.S. Dist. LEXIS 17443 at \*17-\*21 (E.D. Pa. Oct. 26, 1992) (dismissing claims for contribution and indemnification because that party could not be held liable for negligence under the economic loss doctrine in Pennsylvania). As a result, the court grants summary judgment in favor of EFCO and against Third Party Defendants Windows, O'Donnell & Nacarrato, Inc., Melrose Enterprises, Inc., and Jerome Solomon Associates; Fourth Party Defendants Construction Specialty, Inc., Design Equipment Co., Frank X. Tobin & TRS Construction, Inc., and Falcon Glass, Inc.; and Fifth Party Defendant Mapes Industries, Inc., on their claims and cross-claims against EFCO for indemnification and/or contribution.

#### **IV. CONCLUSION**

The claims asserted against EFCO in Cato's complaint are tort claims – not breach of warranty claims – that seek to recover only for property damage to the building. As a result, as a matter of law these claims are barred by the economic loss doctrine. The only claims asserted by other parties are claims for indemnification and contribution, which depend on the

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4. Some of the parties seeking indemnification and/or contribution have also asserted claims against EFCO for *contractual* indemnification, in addition to common law indemnification. However, none of these parties has come forward with any evidence supporting such a claim, or any evidence that would entitle them to a right of indemnification beyond that available at common law.

existence of a tort cause of action against EFCO. As a result, summary judgment on all claims against EFCO is proper.

An appropriate order follows.

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Defendant/Third Party Plaintiff,	:	No. 00-CV-2231
	:	
v.	:	
	:	
THE WINDOWS ASSOCIATES, INC., et. al.	:	
	:	
Third Party Defendants.	:	

**ORDER**

AND NOW, this 18<sup>th</sup> day of March 2002, upon consideration of Third Party Defendant EFCO Corporation, Inc.'s Motion for Summary Judgment Based on the Economic Loss Doctrine (Docket No. 144); responses thereto filed by Defendant/Third Party Plaintiff Robert Cato & Associates, Inc. (Docket No. 151), Third Party Defendant Melrose Enterprises, Inc., (Docket No. 156) and Fourth Party Defendant Construction Specialty, Inc. (Docket No. 149); Defendant/Third Party Plaintiff Robert Cato & Associates, Inc.'s supplemental response (Docket No. 155); and Third Party Defendant EFCO Corporation, Inc.'s replies (Docket Nos. 153 and 158), it is hereby **ORDERED** that Third Party Defendant EFCO Corporation, Inc.'s Motion is **GRANTED**.

Summary judgment is granted in favor of Third Party Defendant EFCO Corporation, Inc. and against Defendant/Third Party Plaintiff Robert Cato & Associates, Inc., as well as against all parties seeking indemnification and/or contribution from it: Third Party Defendants The Windows Associates, Inc., O'Donnell & Nacarrato, Inc., Melrose Enterprises, Inc., and Jerome Solomon Associates; Fourth Party Defendants Construction Specialty, Inc., Design Equipment Co., Frank X. Tobin & TRS Construction, Inc., and Falcon Glass, Inc.; and Fifth Party Defendant Mapes Industries, Inc.

BY THE COURT:

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RONALD L. BUCKWALTER, J.