

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

UNIQUE TECHNOLOGIES, INC.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 02-CV-6649
	:	
MICRO-STAMPING CORP. et al.,	:	
Defendants.	:	

ORDER

AND NOW, this day of April, 2003, upon consideration of: (i) the Third-Party Defendant's Motion to Dismiss Plaintiff's Joinder Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (Document No. 17, filed January 13, 2003); (ii) the Plaintiff's Response in Opposition to the Motion (Document No. 22, filed February 10, 2003); and (iii) the Third-Party Defendant's Reply in Support of its Motion (Document No. 24, filed February 19, 2003), it is hereby **ORDERED** as follows.

Plaintiff ("Unique") filed its Complaint against the Defendant ("Micro-Stamping") in the Court of Common Pleas, Berks County, Pennsylvania. Micro-Stamping removed the action to the United States District Court for the Eastern District of Pennsylvania, and thereafter, filed an Answer to Unique's Complaint, asserting affirmative defenses and three counterclaims: (i) a book account claim; (ii) a breach of contract claim; and (iii) a negligence claim. In response to Micro-Stamping's counterclaims, Unique filed a Joinder Complaint against the Third-Party Defendant ("Bausch"). Bausch moves to dismiss Unique's Joinder Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

In 1998, Bausch, a manufacturer of laser eye surgery equipment, entered into a contract with Micro-Stamping for the acquisition of an initial batch of 400,000 ALK blades. (P. Resp. at

p. 6). ALK blades are vital components to ACS microkeratome corneal resection instruments, the medical devices commonly used by eye surgeons in “LASIK” (Laser In-Situ Keratomileusis) surgery to correct vision deficiencies. Subsequently, Micro-Stamping entered into a contract with Unique, a supplier to Micro-Stamping, in which Micro-Stamping would send metal ALK blanks to Unique, and Unique would process the ALK blanks into ALK blades, according to specifications, and ship the finished ALK blades back to Micro-Stamping. (P. Resp. at p. 7). Micro-Stamping would then resell the finished ALK blades to Bausch. (P. Resp. at p. 7).

Bausch contended that the ALK blades were improperly polished and/or overly sharpened and failed to meet the specifications agreed upon between Bausch and Micro-Stamping. (P. Resp. at p. 7). As a result, Micro-Stamping agreed to accept a debit memo from Bausch to reconcile for the alleged nonconforming ALK blades. (P. Resp. at p. 7). Thereafter, Micro-Stamping issued four debit memos, totaling \$244,277.81, to Unique in an effort to share the losses. Unique asserted that all but 1,546 of the ALK blades conformed to the specifications agreed upon between Unique and Micro-Stamping, but nevertheless agreed to accept the debit memos, so long as Micro-Stamping would agree to contract with Unique for the production of 1,400,000 ALK blades. (P. Resp. at p. 8). In turn, Unique promised it would allow Micro-Stamping to apply a \$6,000 credit per month against the monthly invoices from Unique to Micro-Stamping. (P. Resp. at p. 8). Micro-Stamping applied over \$100,000 in credit against Unique’s monthly invoices before it finally discontinued shipping the ALK blanks to Unique. (P. Resp. at p. 8).

Rule 12(b) of the Federal Rules of Civil Procedure states, in relevant parts, that, “Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-

claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except 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 a Rule 12(b)(6) motion to dismiss, the court will assume the truth of all plaintiff’s well-pleaded facts, and view those facts in the light most favorable to the plaintiff. The court is directed to only dismiss the complaint when the plaintiff cannot prove a set of facts, in support of the claim, for which relief may be granted. See Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); City of Philadelphia v. Lead Industries Ass’n, Inc., 994 F.2d 112 (3d Cir. 1993). However, the court is not “bound to accept as true a legal conclusion couched as a factual allegation.” Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986); see also General Motors Corp. v. New A.C. Chevrolet, 263 F.3d 296, 333 (3d Cir. 2001).

A. Book Account Claim

Micro-Stamping’s first counterclaim against Unique is for the nonpayment or incomplete payment of four debit memos issued by Micro-Stamping to Unique, as a result of alleged nonconforming ALK blades. (T.P.D. Motion ex. B at p. 8). Unique claims that if it is liable to Micro-Stamping for the debit memos, then Bausch could be liable, in whole or in part, to Unique. However, Unique offers this Court no recognizable legal cause of action, and this Court is unaware of any such cause of action, which Unique could possibly assert against Bausch for contribution, in whole or in part, for Unique’s liability to Micro-Stamping for the nonpayment or incomplete payment on debit memos issued by Micro-Stamping to Unique.¹

¹ Unique is reminded that all alleged representations made by any party at a Rule 16 Conference are not cognizable in the formulation of a 12(b)(6) motion or defense.

B. Breach of Contract Claim

Micro-Stamping's second counterclaim against Unique alleges that Unique breached its contract with Micro-Stamping for failing to finish the ALK blades according to the specifications of the contract. (T.P.D. Motion ex. B at p. 9). Unique claims that if it is liable for breach of contract to Micro-Stamping, then Bausch could be liable to Unique for indemnification and/or contribution. Unique's position is unpersuasive and legally insufficient.

Typically, privity of contract is a mandatory prerequisite for a party to bring a breach of contract claim. Privity of contract is a longstanding pillar of Pennsylvania contract law. See, e.g., Evans v. Otis Elevator Co., 403 Pa. 13, 18, 168 A.2d 573, 575 (1961) (“Generally, a party to a contract does not become [sic] liable for a breach thereof to one who is not a party thereto.”); Finney v. Finney, 16 Pa. 380 (1851) (privity of contract between the plaintiff and defendant is essential to the right to maintain a suit on a contract). Unique only maintains a contractual relationship with Micro-Stamping, while Micro-Stamping is in privity with both Unique and Bausch, through the formation of two separate, distinct, and independent contracts. Unique has not contracted with Bausch, and Bausch has not contracted with Unique; neither party is in privity with the other.

Indemnification serves as a method for fault shifting to a third party, where the party legally obligated to pay damages caused by another is without fault, but for its legal status. See, e.g., Builders Supply Co. v. McCabe, 366 Pa. 322, 328, 77 A.2d 368, 371 (1951) (There is a right to indemnity where a defendant is held vicariously liable based upon “fault that is imputed or constructive only, being based on some legal relation between the parties . . .”); Sirianni v. Nugent Bros., Inc., 509 Pa. 564, 570-71, 506 A.2d 868, 871 (1986) (indemnification lies “when a

defendant who has been found liable to a plaintiff solely by operation of law, rather than by active fault, seeks to recover for his loss from a defendant who was actually responsible for the accident which occasioned the loss.”); Burch v. Sears, Roebuck and Co., 320 Pa. Super. 444, 457-58, 467 A.2d 615, 622 (1983)(“Indemnity is only available from those who are primarily liable to those who are merely secondarily or vicariously liable.”).

Before Unique can assert a valid claim for indemnification against Bausch, Micro-Stamping must first prevail on its counterclaim against Unique; the counterclaim will only be successful if it is proven that Unique had some degree of fault for the production of nonconforming ALK blades. However, if Unique did have some degree of fault for producing nonconforming ALK blades, then it can no longer have an indemnification claim against any party, as indemnification is a method of fault shifting, not sharing. Conversely, if Unique produced conforming ALK blades, then Micro-Stamping’s counterclaim for breach of contract will fail, and without a valid counterclaim, Unique’s Joinder Complaint on the breach of contract claim will also fail.

Contribution serves as a method for fault sharing among two or more joint tortfeasors. Joint tortfeasors are defined as, “two or more persons jointly or severally liable in *tort* for the same injury to persons or property, whether or not judgment has been recovered against all or some of them.” 42 Pa. C.S.A. § 8322 (emphasis added); see also TVSM, Inc.v. Alexander & Alexander, Inc., 583 F. Supp. 1089, 1092 (E.D. Pa. 1984). Pennsylvania law does not recognize a right to contribution in a breach of contract case. See, e.g., Kemper National P & C Co. v. Smith, 419 Pa. Super. 295, 309, 615 A.2d 372, 380 (1992)(“Pennsylvania only authorizes contribution among joint tortfeasors.”); TVSM, Inc., 583 F. Supp. at 1092 (“A right to

contribution in Pennsylvania arises only among joint tortfeasors.”); Richardson v. John F. Kennedy Memorial Hosp., 838 F. Supp. 979, 989 (E.D. Pa. 1993)(“Under Pennsylvania law, the right to contribution only arises among joint tortfeasors.”). But see Resolution Trust Corp. v. Gross, 1996 WL 89380 at *2 (E.D. Pa.)(calling into question the limitation on contribution claims). Furthermore, a third-party defendant can only be held liable for contribution as a joint tortfeasor if that third party-defendant is found *directly* liable to the plaintiff. Eagle-Picher Industries, Inc. v. United States, 846 F.2d 888, 892 n.4 (3d Cir. 1988); see also Resolution Trust Corp., 1996 WL 89380 at *2.

Unique’s third-party complaint against Bausch for contribution on Micro-Stamping’s breach of contract counterclaim against Unique must fail for two reasons. First, Micro-Stamping’s counterclaim against Unique sounds in contract for Unique’s alleged failure to produce ALK blades according to specifications. Unique cannot assert a legally permissible cause of action under Pennsylvania state law for contribution on a breach of contract case. Contribution claims are limited to tort actions among joint tortfeasors. Second, to state a legally sufficient cause of action for contribution, Unique must allege that Bausch is directly liable to Micro-Stamping for Unique’s alleged production of nonconforming ALK blades. However, Unique has failed to articulate a valid theory of law for Bausch’s legal liability *to Micro-Stamping* for Unique’s alleged production of nonconforming ALK blades.

C. Negligence Claim

Micro-Stamping’s third counterclaim against Unique alleges that Unique breached a duty of care in failing to finish the ALK blades according to specifications. (T.P.D. Motion ex. B at p. 10). Unique claims that if it is liable to Micro-Stamping on its alleged negligence claim, then

Bausch shall be liable to Unique for contribution and/or indemnification. However, Micro-Stamping's underlying counterclaim against Unique must fail, and accordingly, Unique's Joinder Complaint on the negligence count against Bausch also must fail.

Pennsylvania law is reluctant to allow a negligence claim in an action based upon breach of contract. The "gist of the action" test permits tort recovery only if it can be said that the "tortious wrong ascribed to the defendant [is] the gist of the action with the contract being collateral." Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 103 (3d Cir. 2001). "The important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus." Id. The duties allegedly violated by Unique, as to its relationship with Micro-Stamping, clearly arise from duties imposed by contract based upon the mutual consent of Unique and Micro-Stamping. Public policy does not demand Unique to process ALK blades that conform to Micro-Stamping's specifications; this duty is solely a creature of contract. The gist of this action is based upon contract, and therefore Micro-Stamping's negligence counterclaim against Unique, and Unique's Joinder Complaint on the negligence count against Bausch, are both legally insufficient.

For the foregoing reasons, Bausch's Motion to Dismiss Plaintiff's Joinder Complaint pursuant to Fed. R. Civ. P. 12(b)(6) is hereby **GRANTED**.

BY THE COURT:

Legrome D. Davis, U.S.D.J.