

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

PROFESSIONAL SYSTEMS CORP.	:	
d/b/a PSC INFO GROUP,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO. 05-2689
	:	
OPEX POSTAL TECHNOLOGIES, ¹	:	
	:	
Defendant.	:	
	:	

MEMORANDUM

BUCKWALTER, S. J.

March 8, 2006

Presently before the Court is Defendant OPEX Corporation’s Motion to Dismiss (Docket No. 2), Plaintiff Professional Systems Corporation’s Reply (Docket No. 5), and Defendant’s Reply (Docket No. 6). For the reasons set forth below, Defendant’s Motion is **DENIED**.

I. FACTUAL BACKGROUND

On December 5, 2003, Plaintiff Profession Systems Corporation (“PSC” or “Plaintiff”) entered into a letter agreement with Defendant OPEX Postal Technologies (“OPEX” or “Defendant”). The letter agreement provided that Defendant would install and configure two MPS40 High Speed Letter Sorter machines at Plaintiff’s facility. Under this original letter agreement, Plaintiff would purchase the first machine for \$565,215.00, and Defendant would

1. The Complaint names OPEX Postal Technologies as the Defendant in this case. Defendant notes in it’s Motion for Summary Judgment that OPEX Postal Technologies is a division of OPEX Corporation and not a separate legal entity. (Def.’s Mot. Summ. J. At 2, n. 1.)

provide Plaintiff with the second machine at no initial charge for three years. At the end of the three year period, Plaintiff had the option of returning the second machine to Defendant or purchasing the second machine from Defendant at a price to be agreed upon by the parties. The letter agreement also included the following “Basic Warranty:”

OPEX warrants that it owns the MPS40 products and, upon payment in full for each machine, that it shall transfer good title to the product to the Customer. OPEX further warrants that it shall repair or replace defective parts, including labor, and shall perform preventative maintenance at no cost to Customer for a period of ninety (90 days), commencing from the date of delivery . . . OPEX further warrants that service will be performed in a good and workmanlike manner, based upon commercially reasonable practices and standards.

THE FOREGOING EXPRESS WARRANTIES ARE EXCLUSIVE AND MADE IN LIEU OF ANY AND ALL OTHER WARRANTIES HEREUNDER, EXPRESS OR IMPLIED INCLUDING THOSE OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

(Def.’s Mot. Dismiss Ex. B at 4).

The letter agreement was subsequently amended by the parties on December 23, 2003. According to the amended letter agreement, Defendant would provide two machines to Plaintiff for a six-month trial period in exchange for a one-time, non-refundable payment of \$129,194.00. At the end of the trial period, Plaintiff had the option of purchasing one machine for \$480,432.00. If Plaintiff exercised that option, Defendant agreed to provide the second machine for another two and half years at no additional cost. The amended letter agreement also stated,

except as specifically changed by the terms of this Amendment, all other terms, conditions and descriptions contained in the Purchase Letter remain in full force and effect. In the case of a conflict

between the terms of this Amendment and the terms of the Purchase Letter, the terms of this Amendment are deemed to take precedence.

(Def.'s Mot. Dismiss Ex. C at 3.)

Plaintiff instituted this present action against Defendant on June 7, 2005 alleging fraud and equitable rescission.² Specifically, Plaintiff alleges that “Bill Boyce of Defendant OPEX solicited PSC regarding the purchase of certain sorting and mailing equipment manufactured and sold by OPEX.” (Compl. ¶ 7.) Plaintiff states that “from late 2003 through 2004, [Plaintiff] advised [Defendant] of their specific sorting and mailing needs.”³ Id. ¶ 8.

2. The Court has jurisdiction over this matter on the basis of diversity, as the Complaint notes that “Plaintiff is a citizen of Pennsylvania and Defendant is a citizen of New Jersey and/or Delaware.” (Compl. ¶ 3.) Federal courts sitting in diversity “are to apply state law as interpreted by the state’s highest court. In the absence of guidance from that court we are to refer to decisions of the state’s intermediate appellate courts for assistance in determining how the highest court would rule.” McKenna v. Pac. Rail. Serv., 32 F.3d 820, 825 (3d Cir. 1994) (citations omitted). Further, if brought under diversity of citizenship, the forum state’s choice of law rules dictate which state law applies. Berg Chilling Sys. v. Hull Corp., 435 F.3d 455 (3d Cir. 2006) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)). There is no explicit provision in the letter agreements pertaining to choice of law.

In the absence of an express choice of law provision in the agreement, ‘the law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue

Kruzits v. Okuma Mach. Tool, 40 F.3d 52, 55 (3d Cir. 1994) (citation omitted). Pennsylvania has substantial relationship to Plaintiff as Plaintiff is a citizen of Pennsylvania and the machines were installed and utilized in Plaintiff’s facility in Pennsylvania. Therefore the Court will apply Pennsylvania law. The Court also notes that the parties rely on Pennsylvania law in their papers implicitly agreeing that the letter agreements should be governed by Pennsylvania law.

3. According to Plaintiff’s Complaint, Plaintiff’s specific mailing and sorting needs were that:

- (a) any machinery is a substantial capital investment and will need to enable [Plaintiff] to stop outsourcing all of its sorting and mailing in the Pennsylvania Region and be capable of handling an average of 450,000 letters per day (+/-);
- (b) the two (2) MPS40 machines that [Defendant] were attempting to sell, must be able to collectively handle the anticipated workload;
- (c) the entire transaction was premised upon an integration of the two (2) MPS40 machines being sold as a package utilizing [Defendant’s] ‘multi machine networking solution;’
- (d) the two

(continued...)

Plaintiff also alleges that Defendant’s representative, Bill Boyce, stated “in writing and orally, that the two (2) MPS40 machines were being sold as a package . . . would both collectively handle the anticipated work volume and that [the two machines] would be successfully configured, as outlined in the ‘machine configuration’ and fully integrated utilizing [Defendant’s] ‘multi machine networking solution.’” Id. ¶ 9. The crux of Plaintiff’s Complaint is that “Boyce/OPEX intentionally made these representations to Plaintiff “to induce [Plaintiff] to provide a non-refundable payment of \$129,194.75.”⁴ Id. ¶ 11(d).

Defendant argues that Plaintiff’s claims are barred by the parol evidence rule, the gist of the action doctrine and the economic loss doctrine. Defendant also claims that Plaintiff fails to plead fraud with particularity. Finally, Defendant argues that equitable rescission is not a separate cause of action but a remedy that cannot be sustained in the absence of a properly pled fraud claim.

II. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) allows the Court to dismiss the complaint for failure to state a claim. The purpose of Rule 12(b)(6) is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case.

3. (...continued)

(2) machines together could handle all of the Eastern seaboard zip codes for [Plaintiff], in particular one MPS40 to handle zip codes starting with 0-3 and the other MPS40 to handle zip codes starting 4-6 as one collective client/customer/project; (e) the machines could enable [Plaintiff] to achieve a particularized return on investment.

(Compl. ¶ 8.)

4. Based upon this statement, the Court concludes that Plaintiff is bringing a fraud in the inducement claim. Plaintiff also states several times in its Reply that Plaintiff is bringing a fraud in the inducement claim. (Pl.’s Mem. Opp. at 2) (stating that “fraud in the inducement [what PSC alleges]” and “Plaintiff PSC has alleged that Defendant OPEX fraudulently induced it into the agreements.”)

Johnsrud v. Carter, 620 F.2d 29, 33 (3d Cir. 1980) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). All reasonable inferences that can be drawn from the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) (citing Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985)). The Court may dismiss a complaint “only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Swin Res. Sys., Inc. v. Lycoming County, 833 F.2d 245, 247 (3d Cir. 1989) (citing Hishon v. King & Spalding, 467 U.S. at 69, 73 (1984)).

III. DISCUSSION

A. Fraud with Particularity

As a threshold matter, Defendant moves to dismiss Plaintiff’s fraud count under Federal Rule of Civil Procedure 9(b). Rule 9(b) states “in averments of fraud. . .the circumstances constituting fraud. . .shall be stated with particularity.” Fed. R. Civ. P. 9(b). A plaintiff “may not simply point to a bad result and allege fraud. Rather, plaintiff must . . . inject precision and some measure of substantiation into [the] allegations [of fraud] . . . who, what, when, where, and how.” Sun Co., Inc. v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 369 (E.D. Pa. 1996) (citation omitted). A plaintiff “need not, however, plead the ‘date, place or time’ of the fraud, so long as they use an ‘alternative means of injecting precision and some measure of substantiation into their allegations of fraud.’” Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 658 (3d Cir. 1998) (citation omitted).

The Court finds that Plaintiff used “alternative means of injecting precision” into its fraud claim by adding sufficient detail regarding the content and timing of the alleged

representations. Accordingly, the Court denies Defendant's Motion to Dismiss Plaintiff's fraud claim on the basis of Federal Rule of Civil Procedure 9(b).

B. Parol Evidence Rule

Defendant also argues that Plaintiff's fraud claim must be dismissed due to the parol evidence rule.⁵ In Pennsylvania, under certain circumstances, claims of fraud in the inducement can serve as an exception to the parol evidence rule. Capital Funding, VI, LP v. Chase Manhattan Bank USA, N.A., No. 01-6093, 2003 U.S. Dist. LEXIS 12102, *9-11 (E.D. Pa. Mar. 21, 2003). Fraud in the inducement occurs when "the party proffering evidence of additional prior representations does not contend that the parties agreed that the additional representations would be in the written agreement, but rather claims that the representations were fraudulently made and that but for them, he or she never would have entered into the agreement." Id. (quoting 1726 Cherry St. P'ship v. Bell Atl. Prop., Inc., 653 A.2d 633, 666 (Pa. Super. 1995)). In Blumenstock v. Gibson, 811 A.2d 1029, 1036 (Pa. Super. 2002), the Pennsylvania Superior Court stated "that the theory holds that since fraud induced the agreement, no valid agreement came into being and parol evidence is admissible to show that the alleged agreement is void." Yet, seemingly contradicting itself, the Blumenstock court added: "[n]evertheless, the case law clearly holds that a party cannot justifiably rely upon prior oral representations yet sign a

5. The parol evidence rule applies when prior statements and representations (1) contradict, conflict, add, modify or vary the terms of a contract and (2) fall within the scope of the integrated agreement. Capital Funding, VI, LP v. Chase Manhattan Bank USA, N.A., No. 01-6093, 2003 U.S. Dist. LEXIS 12102, *9 (E.D. Pa. Mar. 21, 2003) (citing Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Inv., 951 F.2d 1399, 1407 (3d Cir. 1991)). **Neither the letter agreement nor the amended letter agreement contain an integration clause.** Yet, a formal provision in the contract, such as an integration clause, is not necessary for a contract to be deemed integrated. Phillips v. Andrews, 332 F. Supp. 2d 797, 804 (D.V.I. 2005), aff'd, 04-3783, U.S. App. LEXIS 7483 (3d Cir. Apr. 19, 2005).

Notably, Plaintiff does not dispute Defendant's contention that the letter agreements "constitute the complete statement of the agreement between OPEX and PSC." (Def.'s Mot. Dismiss at 7.) Further, given the amount of detail contained in the letter agreements, the Court finds that the agreements constitute an integrated, or complete and final, agreement between the parties. Thus, the Court finds that the parol evidence rule applies.

contract denying the existence of those representations.” Id. The Pennsylvania Superior Court attempted to clear up any confusion concerning the applicability of the fraud in the inducement exception to the parol evidence rule in Youndt v. First National Bank by concluding that “parol evidence is inadmissible where the contract contains terms that deny the existence of representations regarding the subject matter of the alleged fraud. But when the contract contains no such term denying the existence of such representations, parol evidence is admissible to show fraud in the inducement.” Youndt v. First Nat’l Bank, 868 A.2d 539 (Pa. Super. 2005).

Plaintiff’s Complaint alleges that Defendant’s representative communicated to Plaintiff that the machines would “collectively handle the anticipated work volume and that [the machines] would be successfully configured, as outlined in the ‘machine configuration’ and fully integrated utilizing [Defendant’s] ‘multi-machine networking solution.’” (Compl. ¶ 9.) Defendant argues that each of these representations relate to “the same subject matter covered by the Letter Agreements, i.e. the terms pursuant to which OPEX would provide PSC with two MPS40 machine” and configure those machines. (Def.’s Mot. Dismiss at 8.) Defendant further argues that the alleged representations are “expressly contradicted by the Letter Agreement which provides: ‘the foregoing express warranties are exclusive and made in lieu of any and all other warranties hereunder, express or implied, including those of merchantability and fitness for a particular purpose.’” Id. (citing Ex. B at 4.)

After repeated review of the letter agreements, the Court finds that certain portions of the letter agreements can be interpreted to have a broad application. However, arguably none of these sections cover the subject matter of Plaintiff’s allegations, particularly in the absence of an integration clause. Thus, the Court is not persuaded at this stage of the

proceedings that the letter agreements cover each of the alleged representations made by Plaintiff. Accordingly, the Court denies Defendant's Motion to Dismiss Plaintiff's fraud claim under the parol evidence rule.

C. Gist of the Action

Defendant next argues that Plaintiff's fraud claim must be dismissed due to the gist of the action doctrine.

“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 is maintainable only if the contract is ‘collateral’ to conduct that is primarily tortious.”⁶

Air Prod. & Chem. Inc. v. Eaton Metal Prod., Co., 256 F. Supp. 2d 329, 340 (E.D. Pa. 2003).

With respect to the tort of fraud, courts recognize that fraud in the inducement of a contract may not be covered by the gist of the action doctrine. Id. at 341. The rationale behind the exception for fraud in the inducement claims is that “fraud to induce a person to enter a contract is generally collateral to the terms of the contract itself and implicates society's desire to avoid the fraudulent inducement of contracts.” Longview Dev. LP v. The Great Atl. & Pac. Tea Co., Inc., No. 02-7422, 2004 U.S. Dist. LEXIS 13977, at *10-11 (E.D. Pa. Jul. 20, 2004). Further,

“caution should be exercised in determining the gist of an action at the motion to dismiss stage.”

Caudill Seed & Warehouse Co. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 834 (E.D. Pa. 2000).

Judicial caution is appropriate because “often times, without further evidence presented during discovery, the court cannot determine whether the gist of the claim is in contract or tort.” Weber

6. Though the Pennsylvania Supreme Court has never adopted the gist of the action doctrine, both “the Pennsylvania Superior Court and a number of United States District Courts have predicted it would.” Air Prod., 256 F. Supp. 2d 329 (E.D. Pa. 2003) (citing eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 14 (Pa. Super. 2002)).

Display & Packaging v. Providence Wash. Ins. Co., No. 02-7792, 2003 U.S. Dist. LEXIS 2187, at *3-4 (E.D. Pa. Feb. 10, 2003).

The Court finds that Plaintiff succeeds in alleging facts in the Complaint that, if proven, would amount to fraud in the inducement to enter into the contract and would be analytically separable from allegations of any breach in the performance of the contract. For example, Plaintiff alleges that Defendant's representative misrepresented information concerning the ability of the MPS40 machines to handle an anticipated work volume. Yet, there is nothing in the contract about the anticipated work volume of the machines. Thus, this misrepresentation, if proven, would be analytically separable from a breach of contract allegation. Accordingly, the Court declines to dismiss Plaintiff's fraud claim on the basis of the gist of the action doctrine.

D. Economic Loss

Defendant next argues that Plaintiff's fraud claim must be dismissed due to the economic loss doctrine. The economic loss doctrine "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." Air Prod., 256 F. Supp. 2d at 335 (citation omitted). Noting an absence of case law from either the Pennsylvania Supreme Court or Pennsylvania Superior Courts, the district court in Air Products relied on the prediction of the Third Circuit in Werwinski v. Ford Motor Co., 286 F.3d 661, 681 (3d Cir. 2000), that "that the Pennsylvania Supreme Court would apply the economic loss doctrine to claims of intentional fraud." Id. at 337 (citing Werwinski, 286 F.3d at 681). The court also noted that the Werwinski court appeared to create a "limited exception to the economic loss doctrine for fraud-in-the-inducement claims if the fraud is extraneous to the contract and not interwoven with the breach of the contract." Id. The court held that "even if the Pennsylvania

Supreme Court would apply the economic loss doctrine to claims of intentional fraud, they would not do so when the fraud alleged is in the inducement and does not relate to the quality or characteristics of the goods sold.” Id. at 337 (citing Werwinski, 286 F.3d at 785 (3d Cir. 2000)).

Defendant argues that each of the alleged misrepresentations relate to the quality or characteristics of the goods sold because the representations “bear on specific aspects of the machine - what the machines were able to accomplish (volume of work capable of being processed) and the physical set-up of the machines (whether or not the machines were configured and integrated in a certain way).” (Def.’s Mot. Dismiss at 12.) The Court is not persuaded at this stage of the proceedings that each of the alleged misrepresentations relate entirely to the quality or characteristics of the machines. For example, Plaintiff alleges that “Boyce/OPEX clearly understood all of the requirements.” (Compl. ¶ 9.) Among these requirements, Plaintiff asserts that it told Defendant that “any machinery is a substantial capital investment and will need to enable PSC to stop outsourcing all of its sorting and mailing in the Pennsylvania Region” and “the machines could enable PSC to achieve a particularized return on investment.” Id. ¶ 8 (a), (e). Such requirements, however, do not likely relate to the quality or characteristics of the mail sorting machines, but rather relate to the potential investment Plaintiff would make in the machines. Accordingly, the Court denies Defendant’s Motion to Dismiss Plaintiff’s fraud claim under the economic loss doctrine.

E. Equitable Rescission

Finally, Defendant argues that Plaintiff's claim for equitable rescission must be dismissed because it is a remedy for fraud and not a separate cause of action.⁷ Defendant is correct in noting that equitable rescission is a remedy for fraud, not a cause of action. Enter., Inc. v. Borden, 807 F.2d 1169, 1174 (3d Cir. 1986) (quoting Scaife v. Rockwell-Standard Corp., 446 Pa. 280, 289 (1971), cert denied, 407 U.S. 920 (1972) ("A defrauded party may pursue several remedies including . . . rescission . . . based on fraud.")); Germantown Mfg. Co. v. Rawlinson, 341 Pa. Super. 42, 48-50 (1985). However, if a plaintiff alleges fraud in a transaction, a right of rescission is established. Baker v. Cambridge Chase, Inc., 725 A.2d 757 (Pa. Super. 1999). **Here, having already determined that Plaintiff sufficiently pled fraud, Defendant's Motion to Dismiss Plaintiff's claim for equitable rescission must be denied.**

F. Plaintiff's Requests to Amend the Complaint and Depose Defendant's Representative

Since the Court is denying Defendant's Motion to Dismiss, Plaintiff's request to file an Amended Complaint and depose Defendant's sales representative is denied as moot. With respect to Plaintiff seeking leave of Court to amend its Complaint, the Court advises the parties that pursuant to Federal Rule of Civil Procedure 15(a) "a party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). The record indicates that Defendant filed a Motion to Dismiss, not an answer, in response to Plaintiff's Complaint. In the Third Circuit, a motion to dismiss is not considered a responsive

7. The purpose of equitable rescission is to return the parties as nearly as possible to their original positions where warranted by the circumstances of the transaction. Gilmore v. Northeast Dodge Co., Inc., 420 A.2d 504 (1980) (citation omitted).

pleading. Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000). Therefore, Plaintiff would be allowed as a matter of course to amend its Complaint without asking permission of the Court.

An order follows.

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

PROFESSIONAL SYSTEMS CORP.	:	
d/b/a PSC INFO GROUP,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO. 05-2689
	:	
OPEX POSTAL TECHNOLOGIES,	:	
	:	
Defendant.	:	
	:	

ORDER

AND NOW, this 8th day of March 2006, upon consideration of Defendant OPEX Corporation's Motion to Dismiss (Docket No. 2), Plaintiff Professional Systems Corporation's Reply (Docket No. 5) and Defendant OPEX Corporation's Reply (Docket No. 6), it is hereby **ORDERED** that Defendant's is **DENIED**.

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.
RONALD L. BUCKWALTER, S.J.