

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

PERSONNEL DATA SYSTEMS, INC. : CIVIL ACTION
 :
 v. :
 :
 GRAND CASINOS, INC. : NO. 97-4896

MEMORANDUM and ORDER

Norma L. Shapiro, J.

July 29, 1998

Personnel Data Systems, Inc. ("PDS"), alleging breach of software licensing and consulting agreements, filed this action against Grand Casinos, Inc. ("Grand").¹ Grand, alleging PDS breached the contracts and a warranty of fitness for a particular purpose and converted Grand's funds by refusing to refund a portion of Grand's deposits, filed a Counter-Claim against PDS. PDS has moved for partial summary judgment on the Complaint and summary judgment on all counts in the Counter-Claim. For the reasons stated below, PDS's motions will be granted in part and denied in part.

BACKGROUND

In March, 1996, PDS and Grand entered into a Software License Agreement ("License Agreement") under which Grand acquired a non-transferrable and non-exclusive license to use PDS's software at unlimited sites. (License Agreement, attached

¹ PDS's Complaint contained a third count for conversion of computer software, but by Order entered April 3, 1998, the parties stipulated to the dismissal of that claim.

as Ex. A to Pltff.'s Brief). PDS provided a Human Resource Manager program and an optional payroll interface ("ADP Interface"). (Id. at Addendum B).² In exchange for the license to use the software, Grand agreed to pay PDS \$700,000 and annual maintenance fees of \$104,500. Grand also ordered third-party software developed and distributed by other companies and sold through PDS.

The License Agreement defines the parties' responsibilities regarding installation and implementation of the PDS software.

This Agreement's sole function is to license the use of the System of Licensee and does not, in any way whatsoever, impose any implementation responsibilities upon PDS. Licensee hereby acknowledges that the success of any project initiated in order to implement the System, with or without the services (paid or non-paid) of PDS, shall be the sole responsibility of Licensee.

(Id. ¶ I(a)). PDS's only obligation was to license the software to Grand. The License Agreement does not impose any duty on PDS to install the software or assist Grand in implementing its use. "The License fee for use of the basic System is paid independent

² The ADP Interface is described as:

A module which allows output to be created from the human resource system to add to and update employee information in a foreign payroll system. Also allows the uploading of payroll data into the HR employee records. This module must be custom fitted to licensee's payroll system and requirements, for which services will be chargeable.

(License Agreement at Addendum A). The licensee is defined as Grand Casinos, Inc. (Id. at 1).

of any custom programming, and acceptance of the basis System shall not be contingent upon the success of any costs or non-cost services provided by PDS." (Id. ¶ VI(b)).

The License Agreement provides that "acceptance of the basic system shall be deemed to have taken place five (5) days after its installation, unless licensee notifies PDS in writing, that the system is materially defective and/or inoperable on licensee's computer." (Id.).

The License Agreement warranty states:

PDS WARRANTS THE SYSTEM TO PERFORM SUBSTANTIALLY IN ACCORDANCE WITH THE THEN-CURRENT OPERATING DOCUMENTATION FOR THE SYSTEM provided that: (a) the System is not modified, changed or altered by anyone other than PDS, unless authorized by PDS in writing; (b) there has been no change in the computer equipment on which PDS installed the System, unless authorized by PDS in writing; (c) the computer equipment is in good operating order and is installed in a suitable operating environment and is a hardware platform supported by PDS with the PDS recommended hardware configuration and database and network software; (d) any error or defect detected was not caused by Licensee or its agents, servants, employees or contractors; (e) Licensee promptly notified PDS of the error or defect after it was discovered; (f) all fees due to PDS have been paid. PDS does not warrant that the system will run properly on all hardware-software combinations which may be selected for use by the Licensee, nor that the system will be uninterrupted or error free, or that all system errors will be corrected. THERE ARE NO OTHER WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THIS AGREEMENT, THE SYSTEM, OR ANY SERVICES OR GOODS PROVIDED BY PDS TO LICENSEE IN CONNECTION WITH THE SYSTEM, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Licensee accepts sole responsibility for (a) the selection of the System to achieve Licensee's intended results, (b) its use, and (c) the results obtained therefrom.

(Id. ¶ III). The License Agreement "constitutes the complete agreement between the parties and supersedes all previous communications, representations or agreements, either written or oral with respect to the subject matter hereof. No modification or amendment of this License will be binding on either party unless acknowledged in writing by their duly authorized representatives." (Id. ¶ IX(a)).

The License Agreement provided for the proper method of notice under the contract:

All notices described in this Agreement shall be sent by U.S. certified mail to:

Grand Casinos, Inc.	PDS
Attention: Bruce Martin	Steve Brody
13705 First Avenue North	670 Sentry Parkway
Minneapolis, MN 55441	Blue Bell, PA 19422

All notices shall be effective on the date postmarked.

(Id. at Addendum C).

PDS installed its software at the Stratosphere Casino ("Stratosphere") in Las Vegas, Nevada in April, 1996. (Dep. of Jill Halper at 57 & Ex. 4, attached as Ex. C to Pltff.'s Brief ["Halper Dep."]; Dep. of James Mandel at 40-41, attached as Ex. E to Pltff.'s Brief ["Mandel Dep."]). Wayne Burke ("Burke"), a Stratosphere technician, testified the PDS software came on line and Jackie Gerlock ("Gerlock"), Stratosphere's Director of Compensation and Benefits, was using the software to generate reports. (Dep. of Wayne Burke at 33, 48, attached as Ex. F to

Pltff.'s Brief ["Burke Dep."]).

PDS also installed its software at Grand's Tunica, Mississippi casino and Grand's corporate offices. (Mandel Dep. at 40-41; Halper Dep. at 77-78). Grand claims the PDS software never worked and was riddled with problems from the start. However, some evidence from Grand's employees indicates the software was "up and running." (8/20/96 Memo from Jill Halper to Jeff Wagner, attached as Ex. A1 to Pltff.'s Supp. Brief ["Halper Memo"])).

Grand concedes it never sent notice of any defect or intent to terminate the License Agreement to Steve Brody ("Brody"), president of PDS, as required by the contract. In September, 1996, Grand decided to terminate the License Agreement. Mandel telephoned John McNally ("McNally") of PDS to inform him of Grand's termination and later confirmed the conversation by letter to McNally. The letter stated that, "[p]ursuant to our sales and purchase agreement dated March 22, 1996, Grand Casinos, Inc., its affiliates, and all related entities to the same are hereby terminating the remaining portion of the aforementioned contract." (9/5/96 Mandel Letter, attached as Ex. B to Pltff.'s Brief). Soon thereafter, Grand claims a meeting among Brody, McNally and Mandel occurred in Minneapolis, Minnesota. Grand contends Brody was made indirectly aware of Grand's decision to terminate through the letter to McNally and by face-to-face

discussions during the Minneapolis meeting.

PDS, arguing Grand never effectively terminated the contract, claims the full licensing fee and moves for summary judgment on Count I of its Complaint and the entire Counter-Claim. PDS does not seek summary judgment on Count Two of the Complaint claiming breach of a separate Consulting Agreement and damages of \$13,042.04.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is

a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

II. Breach of the License Agreement

The parties agree PDS delivered software to Grand, it was downloaded onto Grand's computers, and Grand never sent written notice of defects or termination to Brody. There are questions of law whether: 1) Grand accepted the software; and 2) Grand effectively terminated the contract. In Count I of the Complaint and Count III of the Counter-Claim, both parties argue they are entitled to damages under the Licensing Agreement.³

Acceptance of goods occurs "when, after a reasonable opportunity to inspect the goods, the buyer fails to make an effective rejection of them." Industrial Molded Plastic Prods., Inc. v. J. Gross & Son, Inc., 398 A.2d 695, 699 (Pa. Super. Ct.

³ The Licensing Agreement "shall be construed and enforced according to the laws of the Commonwealth of Pennsylvania." (Licensing Agreement ¶ VIII).

1979); see also 13 Pa. Cons. Stat. Ann. § 2606(a). If the buyer "does any act inconsistent with the ownership of the seller," he has accepted the goods. See 13 Pa. Cons. Stat. Ann. § 2606(a)(3).

The Uniform Commercial Code ("UCC"), as enacted in Pennsylvania, provides the legal framework for interpretation of a contract, but the parties may alter the standard UCC terms and bargain for their own contract.

The effect of provisions of this title may be varied by agreement, except as otherwise provided in this title and except that the obligations of good faith, diligence, reasonableness and care prescribed by this title may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

13 Pa. Cons. Stat. Ann. § 1102(c).

PDS and Grand agreed that "acceptance of the basic System shall be deemed to have taken place five (5) days after its installation, unless licensee notified PDS in writing, that the System is materially defective and/or inoperable on licensee's computer." (License Agreement ¶ I(b)). The parties also agreed that all notices under the contract were to be sent in writing to Brody's attention at PDS. (Id. at Addendum C).

Grand's employees have stated the software was installed at Stratosphere in April, 1996. (Halper Dep. at 57; Mandel Dep. at 40-41; Burke Dep. at 33-35, 38-39; Dep. of Jackie Gerlock at 20-

21, attached as Ex. G to Pltff.'s Brief ["Gerlock Dep."]). Grand did not attempt to rescind or terminate the contract until September, 1996, about five months not five days after installation occurred.

Grand argues the five day period for acceptance of the software is unfair and did not offer Grand enough time to test the software to ascertain whether it worked properly. However, Grand freely bargained for the terms of the License Agreement. The contract is replete with handwritten alterations Grand's representative made to PDS's standard form contract. Grand was not unaware of the five-day provision; it was a bargained for term.

The intent of the parties is fundamental to contract law. See, e.g., Z&L Lumber Co. v. Nordquist, 502 A.2d 697, 699 (Pa. Super. Ct. 1985). "And if their intent can be cleanly extracted from the clear and unambiguous words that the parties have used, it is equally conventional wisdom that they are held to those words contained in the contract." Compass Tech., Inc. v. Tseng Laboratories, Inc., 71 F.3d 1125, 1131 (3d Cir. 1995); see Mellon Bank, N.A. v. Aetna Business Credit, 619 F.2d 1001, 1013 (3d Cir. 1980).

"Whenever this title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement." 13 Pa. Cons. Stat. Ann. § 1204(a).

The License Agreement fixed the time for notice of rejection at five days. Grand had the opportunity to change that term but did not do so. The court "cannot rewrite the terms of the agreement to conform to a party's preferred state of affairs." Horizon Unlimited, Inc. v. Silva, No. 97-7430, 1998 WL 88391, at *4 (E.D. Pa. Feb. 26, 1998) (Shapiro, J.). Grand cannot evade the effect of the five-day acceptance clause; by not notifying PDS in writing that the system was materially defective and/or inoperable on Grand's computers within that period of time, it accepted the goods delivered by PDS.

Grand did not send written notice of non-acceptance or termination to Brody, as expressly required by the contract, even though it now claims the PDS software was flawed from the start. Where a buyer has accepted tender of goods, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." 13 Pa. Cons. Stat. Ann. § 2607(c)(1). "If a buyer fails to inform the seller of defects after discovering them, the buyer forfeits any breach of contract remedy." Ruffin v. Fleetwood Motor Homes of Pennsylvania, Inc., No. 96-4922, 1997 WL 752000, at *10 (E.D. Pa. Dec. 4, 1997) (Shapiro, J.).

Although Brody did learn of Grand's decision to terminate the contract in September, 1996, after Grand sent written notice to another PDS employee, Grand did not comply with the literal

terms of the License Agreement. Grand specifically negotiated the notice provision of the License Agreement and was not ignorant of its explicit requirements. (License Agreement at addendum C).

In Pennsylvania, "the intent of the parties to a written contract is to be regarded as being embodied in the writing itself." Steuart v. McChesney, 444 A.2d 659, 661 (Pa. 1982). "[T]he law declares the writing to be not only the best, but the only evidence" of the parties' agreement. Gianni v. Russell & Co., Inc., 126 A. 791, 792 (Pa. 1924); see Lenihan v. Howe, 674 A.2d 273, 275 (Pa. Super. 1996).

The parties clearly intended that "all notices" described in the License Agreement be sent by U.S. certified mail to Brody before termination would be effective. "In Pennsylvania, conditions precedent to a contract termination must be strictly fulfilled." Accu-Weather, Inc. v. Prospect Comm. Corp., 644 A.2d 1251, 1254 (Pa. Super. 1994). Where the contract provides a specific means of cancellation or termination, "neither plaintiff nor defendant can dispense with such manner of cancellation or rescission without the consent of the other." Wright v. Bristol Patent Leather Co., 101 A. 844, 845 (Pa. 1917) (parties bound by contractual clause requiring use of certified mail). With such a clause in the contract, oral notice to Brody is insufficient as a matter of law. See Residential Reroofers Local 30-b Health and

Welfare Fund v. A&B Metal Roofing, Inc., 976 F. Supp. 341, 347 (E.D. Pa. 1997). But cf. Carlson v. Arnot-Ogden Memorial Hosp., 918 F.2d 411, 415 n.6 (3d Cir. 1990) (Contract required written notice and terminating party gave only oral notice, but issue not addressed by district court and not addressed by parties on appeal, so court "declined to attach significance" to written notice provision.).

Grand argues its September, 1996 letter to McNally, although insufficient notice under the contract, constituted a demand for adequate assurances under the UCC. "When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return." 13 Pa. Cons. Stat. Ann. § 2609(a). "After receipt of a justified demand failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract." 13 Pa. Cons. Stat. Ann. § 2609(c).

Under the License Agreement, "all notices described" therein were to be sent to Brody for PDS. A UCC demand for adequate assurances was not a notice "described" in the License Agreement, so Grand may not have been required to send such a notice

directly to Brody. Grand sent some notice to McNally, a PDS employee, at the main office of PDS.

Under the UCC, a person has notice of a fact when: 1) he has actual knowledge of it; 2) he has received notice or notification of it; or 3) from all the facts and circumstances known to him he has reason to know of it. 13 Pa. Cons. Stat. Ann. § 1201. "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." Id. A person receives notice when: 1) it comes to his attention; or 2) "it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communication." Id.

The letter to McNally stated Grand was "terminating the remaining portion" of the contract. Although the letter purported to terminate the contract, there may be questions of material fact whether the September, 1996 letter to McNally could be reasonably construed as a demand for adequate assurances and was received by appropriate PDS officials.

Summary judgment will be denied on Count I of the Complaint and Count III of the Counter-Claim, because Grand's contention it terminated the License Agreement after PDS failed to satisfy a demand for adequate assurances under the UCC presents an issue of

fact that cannot be decided on summary judgment.

III. Implied Warranty of Fitness for a Particular Purpose

In Count I of the Counter-Claim, Grand argues PDS breached an implied warranty of fitness for a particular purpose. Implied warranties "are designed to protect the buyer of goods from bearing the burden of loss where merchandise, though not violating a promise expressly guaranteed, does not conform to the normal commercial standards or meet[] the buyer's particular purpose." Vlases v. Montgomery Ward & Co., Inc., 377 F.2d 846, 849 (3d Cir. 1967). The implied warranty of fitness for a particular purpose "requires that the seller had reason to know of the buyer's particular purpose at the time of contracting and that the buyer was relying on the seller's expertise. In that case, the goods are implicitly warranted to be fit for that particular purpose." Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992); see 13 Pa. Cons. Stat. Ann. § 2315.

The implied warranty of fitness for a particular purpose can be waived, as long as language is clear and conspicuous. See 13 Pa. Cons. Stat. Ann. §§ 2316(b), (c). "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals ... is conspicuous. Language in the body of a form is conspicuous if it is in larger or other

contrasting type or color." Borden v. Advent Ink Co., 701 A.2d 255, 259 (Pa. Super. 1997); see Moscatiello v. Pittsburgh Contractors Equipment Co., 595 A.2d 1190, 1193 (Pa. Super. 1991), appeal denied, 602 A.2d 860 (Pa. 1992). Whether a purported waiver of an implied warranty is conspicuous is a question of law. See 13 Pa. Cons. Stat. Ann. § 1201.

In the License Agreement, PDS warranted that the software would "PERFORM SUBSTANTIALLY IN ACCORDANCE WITH THE THEN-CURRENT OPERATING DOCUMENTATION FOR THE SYSTEM." (License Agreement ¶ III). In the same paragraph, the contract states:

THERE ARE NO OTHER WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THIS AGREEMENT, THE SYSTEM, OR ANY SERVICES OR GOODS PROVIDED BY PDS TO LICENSEE IN CONNECTION WITH THE SYSTEM, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE.

(Id.). This waiver is in capital letters and is conspicuous. This language waived any implied warranty of fitness for a particular purpose as a matter of law.

Even if the warranty had not been waived, it still would not apply. The implied warranty of fitness for a particular purpose applies when the seller knows of the buyer's particular purpose at the time of purchase and knows the buyer is relying on the seller's expertise in selecting an appropriate product. See 13 Pa. Cons. Stat. Ann. § 2315; Gall v. Allegheny County Health Dept., 555 A.2d 786, 790 (Pa. 1989); see also Altronics, 957 F.2d at 1105.

In the License Agreement, Grand assumed "sole responsibility for (a) the selection of the System to achieve Licensee's intended results, (b) its use, and (c) the results obtained therefrom." (License Agreement ¶ III). By accepting sole responsibility for selecting the software, Grand could not have been relying on PDS's expertise in choosing this particular software package. PDS did not create an implied warranty of fitness for a particular purpose. Summary judgment will be granted on Count I of the Counter-Claim.

IV. Computer Interfaces

In Count II of the Counter-Claim, Grand contends PDS breached the License Agreement by not providing appropriate computer software interfaces to enable the software to work with Grand's computers. Grand first alleges PDS was obliged under the contract to provide an Accustaff Interface to Stratosphere's time and attendance system. Grand has not pointed to and the court cannot find any provision of the License Agreement requiring PDS to provide an Accustaff Interface.

If the License Agreement does not require PDS to provide an Accustaff Interface, PDS cannot be in breach of contract for failing to do so. PDS prepared a custom work order for development of an Accustaff Interface at Grand's request. (Palmer Dep. at 26-28; Halper Dep. at 68-70). Halper, a Grand employee, stated that Grand's Jeff Wagner signed an authorization

for the work order, but PDS denies ever having received the signed authorization. Halper stated Grand has no documents showing the signed authorization was sent to PDS, and she had no recollection of sending it. (Halper Dep. at 69-70).

Assuming Grand's official signed the Accustaff Interface work order, there is no evidence Grand sent the authorization form or communicated its acceptance to PDS. PDS cannot be held liable for its offer when there is no evidence its acceptance was communicated to the offeror. There is no evidence of PDS's contractual obligation to provide an Accustaff Interface, so Grand cannot recover for its failure to receive it.

Grand also contends PDS failed to provide an appropriate payroll ADP Interface. PDS concedes it was to provide the ADP Interface under the terms of the License Agreement. The contract provided that the ADP Interface would have to be "custom fitted" to Grand's payroll system at an additional charge to Grand. (License Agreement at Addendum A). PDS prepared a custom work order to customize the ADP Interface. (Halper Dep. at 85-86 & Ex. 13). Grand did not approve this work order; Halper, Grand's employee, failed to forward it to her supervisors for action. (Halper Dep. at 87-89; Palmer Dep. at 74). A party "cannot prevail in an action for non-performance of a contract if he alone is responsible for the non-performance." Craig Coal Mining Co. v. Romani, 513 A.2d 437, 440 (Pa. Super. 1986), appeal

granted, 522 A.2d 50 (Pa. 1987).

Under the Licensing Agreement, Grand assumed sole responsibility for implementing the PDS software. (License Agreement ¶ I(a)). PDS is not liable for the apparent lack of operability of the ADP Interface when Grand did not authorize the PDS work order for customization of the interface. Summary judgment will be granted on Count II of the Counter-Claim.

CONCLUSION

Grand gave an insufficient notice of termination under the License Agreement, but whether the failure of PDS to satisfy a written demand for adequate assurances terminated the contract is an issue of fact precluding summary judgment on Count I of the Complaint and Count III of the Counter-Claim. Summary judgment will be granted in favor of plaintiff on Counts I and II of the Counter-Claim. Plaintiff has not sought summary judgment on Count II of its Complaint, alleging breach of a software consulting agreement and damages of \$13,042.04; that count remains for trial.

An appropriate Order follows.

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

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 v. :
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 GRAND CASINOS, INC. : NO. 97-4896

ORDER

AND NOW, this 29th day of July, 1998, upon consideration of plaintiff Personnel Data System, Inc.'s ("PDS") motions for summary judgment, defendant Grand Casinos, Inc.'s ("Grand") responses thereto, the parties' reply memoranda, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The PDS motion for summary judgment on Count I of the Counter-Claim is **GRANTED**. Judgment is **ENTERED** in favor of PDS on Count I of the Counter-Claim.

2. The PDS motion for summary judgment on Count II of the Counter-Claim is **GRANTED**. Judgment is **ENTERED** in favor of PDS on Count II of the Counter-Claim.

3. The PDS motion for summary judgment on Count III of the Counter-Claim is **DENIED**. Grand's notice of termination of the License Agreement was ineffective as a matter of law but whether PDS failed to satisfy a UCC written demand for adequate assurances is an issue of fact precluding summary judgment.

4. The PDS motion for summary judgment on Count I of the Complaint is **DENIED** for the reasons stated in paragraph 3.

5. The action for trial on Counts I and II of the Complaint and Count III of the Counter-Claim remains in the jury trial pool.

Norma L. Shapiro, J.