

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

UNITED TRADING & SHIPPING, INC. :

Plaintiff, :

v. :

COMMONWEALTH INSURANCE
COMPANY :

Defendant. :

CIVIL ACTION

NO. 94-4742

GREEN, S.J.

APRIL 21, 1999

MEMORANDUM-ORDER

Presently before the Court are Defendant Commonwealth Insurance Company's Motion for Reconsideration of the entry of Summary Judgment in favor of Plaintiff and Motion to Reopen the Record to Permit Defendant to submit additional evidence in opposition to Plaintiff's Motion for Summary Judgment. Both motions are opposed.

I. Procedural and Factual Background

United Trading and Shipping, Inc. ("United Trading") filed suit against Commonwealth Insurance Company ("Commonwealth") and Taurus Systems Corporation (Taurus) to enforce the obligation of Commonwealth under a bond it issued as surety for an international sugar transaction for the sale of 100,000 metric tons of sugar.

On December 23, 1996, Judge Rendell of this Court granted United Trader's motion for

summary judgment against Commonwealth and denied Commonwealth's cross motion for summary judgment. On December 27, 1996, the Clerk of Court entered judgment in favor of plaintiff and against defendant. Neither order specified the amount of damages and final judgment was not ordered. On May 23, 1997, Judge Rendell denied defendant's motion for reconsideration and to vacate judgment.

United Traders subsequently moved for final judgment and to fix damages after obtaining a writ of execution against Commonwealth. Commonwealth opposed both motions and also moved to strike the writ of execution. Because this Court determined that the amount of damages remained in dispute after Judge Rendell's entry of judgment against Commonwealth, the Court denied the motion for final judgment, granted Commonwealth's motion to strike the writ of execution, and denied the motion to fix damages. At the same time, the Court ordered a hearing to determine and fix damages.

Approximately two years after Judge Rendell's denial of Commonwealth's motion to reconsider, Commonwealth filed a new motion to reconsider the entry of summary judgment against it and also moved to reopen the record to allow further discovery. For the reasons that follow, these motions will be denied.

II. DISCUSSION

Courts recognize three possible grounds for granting a motion for reconsideration: 1) an intervening change in controlling law; 2) the availability of new evidence that was not previously available; and, 3) the necessity of correcting a clear error of law or preventing manifest injustice. Reich v. Compton, 834 F.Supp. 753, 755

(E.D.Pa.1993).¹ In support of its Motions to Reconsider and Reopen the case, Commonwealth argues that a recent effort to determine the value of Plaintiff's damages prompted them to retain the services of Stillwell & Gladding, Inc., ("S&G") a testing laboratory with experience in the sugar industry. S&G's review of the contract at issue in this case revealed "new evidence" that the contract was incapable of being performed because, among other things, it required the delivery of sugar with characteristics that were impossible to produce. (Def's M. to Reconsider and Reopen the case at 10). After review of S&G's findings, Commonwealth contends that United Trading and Taurus entered into the fraudulent sugar transaction to collect the Bond funds that Commonwealth contracted to provide in the event of default. In the alternative, Commonwealth argues that the negligence and misrepresentations of United Trading in connection with this sugar transaction relieves Commonwealth of any liability under the Bond agreement and evidence recently discovered by S&G's investigations now creates a genuine issue of material fact warranting reconsideration of the grant of summary judgment in favor of United Trading. Because S&G's conclusions were not offered in the previous motion for summary judgment and motion

¹Generally, Motions for Reconsideration are governed by Loc. R. Civ. P. 7.1(g) which requires a party seeking reargument or rehearing to file a motion within 10 days of the order concerned. However, according to generally accepted legal practice, a rehearing of an interlocutory decree, such as the one herein at issue, may be sought at any time before the entry of a final judgment, provided that due diligence has been employed by the party seeking relief and revision is consonant with principles of fairness and equity. See Johnson v. Township of Bensalem, 609 F. Supp. 1340, 1341 (E.D.Pa. 1985)(citing John Simmons Co. v. Grier Bros., 258 U.S. 82, 90-91, 42 S.Ct 196, 199-200 (1922)). Therefore, this Court will determine whether fairness and equity requires reconsideration of Judge Rendell's grant of summary judgment in favor of the Plaintiff rather than summarily deny the motion for failure to timely file under Loc. R. Civ. P. 7.1(g).

for reconsideration, Commonwealth argues that this information constitutes new evidence requiring this Court to reconsider Judge Rendell's entry of summary judgment in favor of the Plaintiff and reopen the record allowing a jury to determine whether Commonwealth is liable under the contract.

If a party could have presented the evidence it now alleges is new at some earlier time within the case, the evidence is not new. In re Phila. Litig., 158 F.3d 711, 720 (3d Cir. 1998). In the instant case, the bid and contract specifications reviewed by S&G were available to Defendant from the onset of this case. Furthermore, Defendant's assertions that the Plaintiff breached Paragraph 6 of the bond agreement were raised in its Answer which was filed on December 19, 1994.² (Answer and Affirmative Defenses of Defendant Commonwealth Insurance Company at 5, ¶ 46). In her disposition of the motions for summary judgment and reconsideration Judge Rendell determined that she did in fact review Defendant's arguments in this regard and found no basis upon which to conclude that the possibility of fraud, misrepresentation, or negligence was anything more than speculation on the part of Defendant Commonwealth. (Order Denying Defendant's Motion for Reconsideration at 5, ¶ 8).

Since the allegations of fraud, misrepresentation, and negligence were previously reviewed by the Court in both the motion for summary judgment and motion

² Paragraph 6 of the bond agreement states:

This BOND and any liability arising hereunder is rendered void in the event of fraud, misrepresentation or negligence on the part of any party to the CONTRACT including but not limited to the SELLER and/or BUYER, and/or any other party to the negotiations, and/or the consummation of the CONTRACT and/or this Bond.

for reconsideration, and the Defendant had ample opportunity to investigate and present the evidence it now characterizes as new, this Court finds no adequate basis for reconsidering the motion for summary judgment and reopening the record.

An appropriate order follows.

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UNITED TRADING & SHIPPING, INC. :

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	:	CIVIL ACTION
v.	:	NO. 94-4742
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	:	
COMMONWEALTH INSURANCE	:	
COMPANY	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 22nd day of April 1999, upon consideration of Defendant Commonwealth Insurance Company's Motion to Reopen the Record and Motion for Reconsideration of the Order Granting Summary Judgment, and the opposition thereto, IT IS HEREBY ORDERED that both the Motion to Reopen the Record and Motion for Reconsideration are DENIED.

IT IS FURTHER ORDERED that a hearing to determine and fix damages shall be held within twenty days of this order.

BY THE COURT,

CLIFFORD SCOTT GREEN, S.J.