IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FIREMAN'S FUND McGEE MARINE UNDERWRITERS a/s/o HARTUNG BROTHERS, INC.

Plaintiff,

v.

A&B WELDING & MFG., INC., TYCO VALVES & CONTROLS, LP, and FARMCHEM CORPORATION,

Defendants.

OPINION AND ORDER

04-C-0576-C

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This is a civil action for monetary relief in which plaintiff Fireman's Fund McGee Marine Underwriters, as subrogee of Hartung Brothers, Inc., alleges negligence, strict liability, and breach of warranty arising out of the failure of a fertilizer-tank butterfly valve that was manufactured by defendant Tyco Valves & Controls, LP, distributed by defendant Farmchem Corporation, and installed by defendant A&B Welding & Manufacturing, Inc. Jurisdiction is present under 28 U.S.C. § 1332. Plaintiff is a New York corporation with its principal place of business in New York. Defendant A&B Welding is an Iowa corporation with its principal place of business in Iowa. Defendant Farmchem is an Iowa corporation

with its principal place of business in Iowa. Defendant Tyco is a limited partnership whose partners are citizens of Delaware, Massachusetts, Nevada, New Hampshire, and Texas. It comprises TV&C Holding, Inc. I, a Nevada corporation with its principal place of business in Houston, Texas; the J.R. Clarkson Company, a Nevada corporation with its principal place of business in Portsmouth, New Hampshire; Crosby Holding, Inc., I, a Delaware corporation with its principal place of business in Waltham, Massachusetts; Crosby GP Holding, Inc., a Nevada corporation with its principal place of business in Portsmouth, New Hampshire; and TVC Holding GP, a general partnership composed of Tyco Valves & Controls, Inc. (a Texas corporation with its principal place of business in Houston, Texas) and TVC, Inc. (a Nevada corporation with its principal place of business in Portsmouth, New Hampshire).

Presently before the court are defendants Tyco's and Farmchem's motions for summary judgment, defendant A&B Welding's motion for partial summary judgment, A&B Welding's motion for leave to amend its answer to include cross-claims against Tyco and Farmchem and Tyco's and Farmchem's motion to strike A&B Welding's cross-claims. Because plaintiff does not oppose Tyco's or Farmchem's motion for summary judgment, I will grant the motions. Because I agree that the economic loss doctrine bars plaintiff's negligence and strict liability claims, I will grant A&B Welding's motion for partial summary judgment.

A&B Welding seeks leave to amend its answer to include cross-claims against Tyco and Farmchem for negligence, strict liability, breach of contract and breach of implied warranty of merchantability. Although the amendments were not brought for an improper purpose and would not result in undue prejudice, it would be futile to allow A&B Welding to allege cross-claims for strict liability and negligence because those claims would be barred by Wisconsin's economic loss doctrine. Further, it would be futile to allow A&B Welding to allege cross-claims for breach of contract and breach of implied warranty against Tyco because A&B Welding and Tyco are not in privity of contract. I will grant A&B Welding leave to amend its answer, but only insofar as it seeks to add cross-claims against Farmchem for breach of contract and breach of implied warranty of merchantability. It is unnecessary to decide Tyco's and Farmchem's motions to strike A&B Welding's cross-claims, because I address their concerns in the context of A&B Welding's motion to amend.

Defendants A&B Welding and Tyco were the only parties to submit properly supported proposed findings of fact in support of their motions for summary judgment. They disagree how much plaintiff paid its insured. Tyco proposes as fact that plaintiff paid $143,003.64. A&B Welding proposes that plaintiff only paid $135,003.64. This dispute is not material for the purposes of any pending motion. Except for this dispute, the facts proposed by A&B Welding and Tyco are in agreement. From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Hartung Brothers, Inc. operates a fertilizer tank facility in Arena, Wisconsin. In mid-summer 2001, Hartung began construction of a new fertilizer plant at 6755 Helena Road in Arena. Hartung acted as its own general contractor for the construction of the plant, which included a building to house facilities for receiving, storing, mixing, and delivering fertilizer.

Hartung contracted with defendant A&B Welding & Manufacturing, Inc. to produce the plant's receiving, storing, mixing, and delivery system, using a plan provided to it by Hartung. The receiving, storing, mixing, and delivery system included a rail header, storage tanks, a mixer, load-out tanks, and a dry receiving system. Pursuant to Hartung's specifications, A&B Welding incorporated certain materials into the plant's receiving, storing, mixing, and delivery system, including several butterfly valves manufactured by defendant Tyco Valves & Controls, LP and distributed by defendant Farmchem Corporation.

On April 25, 2002, two butterfly valves on the fill lines of the fertilizer tanks failed, resulting in the improper mixing of chemical components in the tanks. This ruined the fertilizer. Consequently, Hartung filed a claim with its insurer plaintiff Fireman's Fund McGee Marine Underwriters. Plaintiff paid Hartung in excess of $75,000 for its loss and brought the present action as subrogee.

Plaintiff's expert, Packer Engineering, examined the failed valves and concluded that they had failed because they had been improperly installed. Sections were missing from the valves' elastomer seals. Plaintiff's expert concluded that the valves had been installed with the disc closed, contrary to their installation instructions, which warn that installation of the valve with the disc closed can result in damage to the elastomeric seal when the valve is first opened.

OPINION

A. Tyco's and Farmchem's Motions for Summary Judgment

Defendants Tyco and Farmchem have each moved for summary judgment. Plaintiff affirmatively represents that it will not oppose Tyco's motion. Accordingly, I will grant Tyco's motion. Because the time to oppose Farmchem's motion has now expired without response from plaintiff, I will grant Farmchem's motion as well.

Defendant A&B Welding has submitted briefs in opposition to both of these motions, but I have not considered them in reaching my decision to grant Tyco's and Farmchem's motions. At the time A&B Welding submitted its opposition briefs, it had no claims in common with plaintiff against Tyco or Farmchem. Consequently, it lacked standing to oppose Tyco's or Farmchem's summary judgment motion.

B. A&B Welding's Motion for Partial Summary Judgment

Defendant A&B Welding argues that plaintiff's tort theories of strict liability and negligence are barred by Wisconsin's economic loss doctrine. The economic loss doctrine requires sophisticated commercial parties to "pursue only their contractual remedies when asserting an economic loss claim, in order to preserve the distinction between contract and tort law." Digicorp, Inc. v. Ameritech Corp., 2003 WI 54, ¶ 34, 262 Wis. 2d. 32, 46-47 662 N.W.2d 652. "That is, when contractual expectations are frustrated because of a defect in the subject matter of the contract, a party's remedy lies exclusively in contract." Raytheon Co. v. McGraw-Edison Co., Inc., 979 F. Supp. 858, 866 (E.D. Wis. 1997).

The doctrine is based on an understanding that contract law is better suited than tort law for dealing with purely economic loss in the commercial arena. Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 400, 573 N.W.2d 842, 844 (1998); see also Miller v. U.S. Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990) (finding tort law to be "a superfluous and inapt tool for resolving purely commercial disputes"). Contract law is concerned with protecting the parties' bargained-for expectations. The duties of the parties are stated in the terms of the contract and arise from those terms. The parties are encouraged to protect themselves by stating their expectations and allocating the risk that one of the parties might not satisfy those expectations. Bay Breeze Condo. Ass'n, Inc. v. Norco Windows, Inc., 2002 WI App 205, ¶ 12, 257 Wis. 2d 511, 519, 651 N.W.2d 738, 742. This protection is

achieved through the inclusion, exclusion, or limitation of express and implied warranties within the agreement. Id. When a dispute arises concerning the subject matter of the parties' agreement, a court's role is "to hold parties to that agreement so that each receives the benefit of his or her bargain." Wausau Tile, Inc. v. County Concrete Corp., 226 Wis. 2d 235, 247-48, 593 N.W.2d 445, 451-52 (1999). In order to preserve the parties' bargained-for allocations of economic risk, courts will prevent parties from bringing tort actions that would effectively rewrite the agreement to circumvent express allocations of risk. Wausau Tile, 226 Wis. 2d at 247-48, 593 N.W.2d at 451-52.

Although the basic rule is stated easily enough, courts and litigants still struggle with determining what the economic loss doctrine is, or more precisely, how broad its scope should be. "Economic loss" is not a self-defining term, and it does not literally mean all monetary losses. All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 865 (7th Cir.1999); Wausau Paper Mills Co. v. Chas. T. Main, Inc., 789 F. Supp. 968, 971 (W.D. Wis. 1992). Generally speaking, the doctrine does not apply when a defective product causes damage to "other property." Tony Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co., 151 Wis. 2d 431, 437-38, 444 N.W.2d 743, 747 (Ct. App. 1989). However, "other property" is a legal term of art. When component parts are "integrally connected" to form a single system, the connected parts and the resulting system cease to be "other property." Jacob v. Russo Builders, 224 Wis. 2d 436, 452, 592 N.W.2d 271, 277 (Ct. App. 1999); see

also Cincinnati Ins. Co. v. AM Intern., Inc., 224 Wis. 2d 456, 462-63, 591 N.W.2d 869, 871-72 (Ct. App. 1999). The "other property" exception does not apply to claims arising directly from the failure of a product to perform for the purposes for which it was manufactured and sold. D'Huyvetter v. A.O. Smith Harvestore Prods., 164 Wis. 2d 306, 475 N.W.2d 587 (Ct. App. 1991) (refusing to apply exception where grain silo failed and damaged both silo itself and grain stored within it). Consequently, A&B Welding argues, and plaintiff does not disagree, that the "other property" exception does not apply to plaintiff's tort claims because the failed valves were components of an integrated system and the damage to the fertilizer in the system resulted from the failure of the system to perform as expected.

Recently, the Wisconsin Supreme Court held that the economic loss doctrine does not apply to claims arising from contracts for the provision of services. Ins. Co. of N. Am. v. Cease Elec. Inc., 2004 WI 139, ¶ 52, 276 Wis. 2d 361, 381, 688 N.W.2d 462, 472. Plaintiff contends that there is a genuine issue of fact whether the agreement between Hartung and A&B Welding was a contract for goods or a contract for services.

To determine whether the economic loss doctrine applies to an agreement that involves both goods and services, Wisconsin courts apply the Uniform Commercial Code's predominant purpose test:

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (footnotes omitted), quoted in Van Sistine v. Tollard, 95 Wis. 2d 678, 684, 291 N.W.2d 636, 639 (Ct. App. 1980); see also Biese v. Parker Coatings, Inc., 223 Wis. 2d 18, 25, 588 N.W.2d 312 (Wis. Ct. App. 1998) (applying the predominant purpose test in light of the economic loss doctrine).

In Cease, the Wisconsin Supreme Court observed that "[e]vidence of billing is a relevant consideration when determining the nature of a contract." 2004 WI 139, ¶ 19, 276 Wis. 2d at 370, 688 N.W.2d at 467 (citing Micro-Managers, Inc. v. Gregory, 147 Wis. 2d 500, 508, 434 N.W.2d 97, 100 (Ct. App. 1988)). Plaintiff argues that A&B Welding's failure to produce any billing invoices that might indicate whether the contract was a contract for goods or services creates a genuine issue of material fact.

Plaintiff is mistaken. The predominant purpose test instructs courts to consider the totality of the circumstances surrounding a particular transaction. See, e.g., De Filippo v. Ford Motor Co., 516 F.2d 1313, 1323 (3d Cir. 1975). Although billing evidence may reveal whether the parties considered the predominant purpose of their agreement to be the rendition of a service or the sale of a good, its absence from the balance does not create a material factual dispute. It is the content of billing evidence, not its existence or non-

existence, that courts consider in determining the predominant purpose of a particular transaction. See Cease, 2004 WI 139, ¶ 19, 276 Wis. 2d at 370, 688 N.W.2d at 467; Micro-Managers, 147 Wis. 2d at 508, 434 N.W.2d at 100; Van Sistine, 95 Wis. 2d at 685, 291 N.W.2d at 639.

A&B Welding has met its initial burden to establish that the economic loss doctrine bars plaintiff's claims for negligence and strict liability. A&B Welding has presented evidence in support of its motion sufficient to permit a reasonable factfinder to conclude that the damage to plaintiff's fertilizer was economic loss solely caused by the failure of a product (the receiving, storing, mixing and delivery system) to perform as expected. The burden then shifts to plaintiff to establish the existence of a genuine dispute of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). In sustaining this burden, plaintiff may not rest upon mere allegation or denials, but must set forth specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. R. 56(e). Plaintiff has presented no evidence that would permit a reasonable factfinder to conclude that the predominant purpose of the agreement between A&B Welding and Hartung was the rendition of services. Accordingly, A&B Welding is entitled to partial summary judgment as a matter of law.

C. Tyco's and Farmchem's Motion to Strike and A&B Welding's Motion to Amend

On January 21, 2005, defendant A&B Welding filed "cross-claims" against Tyco and Farmchem for breach of warranty, negligence, strict liability and breach of contract alleging Tyco and Farmchem's failure to include instructions with the failed valves. However, a "cross-claim" is not a "pleading" as permited by Fed. R. Civ. P. 7. Accordingly, defendants Tyco and Farmchem correctly construed A&B Welding's cross-claim as an amendment to its answer and moved to strike the cross-claims, arguing that A&B Welding failed to seek leave to amend. In response, A&B Welding sought leave to amend its answer to include the cross-claims. A&B Welding now properly seeks leave to amend its answer and Tyco and Farmchem have incorporated their other concerns into their briefs in opposition to A&B Welding's motion to amend. Consequently, I find it unnecessary to decide the motion to strike.

A&B Welding wants to amend its answer to include cross-claims against Tyco and Farmchem, alleging negligence, strict liability, breach of contract and breach of implied warranty of merchantability. Although Rule 15 of the Federal Rules of Civil Procedure directs district courts to freely grant leave to amend "when justice so requires," the rule does not command that leave be granted every time. Fed. R. Civ. P. 15(a); Thompson v. Illinois Dept. of Prof'l Regulation, 300 F.3d 750, 759 (7th Cir. 2002). The decision to grant or deny leave to amend rests within the sound discretion of the district court. J.D. Marshall

Int'l Inc. v. Redstart, Inc., 935 F.2d 815, 819 (7th Cir. 1991). A court may deny leave to amend in instances of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Foman v. Davis, 371 U.S. 178, 182 (1962).

Tyco and Farmchem oppose A&B Welding's motion to amend. Tyco contends that amendment would be futile because the proposed cross-claims would not survive a motion to dismiss for failure to state a claim or, in the alternative, a motion for summary judgment. Farmchem contends that A&B Welding seeks amendment for an improper purpose and that amendment would be futile because the proposed cross-claims would not survive a motion to dismiss for failure to state a claim.

Both Tyco and Farmchem initially raised concerns about undue prejudice. At the time, trial was scheduled to begin March 10, 2005. After Judge Shabaz recused himself and the case was reassigned to this court, I rescheduled the trial for May 16, 2005 and adjusted several deadlines. Neither Tyco nor Farmchem continued to press the undue prejudice argument after I made these changes. The changes are sufficient to cure any prejudice that might otherwise have resulted from granting A&B Welding's motion to amend.

I disagree with Farmchem that the amendments were brought for an improper purpose. The "improper purpose" alleged by Farmchem is A&B Welding's desire to "coerce"

Tyco and Farmchem into sharing its liability. The Federal Rules of Civil Procedure expressly permit a party to bring a cross-claim "that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." Fed. R. Civ. P. 13(g). There is nothing improperly coercive about any of A&B Welding's proposed cross-claims.

Both Tyco and Farmchem argue that it would be futile to allow A&B Welding to allege cross-claims for negligence and strict liability because those claims would be barred by Wisconsin's economic loss doctrine. In light of my ruling that plaintiff's negligence and strict liability claims against A&B Welding are barred by the economic loss doctrine, I must conclude that the doctrine would apply with equal force to bar A&B Welding's negligence and strict liability cross-claims against Tyco and Farmchem. Accordingly, A&B Welding's negligence and strict liability cross-claims against Tyco and Farmchem are futile. I will not grant A&B Welding leave to amend its answer to include cross-claims against Tyco alleging negligence or strict liability .

In A&B Welding's negligence cross-claim, it alleges that it will suffer harm and be entitled to "contribution and/or indemnification" only "[i]f it is proven that A&B Welding was negligent." Because the economic loss doctrine bars plaintiff's negligence claim against A&B Welding, this necessary condition cannot occur. The passive construction of A&B Welding's strict liability cross-claim prevents it from similarly conditioning Farmchem's and

Tyco's liability on plaintiff's recovery from A&B Welding; in its strict liability cross-claim, it alleges that it will suffer harm and be entitled to indemnification "[i]f it is proven that the subject valves were unreasonably defective." Nevertheless, A&B Welding seeks "indemnification." Indemnification is an equitable principle that shifts the loss from one person who has been compelled to pay to another who should bear the loss. In re Paternity of Jasmine J.E., 198 Wis. 2d 114, 118, 542 N.W.2d 171, 173 (Ct. App. 1995). It would be inappropriate to permit A&B Welding to pursue a tort-based indemnification claim to recover plaintiff's economic loss when plaintiff itself is relegated solely to its contract theories against A&B Welding. Cf. Cooper Power Systems, Inc. v. Union Carbide Chemicals & Plastics Co., Inc., 123 F.3d 675, 684 (7th Cir. 1997) (applying Ohio law in relevant part). Consequently, I will not grant A&B Welding leave to amend its answer to include cross-claims against Tyco and Farmchem alleging negligence or strict liability.

Tyco argues also that it would be futile to allow A&B Welding to allege cross-claims for breach of contract and breach of implied warranty against Tyco because the two parties are not "in privity," that is, they have no contractual relationship. A breach of contract cannot occur when there is no contract to breach. In Wisconsin, a cause of action for breach of implied warranty requires a contractual relationship between the parties. Wis. JI-CIVIL 3200 (2002).

A&B Welding argues that it may bring a cause of action for breach of implied warranty against Tyco because Tyco was "a remote seller who impliedly warranted a product provided to a commercial buyer in a distribution chain." In Dippel v. Sciano, 37 Wis. 2d 443, 463, 155 N.W.2d 55, 65 (1967), however, the Wisconsin Supreme Court expressly declined to extend the law of warranty to permit a non-privity buyer to recover from a remote seller within the distribution chain for breach of an implied warranty. See also Twin Disc, Inc. v. Big Bud Tractor, Inc., 582 F. Supp. 208, 215 (E.D. Wis. 1984), aff'd, 772 F.2d 1329 (7th Cir. 1985). Accordingly, A&B Welding's breach of warranty and breach of contract claims against Tyco are futile. I will not grant A&B Welding leave to amend its answer to include cross-claims against Tyco alleging breach of warranty or breach of contract.

That leaves A&B Welding's cross-claims against Farmchem for breach of contract and breach of implied warranty of merchantability. Wis. Stat. § 402.314 controls A&B Welding's warranty claim. It is likely that it controls A&B Welding's breach of contract claim as well. A&B Welding has alleged the existence of an "implied term" that the valves sold by Farmchem "would be free from defects and would include installation instructions if such instructions were necessary for the proper installation of the subject valves and to prevent the valves from failing due to improper installation." Section 402.314 provides as follows:

402.314. Implied warranty: merchantability; usage of trade

> (1) Unless excluded or modified (s. 402.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as:
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> (a) Pass without objection in the trade under the contract description; and
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> (b) In the case of fungible goods, are of fair average quality within the description; and
>
> (c) Are fit for the ordinary purposes for which such goods are used; and
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> (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
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> (e) Are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) Conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (s. 402.316) other implied warranties may arise from course of dealing or usage of trade.

Wis. Stat. § 402.314 (2001-2002). A&B Welding argues that the valves were not merchantable because they were not "adequately contained, packaged, and labeled." See id. § 402.314(2)(e). Farmchem responds that A&B Welding can cite no case in which a Wisconsin court recognized a breach of the implied warranty of merchantability when installation instructions were not supplied with a product. Although I have not yet formed an opinion on the merits of A&B Welding's warranty claim, I cannot say as a matter of law that A&B Welding has failed to state a claim merely because no Wisconsin court has yet addressed the issue. I will grant A&B Welding leave to amend its answer, but only insofar

as it seeks to add cross-claims against Farmchem for breach of implied warranty of merchantability and breach of contract.

Finally, I note that A&B Welding has requested that its cross-claims "apply retroactively effective January 21, 2005, the date A & B Welding filed its cross-claims." A&B Welding moved to amend on February 4, 2005. Rule 15(c) controls the relation back of amendments. I will not grant A&B Welding's request, because it has not adequately explained why I should do so.

ORDER

IT IS ORDERED that

1. Defendant Tyco Valves & Controls, LP's motion for summary judgment against plaintiff Fireman's Fund McGee Marine Underwriters is GRANTED.

2. Defendant Farmchem Corporation's motion for summary judgment against plaintiff is GRANTED.

3. Defendant A&B Welding & Manufacturing, Inc.'s motion for partial summary judgment against plaintiff is GRANTED.

4. Defendant A&B Welding's motion for leave to amend its answer is GRANTED insofar as it seeks leave to add cross-claims for breach of implied warranty of merchantability

and breach of contract against defendant Farmchem. In all other respects, the motion is DENIED.

5. Defendant Farmchem shall have 20 days from the date of this order in which to serve and file its responsive pleading.

Entered this 8th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge