

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LUND EGG CO., INC.,

Plaintiff,

OPINION AND ORDER

v.

11-cv-186-wmc

QUALITY EGG, LLC, and ABC
INSURANCE COMPANY,

Defendants.

Presently before the court is defendant Quality Egg, LLC's motion to dismiss two claims in plaintiff Lund Egg Co., Inc.'s second amended complaint as barred by Wisconsin's economic loss doctrine. (Dkt. #25.) Lund Egg failed to oppose the motion. The court will grant defendant's motion in part and deny it in part. As for Lund Egg's fraudulent misrepresentation claim (Count V), the court will grant the motion as to any common law claim and deny the motion as to plaintiff's specific allegation that Quality Egg violated Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18. As for Lund Egg's negligence claim (Count VI), the court will grant the motion finding the claim barred by the economic loss doctrine. Finally, this order supplements the parties' obligations as the remainder of this case proceeds to trial.

JURISDICTION

Before turning to the merits of Quality Egg's motion, the court first must address whether jurisdiction exists. The court previously issued two orders seeking amendment of the parties' pleadings as to citizenship. Based on the pleadings in the second amended

complaint, the amended notice of removal, and the affidavit of an Assistant Manager of Quality Egg, LLC, the court is satisfied that subject matter jurisdiction exists pursuant to 28 U.S.C. § 1332. Plaintiff Lund Egg Co., Inc. is a Wisconsin corporation, with its principal place of business in Woodville, Wisconsin. (Am. Notice of Removal (dkt. #3) ¶ 7(a)(i); 2nd Am. Compl. (dkt. #11) ¶ 1.) The sole member of defendant Quality Egg, LLC is Austin J. Decoster, who is a citizen of the state of Iowa. (Affidavit of Peter Decoster (dkt. #19) ¶ 3.) Therefore, defendant Quality Egg is a citizen of the state of Iowa. Peter Decoster, the Assistant Manager, also avers that “Wright County Egg is a division of Quality Egg, LLC.” (*Id.* at ¶ 2.) In light of this representation, Wright County Egg is not a separate legal entity but simply part of Quality Egg, LLC, the only legal entity subject to suit.¹ *See, e.g., Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 591 (5th Cir. 1980) (“A division of a corporation is not a separate legal entity but is the corporation itself.”) (quoting *In re Sugar Industry Antitrust Litig.*, 579 F.2d 13, 18 (3d Cir. 1978)). The citizenship of fictitious defendant ABC Insurance Company is also properly ignored for purposes of citizenship. 28 U.S.C. § 1441(a) (“For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.”). Finally, the amount in controversy exceeds \$75,000. (Am. Notice of Removal (dkt. #3) ¶ 7(b).)

¹ Accordingly, the court has removed Wright County Egg from the caption.

ALLEGATIONS OF FACT²

Lund Egg is an egg distributor that also provides egg brokerage services. (2nd Am. Compl. (dkt. #11) ¶ 5.) Quality Egg is in the business of producing and selling eggs. (*Id.* at ¶ 6.) The parties entered into numerous agreements in which Lund Egg purchased shell eggs from Quality Egg or brokered sales of its eggs to Lund Egg's customers. (*Id.* at ¶ 8.) The complaint alleges that Quality Egg sold eggs that could have been contaminated with Salmonella and were subject to a recall. (*Id.* at ¶ 7.) Lund Egg's claims and Quality Egg's counterclaim all arise out of this possible Salmonella contamination and recall of those eggs.

In its second amended complaint, Lund Egg alleges a breach of contract claim, breach of express warranties claim, breach of implied warranty of fitness for particular purpose claim, and a breach of implied warranty of merchantability claim. (2nd Am. Compl. (dkt. #11) Counts I-IV.) Lund Egg also alleges that Quality Egg (1) misrepresented the quality of its eggs in violation of the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18 (Count V); and (2) was negligent in its production and sale of contaminated eggs (Count VI).

OPINION

The economic loss doctrine is a judicially-created principle that generally precludes contracting parties from pursuing tort recovery for purely economic or commercial losses

² The court accepts as true all well-pleaded facts and allegations in the complaint, drawing all reasonable inferences in favor of plaintiff. *London v. RBS Citizens, N.A.*, 600 F.3d 742, 745 (7th Cir. 2010).

associated with the contract relationship. *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶¶ 33-35, 262 Wis.2d 32, 662 N.W.2d 652. “The doctrine generally ‘requires transacting parties in Wisconsin to pursue only their contractual remedies when asserting an economic loss claim.’” *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 24, 270 Wis. 2d 146, 677 N.W.2d 233 (quoting *Digicorp*, 2003 WI 54, ¶ 34, 262 Wis. 2d 32, 662 N.W.2d 652).

In Count V of the second amended complaint, plaintiff alleges “fraudulent representation.” Specifically, plaintiff alleges that “[d]efendants’ fraudulent representations regarding its eggs are in violation of the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18.” (2nd Am. Compl. (dkt. #11) ¶ 46.) To the extent plaintiffs are alleging a common law fraudulent misrepresentation claim, that claim is barred by the economic loss doctrine. *See, e.g., Tietsworth*, 2004 WI 32, at ¶ 29 (“The economic loss doctrine has been applied by Wisconsin courts to bar claims of negligent and strict responsibility misrepresentation, and by federal courts applying Wisconsin law to bar claims of negligent, strict responsibility, and intentional misrepresentation.”). Perhaps in recognition of the application of this doctrine, Lund Egg failed to oppose Quality Egg’s motion to dismiss, specifically failing to offer any argument that its claims would fall within the narrow exception to the doctrine where “the fraud is extraneous to, rather than interwoven, with the contract.” *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 42, 283 Wis. 2d 555, 699 N.W.2d 205. Accordingly, the court will grant defendant’s motion to dismiss any common law claim for fraudulent misrepresentation.

Defendant Quality Egg also moves to dismiss plaintiff's claim under Wisconsin's Deceptive Trade Practices Act, Wis. Stat. § 100.18, as barred by the economic loss doctrine. (Def.'s Br. (dkt. #26) 5.) In *Kailin v. Armstrong*, 2002 WI App 70, ¶ 43, 252 Wis. 2d 676, 643 N.W.2d 132, the Wisconsin Court of Appeals considered this issue and held that "the economic loss doctrine does not apply to claims under WIS. STAT. § 100.18." This is hardly surprising since the remedies for breach of this statute are themselves statutory. *See* Wis. Stat. § 100.26. Accordingly, the court will deny defendant's motion to dismiss plaintiff's claim pursuant to Wis. Stat. § 100.18.

Finally, Quality Egg seeks to dismiss Count VI of the second amended complaint, alleging negligence on the part of Quality Egg in distributing contaminated eggs. The court will grant defendant's motion to dismiss this claim as barred by the economic loss doctrine. *See, e.g., Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 400, 573 N.W.2d 842, 844 (1998) ("[T]he economic loss doctrine bars a remote commercial purchaser from recovering economic losses from a manufacturer under tort theories of strict liability and negligence."). This holding is without prejudice to any right of contribution or indemnification Lund Egg may have against Quality Egg, if any, for claims asserted by third-parties arising out of its sale of defective eggs.

ORDER

IT IS ORDERED that:

- 1) Defendant Quality Egg, LLC's partial motion to dismiss (dkt. #25) is GRANTED IN PART AND DENIED IN PART. Defendant's motion is granted as to plaintiff's claims of common law fraudulent misrepresentation

and negligence, and those claims are dismissed with prejudice. Defendant's motion is denied as to plaintiff's Wis. Stat. § 100.18 claim; and

2) In anticipation of the upcoming trial, the court sets forth the following deadlines and guidelines on pre-trial submissions. Counsel should take note of the bolded additions to the obligations set forth in the preliminary pretrial order.

a) On or before Friday, May 11, 2012 the parties shall provide opposing counsel and the court:

i. Rule 26(a)(3) disclosures.

ii. Motions in limine.

b) On or before Friday, May 18, 2012, the parties shall provide opposing counsel and the court:

i. **A short, written narrative statement of each expert's background and experience. These statements will be read to the jury and no proof will be received on the matters covered unless an objection to the narrative statement is filed.**

ii. Exhibit lists. Any exhibits not listed shall be excluded from admission into evidence except upon good cause shown.

iii. **A list of portions of depositions, to be offered into evidence at trial, by page and line references for witnesses unavailable at trial. Extensive reading from depositions is strongly discouraged. Toward that end, the proponent of a deposition may -- though is not required to -- prepare a written narrative summary of some or all deposition transcripts the party intends to offer into evidence, with annotated page and line references in parenthesis after each sentence, in lieu of part or all of the narrative of questions and answers.**

iv. Additional voir dire questions.

v. Proposed verdict forms.

vi. Proposed jury instructions, including the brief ordered above.

vii. In addition to electronically filing voir dire questions, verdict forms and jury instructions, please submit to the court an

electronic copy of each in Microsoft Word format to wiwd_wmc@wiwd.uscourts.gov.

- c) On or before Friday, May 25, 2012, the parties shall provide opposing counsel and the court:
 - i. Responses to motions in limine.
 - ii. Objections to exhibits.
 - iii. Responses to opposing parties' voir dire questions, verdict forms, and jury instructions.
 - iv. **Objections and counter designations to proffered deposition designations.**
- d) **Counsel are directed to consult in good faith and reach resolution on the admissibility of exhibits to the extent possible. Each party shall file copies of any *contested* exhibits they intend to offer with the court by 12:00 p.m. on Thursday, May 31, 2012.**
- e) The final pre-trial conference shall be held on Tuesday, June 5, 2012 at 4:00 p.m.
- f) The trial shall commence Monday, June 11, 2012 at 9:00 a.m. The parties shall meet with the court at 8:30 a.m. that morning for any matters that need to be brought to the court's attention. The court notes that this trial may start later in the week, as other trials are also scheduled to commence on Monday. The timing of this trial will be determined at the final pre-trial conference.

Entered this 2nd day of May, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge