

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**ONE BEACON INSURANCE GROUP, LLC,
Plaintiff,**

v.

**Case No. 15-145486-CK
Hon. James M. Alexander**

**PENTAIR FILTRATION, INC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s motion for summary disposition. This case arises out of a flood that occurred at non-party Computerized Facility Integration’s office in Southfield. Plaintiff issued a business insurance policy to Computerized that was in effect at the time of the flood. Plaintiff claims that a faulty water filter and supply line on a coffee maker system caused the flood and Defendants were the source of the faulty filter.

Plaintiff paid Computerized for the damages and filed the present suit to recover said damages based on its subrogation rights.

Defendants now move for summary disposition of Plaintiff’s Complaint under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. All well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992). A motion under this subrule may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual

development could possibly justify recovery.” *Id.* When deciding such a motion, the court considers only the pleadings. MCR 2.116(C)(G)(5).

Defendants argue that: (1) Plaintiffs’ defect claims (Counts I, III, and IV) should all be dismissed under the economic-loss doctrine; (2) Plaintiff’s spoliation claim (Count II) should be dismissed because Michigan does not recognize such a cause of action; and (3) Plaintiff’s contract claims (Counts V and VI) should be dismissed for lack of consideration or underlying contract.

1. Counts I, III, and IV – Defect Claims

Defendants first argue that, under the economic-loss doctrine, they are entitled to dismissal of Plaintiff’s Count I for negligence, Count III for contribution/reimbursement, and Count IV for equitable indemnification.

In support, Defendants cite *Neibarger v Universal Coops*, 439 Mich 512, 527-528; 486 NW2d 612 (1992) for the proposition that: “where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC.”

“The economic loss doctrine, simply stated, provides that ‘[w]here a purchaser’s expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only ‘economic’ losses.’” *Neibarger*, 439 Mich at 520; quoting *Kershaw Co Bd of Ed v United States Gypsum Co*, 302 SC 390, 393; 396 SE2d 369 (1990), and *Kennedy v Columbia Lumber & Mfg Co*, 299 SC 335, 345; 384 SE2d 730 (1989).

In *Neibarger*, the plaintiffs owned and operated a dairy farm and contracted with the defendant to install a milking system. After using the system for some time, some of the plaintiffs' cattle became ill or died. The plaintiffs claimed that the milking system was defective and to blame for injuring and killing their cattle and brought claims for breach of express warranty, breach of implied warranty, and negligence.

Our Supreme Court held that the plaintiffs' tort claims were barred even though they sought to recover for damage to property other than the allegedly defective product, reasoning:

In many cases, failure of the product to perform as expected will necessarily cause damage to other property; such damage is often not beyond the contemplation of the parties to the agreement. Damage to property, where it is the result of a commercial transaction otherwise within the ambit of the UCC, should not preclude application of the economic loss doctrine where such property damage necessarily results from the delivery of a product of poor quality. *Neibarger*, 439 Mich at 531.

Further, privity of contract is unnecessary for the economic-loss doctrine to apply. *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 344; 480 NW2d 623 (1991) (holding "the trial court clearly erred in finding that the absence of privity between Sullivan and Norton precluded an application of the economic-loss doctrine"); and *Freeman v DEC Int'l*, 212 Mich App 34, 36; 536 NW2d 815 (1995) (holding "the buyer's remedies are not based on tort but on rights of recovery provided by the UCC, irrespective of the existence of privity of contract").

Defendants argue that our appellate courts "have consistently applied the economic-loss doctrine to bar claims where a plaintiff alleges economic losses arising from an allegedly defective product," citing *Citizens Ins Co v Osmose Wood Preserving, Inc*, 231 Mich App 40; 585 NW2d 314 (1998) (applying the economic-loss doctrine to dismiss an insurer's negligence and fraud claims where a flame-retardant chemical caused a restaurant's roof to collapse); and

MASB-SEG Prop/Cas Pool, Inc v Metalux, 231 Mich App 393, 400; 586 NW2d 549 (1998) (applying the economic-loss doctrine to dismiss an insurer's tort claims where a defective fluorescent light caused a fire).

In response, Plaintiff relies on two nonbinding cases in support of the proposition that the economic-loss doctrine may not apply if the potential harm was “not anticipated or in contemplation of the parties at the time of the transaction.”

In *State Farm Fire & Cas Co v Ford Motor Co*, an unpublished opinion per curiam of the Court of Appeals, issued March 11, 2010 (Docket No. 287512), a consumer purchased a Ford F-150 that later caught fire and caused damage to the consumer's home. The *State Farm v Ford* panel reasoned that the consumer did not anticipate that the truck might cause a fire and damage his home, and therefore, it did not apply the economic-loss doctrine to bar the insurer's claims.

In *State Farm Fire & Cas Co v Conair Corp*, 833 F Supp 2d 713 (ED Mich 2011), consumers purchased a coffeemaker that caused a fire – damaging their home. The District Court found that the fire hazard was not within the contemplation of the consumer at the time of purchase, and therefore, the economic-loss doctrine did not apply.

The Court rejects Plaintiff's reliance on these cases as both non-binding and distinguishable. In this case, Plaintiff's insured purchased a water filter to filter water as a part of a coffee maker system. The system necessarily uses water in order to make the coffee. The very component alleged to be defective – the water filter – necessarily comes into contact with water. As a result, any purchaser of such a filter must anticipate that, in the event of a defect, water may leak and cause damage to adjacent property. Therefore, the Court finds that the damages at issue were within the contemplation of the parties at the time that the water filter was purchased, and the economic-loss doctrine applies in this case.

For all of the foregoing reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court concludes that Plaintiff's tort-based claims (Counts I, III, and IV) are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." As a result, Defendants' motion for summary disposition of these claims under (C)(8) is GRANTED, and said claims are DISMISSED.¹

2. Count II – Negligence (Spoliation)

Defendants next move for summary disposition of Plaintiff's Count II – titled Negligence (Spoliation) – because Michigan law does not recognize a cause of action for spoliation.

Plaintiff's spoliation claim is based on the allegation that it provided the allegedly defective water filter to Defendants for evaluation, where it was modified or distorted.

In support of their motion, Defendants cite *Teel v Meredith*, 284 Mich App 660; 774 NW2d 527 (2009). The *Teel* Court considered whether an independent cause of action for spoliation was appropriate and held that "Michigan does not yet recognize as a valid cause of action spoliation of evidence."

In response, Plaintiff offers no argument why the Court should ignore *Teel* as binding authority – instead generally arguing that its claim is valid. But Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

For the foregoing reasons, Defendants' motion for summary of Plaintiff's Count II under (C)(8) is GRANTED, and the same is DISMISSED.

¹ Plaintiff's unspecified request to amend its Complaint should the Court grant summary disposition is, likewise, denied as futile. Plaintiff fails to identify a valid claim (alternative or otherwise) that it may bring against any of these Defendants that is well-grounded in law.

3. Counts V and VI – Express and Implied Contract and Guarantee

Defendants next seek summary disposition of Plaintiff's Count V for Express and Implied Contract and Count VI for Express Guarantee. Defendants argue that they are entitled to summary disposition of these claims because there was no consideration for any alleged contract.

Indeed, “[c]onsideration is required for a valid contract.” *Prentis Family Fund, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 58; 698 NW2d 900 (2005). This is true of both express and implied contracts. *Freiburger v Department of Mental Health*, 161 Mich App 316, 317; 409 NW2d 821 (1987) (holding, “[a]s with any other contract, an implied contract must satisfy the elements of mutual assent and consideration.).

Plaintiff's claim is based on the allegation that, after the flood, Defendant Sedgwick (Defendant Pentair's claims management service) emailed Plaintiff and asked to evaluate the allegedly defective water filter. In the August 6, 2014 email, Sedgwick stated:

Allowing Pentair to perform their own non-destructive evaluation of the subject filter in their laboratory with various team members is an essential component of their investigation.

Pentair gives you all assurances that if the product becomes lost while in the possession of Pentair, altered or damaged while in their possession your claim will be paid based on ACV. As a liability carrier – if it is determined we owe this loss – we are only obligated to pay actual cash value.

Plaintiff's contract and guarantee claims are based on this email. Defendants argue, however, that their promise to not alter or damage the filter cannot constitute consideration because they were already under that duty under Michigan law. In support, Defendants cite *Brenner v Kolk*, 226 Mich App 149, 162; 573 NW2d 65 (1997), in which, the Court of Appeals reasoned: “Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action.”

The Court of Appeals has also held that ““The general rule is that a promise to do that which the promisor is legally bound to do, or the performance of an existing legal obligation, does not constitute consideration, or sufficient consideration, for a contract.”” *Green v Millman Bros, Inc*, 7 Mich App 450, 455; 151 NW2d 860 (1967); quoting 17 Am Jur 2d, Contracts, § 119, p 465.

Based on the foregoing, Defendants argue that a promise to not damage the filter, which they were already under the duty to do, cannot constitute consideration to create a binding contract to pay for any damages.

In response, Plaintiff offers minimal analysis. Rather, Plaintiff argues, “in consideration for Plaintiff providing the water filter and connecting parts to Defendants and allowing them to exam and test the same during a non-destructive evaluation, Defendants expressly guaranteed and warranted that its investigation and examination of the water filter and connecting parts would be accomplished without distorting or destroying the items.”

But the precise consideration that Plaintiff alleges (an agreement to not destroy evidence) is the type of consideration that Defendants’ authority suggests cannot be valid. And Plaintiff offers no authority or reasonable analysis to the contrary.

For all of the foregoing reasons, Defendants’ motion for summary of Plaintiff’s Counts V and VI under (C)(8) is GRANTED, and the same are DISMISSED.²

² Again, Plaintiff’s unspecified request to amend its Complaint should the Court grant summary disposition is denied as futile. Plaintiff fails to identify a valid spoliation or contract claim that it may bring against any of these Defendants that is well-grounded in law.

Summary

To summarize, Defendants' motion for summary disposition under (C)(8) is GRANTED, and Plaintiff's Complaint is DISMISSED in its entirety.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

June 3, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge