UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DETERMINATION CORPORATION *d/b/a* "FORESITE"	CIVIL ACTION
VERSUS	NO. 02-405-D
ELTEC INSTRUMENTS, INC	JUDGE BRADY

RULING ON MOTION FOR SUMMARY JUDGMENT

Pending before the court is a motion for summary judgment (doc. 79) filed by Defendant, Eltec Instruments, Inc. ("Eltec"). Plaintiff, Determination Corporation d/b/a Foresite ("Foresite"), filed an opposition (doc. 88) and Eltec filed a reply brief (doc. 91). Oral argument is not required on this motion. Subject matter jurisdiction in this court exists pursuant to 28 U.S.C. § 1332, because the parties are of diverse citizenship and the amount in controversy is greater than $75,000, exclusive of costs and interest.

I. BACKGROUND

The relationship between these two parties began when Foresite ("plaintiff") and Eltec ("defendant") entered into a contract under the terms of which the defendant was to supply the plaintiff with detectors, also referred to as sensors, to be used by the plaintiff in cameras. The court previously discussed the facts at

issue in this case in an earlier ruling.[1] Nevertheless, the plaintiff's claims can be condensed as follows. The plaintiff alleges the defendant omitted the age of the detectors when selling the products to the plaintiff and these detectors allegedly caused plaintiff's cameras to have false triggers and malfunctions. Plaintiff then filed suit alleging claims for fraud, negligent misrepresentation, breach of contract, and unfair trade practices. In an earlier order, this court determined that Florida law should apply to resolve all aspects of this dispute, unless the plaintiff can show that applying that law would offend Louisiana public policy. [2]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[3] When the burden at trial rests on the non-moving party the moving party need only demonstrate that the record lacks sufficient evidentiary support for the non-moving party's case.[4] The moving party may do this by showing that the evidence is insufficient to prove the existence of one or more elements essential to

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[1] Docket No. 32.

[2] Docket No. 42.

[3] Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[4] Id.

the non-moving party's case.[5]

Although this Court considers the evidence in the light most favorable to the non-moving party, the non-moving party may not merely rest on allegations set forth in the pleadings. Instead, the non-moving party must show that there is a genuine issue for trial.[6] Conclusory allegations and unsubstantiated assertions will not satisfy the non-moving party's burden.[7] If, once the non-moving party has been given the opportunity to raise a genuine factual issue, no reasonable juror could find for the non-moving party, summary judgment will be granted for the moving party.[8]

III. ANALYSIS

Defendant proffers several arguments in support of its claim for summary judgment. The court shall address each argument independently and briefly.

A. The defendant argues bare allegations of fraud cannot be used as a shield against summary judgment.

The defendant argues that the record proves Eltec did not make a single false statement of fact, material or otherwise, and at no time failed to disclose any information during the litigants' business relationship.[9] The court is well-aware "that an allegation of fraud does not create an impenetrable shield through which the

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[5] Id.

[6] Anderson v. Liberty Lobby, 477 U.S. 242, 248-49 (1986).

[7] Grimes v. Tex. Dep't of Mental Health, 102 F.3d 137, 139-40 (5th Cir. 1996).

[8] Celotex, 477 U.S. at 322; see also FED. RULE CIV. P. 56(c).

[9] Docket No. 81, page 3.

sword of summary judgment cannot pierce."[10] However, the plaintiff contends the first element, a false statement, for an action in fraud can be satisfied by an intentional omission of a material fact.[11] The court is inclined to agree with the plaintiff on this issue. Under Florida law, "[f]raud includes the intentional omission of a material fact."[12] The plaintiff in this case has alleged the defendant omitted relevant information, therefore, whether it rises to the level of an "intentional omission of a material fact" is a genuine issue that cannot be disposed of at this time. Furthermore, there are genuine issues as to Eltec's knowledge of the omission and intent to induce the plaintiff to rely on the omitted information.[13] For these reasons, the court finds there are genuine issues as to the elements required for a fraud claim; therefore, defendant is not entitled to summary judgment on these grounds.

B. The defendant claims the plaintiff has failed to proffer reliable expert evidence that the sensors were defective.

Here, the defendant argues the plaintiff has failed to demonstrate that any Eltec detector was defective or was the cause of any malfunction in the Foresite

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[10] S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 495 (5th Cir. 1996).

[11] Docket No. 88, page 13.

[12] Ward v. Atlantic Sec. Bank, 777 So. 2d 1144, 1146 (Fla. 3d DCA 2001) (citing Nessim v. DeLoache, 384 So. 2d 1341, 1344 (Fla. 3d DCA 1980)).

[13] The elements of a common law fraud in Florida are: (1) a false statement concerning a material fact; (2) declarant's knowledge that the representation is false; (3) declarant's intent that the representation induce reliance in the interlocutor; and (4) consequent injury to the interlocutor. See Lance v. Woods, 457 So. 2d 1008, 1011 (Fla. 1984).

product. The defendant further attacks the findings of plaintiff's experts, Jim Albert and Procopio Villarreal. Specifically, defendant contends the experts rely on hearsay, incomplete information, and incorrect facts. The defendant argues, among other things, that the experts: (1) failed to rule out other causes for the malfunctions, (2) failed to demonstrate that their conclusions are based on a scientific method; and (3) rely largely on temporal proximity between the change in sensors and cessation of false triggers. The plaintiff disputes these contentions.

Defendant also contends Mr. Villarreal relies on Hans Keller's e-mail, which plaintiff contends proves Eltec's detector was defective. On this note, defendant argues that the plaintiff cannot use Dr. Keller as a phantom expert without first demonstrating his purported findings are based on scientific method. This court previously ruled that Dr. Keller's email is admissible against the defendant as an "admission by a party-opponent;" however, that ruling merely determined the admissibility of the e-mail on grounds that it was not hearsay.[14] The court did not examine whether the e-mail could be relied upon as expert testimony.

To the extent Mr. Villarreal relies on the Keller e-mail in forming his own expert opinions, the court concludes the plaintiff's experts are permitted to base their opinions on facts or data perceived by them or others.[15] However, it is true

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[14] Docket No. 66, pages 4 & 5.

[15] See Slaughter, et al. v. Southern Talc Co., et al., 919 F.2d 304, 307 n.3 (5th Cir. 1990).

that "expert testimony relying on the opinions of others should, of course, be rejected if the testifying expert's opinion is too speculative."[16] At this time, it is unclear whether plaintiff's expert reports are too speculative. It appears from the record that plaintiff's experts did conduct their own testing and utilized the Keller e-mail as one factor among several to reach a conclusion. Considering the plaintiff's opposition on this issue focuses on the court's previous ruling of admissibility, it would be beneficial for this issue to be raised separately at a later date, possibly in a motion in limine. This would assist the court in examining whether the plaintiff's experts satisfy the requirements set forth in Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786 (1993). As to defendant's arguments that plaintiff's experts failed to consider other causes of malfunction or utilized flawed factual premises, these issues also may be raised at a later date. Therefore, defendant is not entitled to summary judgment at this time based on these grounds.

C. The defendant argues certain sworn admissions prove the plaintiff cannot create a genuine issue on any of its claims.

The defendant contends the record conclusively shows: (1) Eltec made no fraudulent claims or false statements; (2) the deposition of John Fore, president of Foresite, allegedly demonstrates the absence of any evidence of misrepresentation, reliance, or inducement; and (3) K.C. Jones, an employee of plaintiff who the plaintiff allegedly relied upon to select the sensors, admitted that he had no

[16] Walker v. Soo Line R.R., 208 F.3d 581, 588 (7th Cir. 2000).

knowledge of any false statement made by Eltec.

As mentioned above, the court finds there are genuine issues as to plaintiff's claim for fraud. Defendant's argument that the record is devoid of any false statements is unpersuasive. There is certainly evidence in the record of the alleged omission that may satisfy the false statement requirement in a fraud claim. For example, plaintiff has adequately alleged inspection stickers, which when removed revealed the true date of manufacturing, were placed on the sensors in an attempt to hide the true date. The defendant argues plaintiff's contentions on this point are a "red herring" and offers what may be a plausible explanation for the placement of the stickers. Nevertheless, it is an issue of material fact that may not be resolved at the summary judgment stage. Also, plaintiff provides correspondence, some of which are between K.C. Jones and Mr. Armstrong of Eltec, which purport to demonstrate that Eltec representatives did indeed recommend the sensor in question and plaintiff then relied on these representations. Whether the reliance rises to the level required in a claim for fraud is a question of material fact; hence, defendant is not entitled to summary judgment on these grounds.

D. The defendant argues the plaintiff cannot establish negligent misrepresentation under Florida law.

Under Florida law, the elements for a negligent misrepresentation claim are the same as a fraud claim, except that it does not require the element of knowledge

to establish scienter.[17] Again, the court finds there is a genuine issue regarding whether the defendant's omission was material. Moreover, the plaintiff has adequately demonstrated it may have acted differently if it had known the true date of the sensors. Therefore, defendant is not entitled to summary judgment on plaintiff's negligent misrepresentation claim.

E. The defendant asserts the plaintiff is barred by Florida's Economic Loss Rule from prosecuting its fraud and negligent misrepresentation theories or recovering any damages under those tort theories.

This court has previously held Florida's economic loss rule bars recovery in tort for fraud in performance, not fraud that encourages a plaintiff to enter a contract.[18] As explained in Allen v. Stephan, 784 So. 2d 456, 457 (Fla. 4th DCA 2000), "[i]f the fraud occurs in connection with . . . omissions which cause the complaining party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort. However, where the fraud complained of relates to the performance of the contract the economic loss doctrine will limit the parties to their contractual remedies."

After examining the briefs and exhibits submitted by both parties, it appears there is a genuine issue as to whether the omission (i.e. the age of the sensors) caused the plaintiff to enter into the transaction in question. Of course, if the plaintiff were to prove only that the defendant decided to dump some of its obsolete

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[17] See Butterworth v. Quick & Reilly, 998 F. Supp. 1404, 1411 (M.D. Fla. 1998).

[18] Docket No. 42, page 7.

merchandise on an existing customer and took advantage of an existing contract, then the fraud would be related to performance and the economic loss rule would bar recovery in tort. However, the plaintiff may very well be able to prove at trial the defendant intended all along to send aged merchandise and intentionally omitted this information to obtain the contracts. Therefore, the defendant is not entitled to summary judgment on grounds the Florida economic loss rule bars plaintiff's claims for fraud and negligent misrepresentation.

F. The defendant avers pursuant to the parties' agreement the defendant is entitled to summary judgment on plaintiff's claim for consequential damages and loss profits because the plaintiff is limited to the amount of the purchase price.

Here, defendant contends Florida courts routinely recognize and uphold the principle that parties are limited by the remedy provided for in the contract, so long as the limitation of liability is clear and unambiguous.[19] However, the defendant concedes that a party may not contractually limit liability in a contract induced by fraud.[20] Inasmuch the court has decided there are genuine issues as to plaintiff's claim for fraud, it is equally true that the limitation of liability provision may not apply in this lawsuit. Accordingly, the defendant is not entitled to summary judgment on these grounds.

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[19] For this proposition, defendant cites Orkin Exterminating v. Delguidice, 790 So. 2d 1158, 1161 (Fla. 5th DCA 2001) and Interfirst Fed. Sav. Bank v. Burke, 672 So. 2d 90, 92 (Fla. 2d DCA 1996).

[20] Docket No. 81, page 24 n. 7.

G. The defendant claims it is entitled to summary judgment on plaintiff's contract claim because plaintiff cannot prove any genuine issue of fact on either breach or causation.

The elements of a breach of contract claim under Florida law are: (1) the existence of a valid contract; (2) a material breach; and (3) damages resulting from the breach.[21] Each party admits that they entered several valid contracts. The plaintiff has alleged that the defendant knowingly shipped obsolete products prone to malfunctioning; more importantly, the court has found that there are genuine issues regarding whether the defendant committed such an act. Thus, if the plaintiff is able to prove such a breach and that the damages resulted therefrom, plaintiff may be able to succeed on its contract claim.

Again, there are issues as to whether the defendant knowingly shipped obsolete parts and whether plaintiff's experts will be able to link said parts to the damages sustained. The court notes the issue of plaintiff's experts and the reliability of their methodology is saved for another date. For the reasons provided in this section, defendant is not entitled to summary judgment on plaintiff's breach of contract claim.

[21] Abruzzo v. Haller, 603 So. 2d 1338, 1340 (Fla. 11th DCA 1999).

H. The defendant argues it is entitled to summary judgment because under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), plaintiff cannot recover damages to property other than the property that was the subject of the transaction and because the parties' dealings do not constitute a consumer transaction.

First, defendant argues it is entitled to summary judgment simply because plaintiff is seeking consequential damages (i.e. loss of business value, replacement costs, freight costs, useless inventory, and loss of good will). The court is fully aware that Florida courts reject the recovery of consequential damages under FDUTPA.[22] Nonetheless, plaintiff contests defendant's argument on the basis that it seeks various damages, including actual damages. Thus, plaintiff correctly argues that recovery of actual damages is permitted under FDUTPA. To the extent plaintiff is seeking actual damages, defendant is not entitled to summary judgment on plaintiff's FDUTPA claims.

Next, defendant avers it is entitled to summary judgment because under FDUTPA the transaction in this lawsuit was not a "consumer" transaction. On this issue, plaintiff asserts FDUTPA is to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition. Plaintiff further contends that "consumer" as defined by FDUTPA includes businesses and commercial entities. The plaintiff posits that at least one learned scholar has stipulated FDUTPA was amended in 2001 and "modified the definition

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[22] See Orkin, 790 So. 2d at 1162.

of 'consumer' . . . to clarify that it includes a 'business' and 'any commercial entity, however denominated . . . .'"[23] The persuasive scholar further states, "this change appears to be intended to clarify that the remedies available to individuals under the FDUTPA are also available to businesses that are harmed by a violation of the FDUTPA."[24] Considering this fact, the court agrees with plaintiff's assertions on this point and finds the defendant is not entitled to summary judgment on these grounds.[25]

Finally, defendant argues the plaintiff has not shown an unfair or deceptive trade practice. Specifically, defendant claims there has been no evidence that Eltec in any way represented or caused the plaintiff to believe that inspection labels were related to the manufacturing date. FLA. STAT. § 501.204 provides in part, "unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Furthermore, a deceptive trade practice is "one that is likely to

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[23] David J. Federbush, Obtaining Relief for Deceptive Practices under FDUTPA, 75 Fla. B.J. 22, 30 (Nov. 2001).

[24] Id. (citing Senate Staff Analysis, Committee on Commerce and Economic Opportunities, CS/SB 208, March 22, 2001).

[25] The court acknowledges that "[d]ue to inconsistent court interpretations of [FDUTPA] and its intended protection of businesses, the remedies available to individual consumers have not always been available to business consumers." Id. Nevertheless, the court is of the opinion that the amendments to FDUTPA provide business consumers with the same remedies previously restricted to individual consumers. See Beacon Property, Inc. v. PNR, Inc., 890 So. 2d 274, 278 (Fla. 4th DCA 2004) (stating the "definition of *consumer* expressly includes the whole range of business entities").

mislead consumers."[26] The plaintiff does not need to prove the elements of fraud to sustain an action under FDUTPA.[27] The question is not whether the plaintiff actually relied on the defendant's alleged deceptive trade practice; rather, the plaintiff must only demonstrate the defendant's practice was likely to deceive a consumer acting reasonably in the same circumstances.[28] There are clearly questions that remain as to whether the defendant's conduct (i.e. placement of the inspection stickers and omission of the true manufacturing date) would have deceived a consumer acting reasonably in the same circumstances. Therefore, the defendant is not entitled to summary judgment on these grounds.

I. The defendant argues it is entitled to summary judgment on the plaintiff's Louisiana Unfair Trade Practices and Redhibition claims.

The defendant submits that plaintiff's redhibition claim and Louisiana statutory unfair trade practices claim are not before the court. Defendant contends redhibition is not a theory of recovery under Florida law and FDUTPA governs any unfair trade practices. In earlier rulings, this court determined that Florida law applies to this dispute on all issues, unless the plaintiff can show that applying that law would offend Louisiana public policy.[29] The plaintiff identified one potential

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[26] Davis v. Powertel, Inc., 776 So. 2d 971, 974 (Fla. 1st DCA 2000) (internal quotation marks omitted).

[27] Id. (citing W.S. Badcock Corp. Myers, 696 So. 2d 776 (Fla. 1st DCA 1996); Urling v. Helms Exterminators, Inc., 468 So. 2d 451 (Fla. 1st DCA 1985)).

[28] Id.

[29] Docket No. 42, page 3.

locus of conflict between Louisiana and Florida law. Plaintiff argued then, as it argues now, that adhesionary waivers of warranties are treated differently under Louisiana and Florida law. Louisiana strongly disfavors such waivers and it is not clear that Florida law is in accordance with that notion. The defendant has not addressed in its motion for summary judgment whether Louisiana public policy would be offended in this instance. Hence, the court is not willing to grant summary judgment if the possibility remains that Louisiana policy would be gravely offended. Therefore, defendant is not entitled to summary judgment on these grounds.

IV. CONCLUSION

Accordingly, for the reasons assigned herein, defendant's motion for summary judgment (doc. 79) is hereby DENIED.

Baton Rouge, Louisiana, this 24th day of February, 2005.

JAMES J. BRADY, DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA