UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

THE OWEN BUILDING LLC	:	
	:	
v.	:	C.A. No. 20-00266-WES
	:	
VICTORY HEATING & AIR CONDITIONING CO., INC., et al.	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Pending before me for a report and recommendation (28 U.S.C. § 636(b)(1)(B)) is Defendant Johnson Control Inc.'s ("Johnson's") Motion to Dismiss Counts II and III of the Amended Complaint. (ECF No. 5). For the following reasons, I recommend that Johnson's Motion to Dismiss be GRANTED as to Count II and DENIED as to Count III.

Background

Plaintiff, The Owen Building ("Owen") is a Rhode Island Limited Liability Company with its principal place of business in Providence, Rhode Island. Defendant Victory Heating and Air Conditioning ("Victory") is a Massachusetts Corporation. Johnson is a Wisconsin corporation. (ECF 1-1 p. 6).

The following facts are gleaned from Plaintiff's three-count Complaint and taken as true for purposes of this Motion. Owen contracted with Victory to install a rooftop heating, ventilation and air-conditioning system at the Owen Building located at 101 Dyer Street in Providence, Rhode Island. Id. As part of the contract, Victory installed a York chiller unit on or about May 16, 2016. Id. at p. 7. On or about July 20, 2017, one of the two units used to chill cooled water had all three compressors locked out due to high head pressure. Id. Over the next few weeks, all six compressors and electronic expansion valves in both units failed and required replacement. Id.

The York chiller was manufactured by Johnson, and Owen claims it was defective at the time of installation. Owen asserts that the defect existed at the time the product was sold and that there was a known problem with certain components in the chillers at the time of installation. Id. Owen incurred $80,186.69 in service and replacement expenses, plus personnel costs incurred in connection with the unit failures. Owen seeks recovery of its damages, plus interest, costs and attorneys' fees.

In Count I, Owen asserts a breach of contract claim against Victory. Count II asserts a negligence claim against Johnson and Count III asserts a breach of implied warranties claim against both Victory and Johnson. Plaintiff initially filed its Complaint in Rhode Island Superior Court, but it was removed to Federal Court by Johnson on June 17, 2020. Subsequently, on July 1, 2020, Johnson filed this Motion. (ECF No. 5). Owen filed an Opposition to the Motion to Dismiss on August 15, 2020. (ECF No. 14). Johnson filed its Reply on October 30, 2020. The matter was referred to me for a Report and Recommendation on December 4, 2020 and a hearing was held on December 22, 2020. At the hearing, Owen made an Oral Motion to Amend its Complaint to add additional claims for Breach of Express Warranty and Breach of Contract. That Motion was granted absent opposition and in accordance with the liberal amendment policy of Rule 15. (See Text Order, dated December 22, 2020). Plaintiff's Second Amended Complaint was filed on January 5, 2021 and this recommendation applies as to Counts II and III of that currently operative pleading. (ECF No. 22).

Discussion

A. Standard of Review

Under Rule 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff, see Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir. 1994); taking

all well-pleaded allegations as true and giving the plaintiff the benefit of all reasonable inferences, see Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir. 2002); Carreiro v. Rhodes Gill & Co., 68 F.3d 1443, 1446 (1st Cir. 1995). If under any theory the allegations are sufficient to state a cause of action in accordance with the law, the motion to dismiss must be denied. Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994).

While a plaintiff need not plead factual allegations in great detail, the allegations must be sufficiently precise to raise a right to relief beyond mere speculation. See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (abrogating the "no set of facts" rule of Conley v. Gibson, 355 U.S. 41, 44-45 (1957)). "The complaint must allege 'a plausible entitlement to relief' in order to survive a motion to dismiss." Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008) (quoting Twombly, 550 U.S. at 559). See also Ashcroft v. Iqbal, 556 U.S. 662, 679 ("[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief"). The Court of Appeals has cautioned that the "plausibility" requirement is not akin to a "standard of likely success on the merits," but instead, "the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor." Sepulveda-Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 30 (1st Cir. 2010).

B. Discussion

In Count II of the Complaint, Owen asserts a negligence claim against Johnson. The Complaint states that the "chiller unit was manufactured by Johnson Controls with one or more manufacturing defects...[which] constitutes a breach of duty to the purchasers of its chiller units to use reasonable care in manufacturing." (ECF No. 1-1 at p. 8). Johnson moves to dismiss Count II pursuant to the economic loss doctrine as adopted by the Rhode Island Supreme Court. It argues that since Owen seeks purely economic damages, its remedy lies exclusively in contract and not

in tort law. The economic loss doctrine holds that a plaintiff is "precluded from recovering purely economic losses in a negligence cause of action." Franklin Grove Corp. v. Drexel, 936 A.2d 1272, 1275 (R.I. 2007). Further, the economic loss doctrine forbids a plaintiff from recovering tort damages where "the plaintiff has suffered no personal injury or property damage." Id. This Court has noted that the economic loss doctrine "preserves the distinction between tort and contract law, allows sophisticated parties freedom to allocate economic risk by contract, and enables the party best positioned to assess economic risk to allocate it." W. Reserve Life Assurance Co. of Ohio v. Conreal LLC, 715 F. Supp. 2d 270, 289 (D.R.I. 2010). Johnson argues that the economic loss doctrine disposes this negligence claim, and persuasively argues that the Rhode Island Supreme Court's decision in Hexagon Holdings, Inc. v. Carlisle Syntec Inc., et al, 199 A. 3d 1034 (R.I. 2019) is dispositive.

The plaintiff in Hexagon, a commercial building owner, sought to recover damages against a subcontractor who installed an allegedly defective roofing system. The matter was before the Rhode Island Supreme Court on the issue of whether the economic loss doctrine barred the negligence claim even where there was no direct contract between the parties to the case. The Rhode Island Supreme Court concluded that even though there was no privity of contract, the economic loss doctrine barred the negligence claim. The Court stated that "in the case of sophisticated commercial entities in the commercial real estate market, contract law is the proper device to allocate economic risk." Id. The Court further held that "in the construction context between commercial entities" the economic loss doctrine applies to bar purely economic losses, and an injured party "must resort to contract law for recovery." Id.

Owen contends that its negligence claim is viable under Rhode Island law and argues that this Court should apply Forte Bros. v. Nat'l Amusements, Inc., et al., 525 A.2d 1301 (R.I. 1987).

It argues that the "economic loss doctrine" has certain limitations and exceptions, and that it does not apply to the facts of this case. Owen notes that in Forte Bros., the Rhode Island Supreme Court held that a third-party general contractor, who may foreseeably suffer an economic loss proximately caused by the negligent performance of a contractual duty by an architect/site engineer may bring a negligence claim despite a lack of contractual privity. (ECF No. 14 at p. 7). After a thorough review of the case and subsequent decisions on this issue, the Court declines Plaintiff's invitation to follow Forte Bros. under the facts presented in this case for several reasons.

First, Forte Bros. was decided in 1987, prior to the Rhode Island Court's adoption of the economic loss doctrine. See Robertson Stephens, Inc. v. Chubb Corp., 473 F. Supp. 2d 265, 278-279 (D.R.I. 2007). Further, this Court has noted that "Rhode Island courts have been reluctant to extend Forte Bros. beyond the chainlink fences of a construction site." Id. at 278. The Court went on to note that the "independent duty in tort" found in Forte Bros. "represents an exception to the general rule" that "carries currency in the construction context." Id. at 277-278. In addition to the inapplicability of the holding in Forte Bros., this Court finds the Hexagon case to be more directly on point and dispositive on these facts.

Like the plaintiff in Hexagon, this case concerns a commercial building owner seeking to recover damages against a subcontractor with whom the building owner is not in privity of contract. Owen contends that Forte Bros. controls because in both this case and Forte Bros., the defendant owed a "duty to render its services professionally as it was foreseeable that [plaintiff] would suffer economic harm if it failed to do so." (ECF No. 14 at p. 7). Although this argument has some appeal at first blush, a deeper dig reveals that those basic facts are also present in Hexagon, where the plaintiff relied upon its subcontractor to design and select an appropriate roofing system. Furthermore, any commercial transaction could potentially be said to fall into this

category – where one party relies upon the expertise of the party with whom they contract. Owen is asking this Court to find that an exception to the economic loss doctrine applies in this case where such an exception has not been articulated by the Rhode Island Courts and would effectively swallow the rule. I am not convinced that Forte Bros. controls here and recommend that the District Court GRANT the Motion to Dismiss Count II as barred by the economic loss doctrine.

Next, the Court turns to Johnson's Motion to Dismiss Count III, Owen's implied warranty claim. In Count III, Owen states that the chiller at issue was "manufactured by Johnson Controls and installed by [Victory] with an implied warranty that the units purchased conformed to ordinary standards of care and were of the same average grade, quality, and value as similar goods sold under similar circumstances." (ECF No. 1-1 at p. 8). Owen pleads that it relied upon that implied warranty in contracting for the purchase and installation of the chillers and that they contained a defect that "rendered them prone to failure and ultimately useless." Id. Owen claims a breach of the implied warranties of merchantability and fitness for a particular purpose. Id.

Johnson moves to dismiss the claim, arguing that it expressly disclaimed all implied warranties in its contract with Victory, consistent with Section 2-316 of Rhode Island's Uniform Commercial Code. In its Objection, Owen does not dispute that the Uniform Commercial Code allows commercial entities to disclaim limited warranties, nor does it deny that such a warranty applies to third parties. (ECF No. 14 at p. 8). Owen does, however, convincingly argue that the Court should not recommend dismissal of Count III at this time.

The most compelling argument presented by Owen is its argument that the contract between Victory and Johnson which underlies Johnson's Motion as to Count III is "outside the pleadings." See ECF No. 14 at p. 4. Along with its Motion to Dismiss, Johnson submitted the Declaration of Sergio R. Reyes, a Sales Executive in the Building Efficiency Department at

Johnson. (ECF No. 6-1). Mr. Reyes' Declaration details the emails containing the Proposal and subsequent Purchase Order exchanged between Johnson and Victory which Johnson asserts contains the disclaimer of the implied warranties. Owen contends that it is inappropriate at this stage for the Court to consider the contract, and notes that it had not even seen several of the documents underlying Count III until the Motion to Dismiss was filed. (ECF No. 14 at p. 5). In order for the Court to go down this path, it would have to review the Reyes Declaration and attached documents and make both a factual and a legal determination as to what actually constitutes the contract between Victory and Johnson and its terms. Such an exercise is not proper under Rule 12(b)(6). Owen makes a variety of other arguments in its Objection, including its contention that the limited warranty does not appear in the maintenance manual provided with the chiller and that any ambiguities must be resolved against the drafter.

I have reviewed the materials submitted and given that this litigation is in the early pre-discovery stages, I opt to reject the introduction of the extraneous materials submitted by Johnson, and find they are outside the pleadings and thus not properly before the Court on this Rule 12(b)(6) Motion. Without the introduction of the Johnson-Victory contract and given that a Second Amended Complaint has been filed by Owen containing additional contract and warranty claims, I find that conversion of the present Motion to Dismiss into a Motion for Summary Judgment would not be effective or efficient in presenting the ultimate legal questions to the Court. Accordingly, I recommend that the District Court DENY the Motion to Dismiss Count III.

Conclusion

For the foregoing reasons, I recommend that Johnson's Motion to Dismiss (ECF No. 5) be GRANTED as to Count II and DENIED without prejudice as to Count III.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
January 20, 2021