

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF WAYNE

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SBA NETWORK SERVICES,

Plaintiff,

v.

DECISION AND ORDER

INDEX No. 51706

FRED A. NUDD CORPORATION, GEORGE R.  
UNDERHILL AND UNDERHILL CONSULTING  
ENGINEER, P.C.,

Defendants.

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Plaintiff commenced this action seeking damages for economic loss after discovering that the cell phone towers it purchased from defendant Fred A. Nudd Corporation ("Nudd") did not meet certain design specifications. Plaintiff asserts causes of action against Nudd for breach of contract, breach of express warranty, breach of implied warranty and negligence. In addition, plaintiff asserts a cause of action sounding in negligence against the professional engineer, defendant George R. Underhill of Underhill Consulting Engineer, P.C. (collectively "Underhill"), who certified the plans for Nudd. Nudd has cross-claimed against Underhill for contribution and/or.....<sup>1</sup>

Nudd moves for summary judgment dismissing the complaint against it. With reference to the first cause of action, it contends that it contracted only to "build the towers based upon drawings approved by an outside Professional Engineer," and thus it

did not breach its contract with plaintiff. Nudd contends that the second cause of action should be dismissed because its express warranty did not extend to the design of the towers. The third cause of action should be dismissed because the evidence establishes, in Nudd's view, that plaintiff solely relied upon the expertise of Underhill in ordering the towers. Finally, Nudd contends that the fourth cause of action should be dismissed because any duty it owed plaintiff was contractual and the evidence establishes that it was the design of the towers by Underhill, and not the manufacture of the towers by Nudd, which was flawed.

Underhill cross-moves for summary judgment dismissing Nudd's cross claim. Underhill contends that the action against Nudd is based in contract rather than tort and thus no claim for contribution lies. Underhill further contends that Nudd has no claim for common-law or implied indemnity because the evidence establishes that Nudd's liability was active.

Finally, plaintiff cross-moves for partial summary judgment against Nudd on the issue of liability under the first three causes of action of the complaint.

## **BACKGROUND:**

Nudd is a manufacturer of cell phone towers. It is undisputed that plaintiff purchased approximately 69 monopole towers from Nudd through August 2001 in several transactions. In each instance, plaintiff submitted a written request to Nudd for a price quotation in which it specified its design requirements, including the windload capacity

"[p]er EIA/TIA 222-F & Applicable State Building Codes" for the particular towers being purchased. Each request also specified that the "Drawings Shall be P.E. Stamped For the Above State."

After reviewing each request, Nudd provided plaintiff with a written price quotation for the manufacture of the towers in accordance with plaintiff's design specifications, including "[f]our (4) sets of complete design and erection drawings stamped by a ... licensed Professional Engineer." For example, price quotation No. 8241 Rev.1, dated February 22, 2001, indicated that the towers would be "designed for 80 mph windload with ice or 80 mph wind with ½" radial ice and the wind/ice reduction, per ANSI/EIA/TIA 222-F." Each price quotation also set forth Nudd's warranty: "We warranty this tower for one (1) year against all defects in materials and workmanship. Defective materials will be replaced or repaired. Warranty does not cover lost labor or travel fees for contractors."

Upon receipt of the price quotation, plaintiff issued a purchase order, "per Nudd's Quote." Every purchase order had attached to it a list of 12 conditions. These conditions included the following:

- (1) This order must be promptly accepted and acceptance is expressly limited to the terms of this order. ... Seller's shipment of goods in response to this order ... shall be considered acceptance by the Seller under the Condition (1). ...

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- (4) Seller warrants for a period of 12 months following start of use or 18 months from receipt, whichever occurs first, that the goods and services described herein will be free of defects in workmanship, design, materials and title, will conform

to all applicable specifications, instructions, drawings, data, descriptions, and samples, and will be of good and merchantable quality and fit and sufficient for the purpose intended.

Nudd thereafter manufactured the towers and shipped them to plaintiff without objection. It is without dispute that the towers did not meet the required design specifications with respect to windload capacity, thereby rendering the towers inadequate for their intended use.

The design of the towers had been the responsibility of Nudd as part of the manufacturing process and its design engineers prepared the preliminary drawings. However, because none of Nudd's engineers were licensed to practice in the various states where the towers were to be erected, Nudd sent the drawings to Underhill for review to ensure compliance with applicable standards. Underhill was paid \$200 per tower by Nudd to perform that review and to provide the required professional engineer's stamp.

The design flaw was traced to an error on the part of Nudd during the initial design phase that was not caught by Underhill. As a result, the towers were capable of supporting only 60% of their intended loads. Nudd acknowledged this in communications with plaintiff and initially indicated that it would work with plaintiff to rectify the problem. For example, in one letter dated August 28, 2001, Nudd indicated that: "An error was discovered in the design program and caused some of the steel used to fabricate these monopoles to be insufficient to meet the specified antenna load." In other letters in October 2001 and April 2002 Nudd indicated that, without required modifications,

the monopoles would support only "60% of their initial design capacity."

**DISCUSSION:**

"[P]urchase orders may create a binding contract." Kay-Bee Toys Corp. v. Winston Sports Corp., 214 A.D.2d 457, 458 (1<sup>st</sup> Dept. 1995), lv. denied 86 N.Y.2d 705 (1995).

Each purchase order herein indicated that a shipment of goods in response would constitute an acceptance of the terms and conditions of that order. Nudd shipped the towers without objection. Nudd thus accepted the terms and conditions of each purchase order, as the defendant Boyle did in Capeles v. Crouse-Hinds Foundation, Inc., 292 A.D.2d 829, 829 (4<sup>th</sup> Dept. 2002), and those purchase orders constitute the parties' contract. See UCC 2-206(1)(b) ("an order ... to buy goods for prompt or current shipment shall be construed as inviting acceptance ... by the prompt or current shipment of conforming ... goods...").

A "purchase order or any other agreement, may incorporate by reference aspects of the agreed-upon performance." Ealem v. Eurotech Construction Corp., 307 A.D.2d 217, 218 (1<sup>st</sup> Dept. 2003). Each purchase order herein expressly incorporated Nudd's price quotation, thereby obligating Nudd to provide towers meeting the "Design Specs" set forth therein. Because none of the towers supplied by Nudd met those "Design Specs," Nudd breached its contractual obligations to plaintiff.

Plaintiff therefore is entitled to partial summary judgment on the issue of liability under the first cause of action. The contention of Nudd that its contractual obligations did not extend beyond "build[ing] the towers based upon drawings approved by an outside Professional Engineer" is belied by the express terms of its contract as set forth in each purchase order, obligating it to provide towers meeting the "Design Specs."

Furthermore, under the contract as set forth in each purchase order, there is an express warranty of the design of the towers: "Seller warrants for a period of 12 months following start of use or 18 months from receipt, whichever occurs first, that the goods and services described herein will be free of defects in workmanship, design, materials and title, will conform to all applicable specifications, instructions, drawings, data, descriptions, and samples, and will be of good and merchantable quality and fit and sufficient for the purpose intended."

(emphasis added). In moving for summary judgment dismissing the second cause of action, Nudd contends that its warranty was limited to workmanship and materials, citing its price quotes. The price quotes, however, do not represent the contract between plaintiff and Nudd. Nudd shipped the towers to plaintiff without objection according to the purchase order for each sale, thereby accepting the terms of the purchase order and its conditions, even though they were different from the terms of the price quotes. Because the design of the towers admittedly was

defective, plaintiff is further entitled to partial summary judgment on the issue of liability under the second cause of action.

Additionally, there is an implied warranty of fitness for a particular purpose that is applicable here under UCC 2-315, which provides in relevant part: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is ... an implied warranty that the goods shall be fit for such purpose." Nudd contends that the warranty is not applicable because the evidence shows that plaintiff relied solely on the expertise of Underhill "with respect to the engineering of the tower at the time it ordered the towers at issue." To the contrary, the evidence shows that plaintiff only had contact with Nudd and relied on Nudd to provide towers meeting its requirements. It was Nudd that contacted Underhill to fulfill Nudd's additional contractual obligation to provide stamped drawings. There being no question that the towers were not fit for particular purpose they were required, plaintiff is also entitled to summary judgment on the issue of liability under the third cause of action.

The fourth cause of action is a negligence claim against Nudd. However, a plaintiff may not transform a contract action into a tort action by simply claiming that the defendant acted

negligently. Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co., 70 N.Y.2d 382, 390 (1987). Clark-Fitzpatrick Inc. holds that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Id. at 389.

This case is similar on its facts to Clark-Fitzpatrick since the breach of contract and negligence claims herein arise from certain engineering design flaws. Yet the plaintiff here, as in Clark-Fitzpatrick, has failed to identify a legal duty owed by Nudd independent of its contractual obligations. Missing are any "additional allegations of wrongdoing." Matzan v. Eastman Kodak Co., 134 A.D.2d 863, 863 (4<sup>th</sup> Dept. 1987). Because the fourth cause of action is simply a contract claim masquerading as a tort claim, summary judgment dismissing it is appropriate.

The remaining issue before the court concerns Nudd's cross claim against Underhill for contribution and/or indemnification. The right to contribution is statutory and applies only when "two or more persons ... are subject to liability for damages for the same personal injury, injury to property or wrongful death." CPLR 1401. It may not be invoked to apportion a defendant's liability arising from breach of contract. Board of Educ. v. Sargent, Webster, Crenshaw & Folley, 71 N.Y.2d 21, 28 (1987). Nor is it available to a defendant when the direct claims against it seek recovery of "only a contractual benefit of the bargain ... their tort language notwithstanding." Trump Village Section

3, Inc. v. New York State Housing Finance Agency, 307 A.D.2d 891, 897 (1<sup>st</sup> Dept. 2003), lv. denied 1 N.Y.3d 504 (2003). In fact, it has been held that "the determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought." Rockefeller Univ. v. Tishman Constr. Corp ., 240 A.D.2d 341, 343 (1<sup>st</sup> Dept. 1996), lv. denied 91 N.Y.2d 803 (1997). As the Fourth Department has said, "CPLR 1401 does not permit a claim for contribution where ... 'the damages sought are purely economic loss.'" Scalp & Blade, Inc. v. Advest, Inc., 300 A.D.2d 1068, 1069 (4<sup>th</sup> Dept. 2002).

In this case, the only tort claim against Nudd has been dismissed. More importantly, though, the underlying claim against Nudd is for the recovery of the economic loss arising from Nudd's failure to provide cell phone towers meeting plaintiff's specifications, as required by contract. Because plaintiff seeks only the benefit of its contractual bargain, Nudd cannot assert a contribution claim against Underhill. See Rothberg v. Reichelt, 270 A.D.2d 760, 762 (3<sup>rd</sup> Dept. 2000).

Nudd would have a claim for common-law indemnification against Underhill if Nudd had "delegated exclusive responsibility for the duties giving rise to the loss to [Underhill]." (17 Vista Fee Assocs. v. Teachers Insurance and Annuity Assoc. of America, 259 A.D.2d 75, 80 (1<sup>st</sup> Dept. 1999). In 17 Vista Fee Assocs., "the seller of a building ... [sought] indemnification

from a mechanical engineer because the engineer's negligent design of a smoke purge system resulted in the seller having to pay the building's new owner for those defects." Id. at 78. Although the claims against the seller relating to the smoke purge system sounded in breach of contract, there was evidence that seller had delegated full responsibility for the design of the system to the mechanical engineer and that the seller's liability was due solely to the mechanical engineer's negligent performance of its duty. Id. at 80-81. The First Department held under those circumstances that the seller's potential liability was derivative only and thus it was error to dismiss the seller's indemnification claim.

On its cross motion in this case, however, Underhill established that Nudd's liability is not vicarious only but based in part on the errors of Nudd's design staff that were not caught by Underhill in its capacity as the licensed design engineer. Nothing submitted by Nudd in response disputes that evidence. Indeed, Nudd's response is devoted almost exclusively to the contention that Nudd may seek contribution from Underhill. Because Nudd's liability is not vicarious only, Nudd has no claim against Underhill for common-law or implied indemnity. This is consistent with the following line of cases:

- Garrett v. Holiday Inns, 58 N.Y.2d 253, 263 (1983): "There is no view of the third-part complaints supporting a theory that appellants, if held liable to plaintiffs, are being cast in damages solely for the negligence of the town or on the basis of vicarious or imputed liability."

- Edgewater Construction Co., Inc. v. 81 & 3 of

Watertown, Inc., 252 A.D.2d 951 (4<sup>th</sup> Dept. 1998), lv. denied 92 N.Y.2d 814 (1998): "Because Edgewater is suing 81 & 3 for its breach of the construction contract and is not seeking to hold 81 & 3 vicariously liable for any negligence by Wal-Mart, 81 & 3 has no cause of action against Wal-Mart for common-law or implied indemnification."

• Lawrence Dev. Corp., v. John Waterproofing, Inc., 167 A.D.2d 988 (4<sup>th</sup> Dept. 1990): "[B]ecause plaintiff seeks to hold defendant liable for its active negligence and breach of contract, defendant has no cause of action against the architect based upon a theory of implied indemnity."

**CONCLUSION:**

The court grants that part of Nudd's motion seeking summary judgment dismissing the fourth cause of action. In all other respects, Nudd's motion is denied. The court grants plaintiff's cross motion seeking partial summary judgment on the issue of liability under the first three causes of action. The court also grants the cross motion of Underhill seeking summary judgment dismissing the cross claim against it.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: June 23, 2005  
Rochester, New York  
.....mon-law or implied indemnity only is made.