IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TECHTON AMERICAN, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 04C-05-271 CLS
	:	
GP CHEMICALS, INC.,	:	
	:	
Defendant.	:	

Submitted: July 26, 2004
Decided: October 25, 2004

On Defendant GP Chemicals, Inc.'s
Motion to Dismiss
GRANTED.

MEMORANDUM OPINION

Francis G.X. Pileggi, Esquire, Fox Rothschild, Wilmington, Delaware, Attorney for Plaintiff.

Ronald A. Brown, Jr., Esquire, Prickett Jones & Elliott, P.A., Wilmington, Delaware, Attorney for Defendant.

SCOTT, J.

I. INTRODUCTION

This case arises from an alleged breach of contract. Plaintiff Techton American, Inc. ("Techton") alleges, in addition to breach of contract, breach of implied warranty of merchantibility, breach of implied warranty arising from course of dealing or usage of trade, breach of implied warranty of fitness for a particular purpose, and breach of express warranty.

Defendant GP Chemicals, Inc. ("GP") has filed a Motion to Dismiss based on a statute of limitations defense.

For the reasons stated below, the court **GRANTS** GP's Motion to Dismiss.

II. BACKGROUND

Techton alleges GP breached a contract to supply 10,000 kg succinimide. The contract was entered into in March 1998. GP knew the succinimide was to be re-sold to a Korean company, which had specific requirements for the quality of the succinimide. The succinimide was shipped in 1999. At the end of 1999 or early 2000, the Korean company notified Techton the succinimide was defective. GP requested re-testing which still showed the succinimide was defective. On January 31, 2000, GP sent a portion of succinimide as replacement, but that batch was also defective. The end of October 2000, another attempt was made to ship acceptable succinimide, but that batch was also defective. Techton then purchased new succinimide from the supplier it had previously used at a cost of $2.50 per kg

more than the price quoted by GP. GP made another attempt to offer acceptable succinimide in early 2001, but Techton refused to take another risk with GP. A last attempt to provide acceptible succinimide was made in October 2002.

Techton seeks the $74,517.60 it paid to GP before realizing the succinimide was defective.

III. STANDARD OF REVIEW

The parties have submitted materials in addition to the pleadings. The Motion to Dismiss, therefore, must be analyzed as a Motion for Summary Judgment.[1] The court will grant summary judgment only if there are no genuine issues of material fact "and the moving party must show he is entitled to judgment as a matter of law."[2] In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the non-moving party.[3] Summary judgment, therefore, is appropriate only if, after viewing the evidence in the light most favorable to the non-moving party, the court finds no genuine issue of material fact.[4]

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[1] "Once the court decides to accept matters outside the pleading, it must convert the motion to dismiss into one for summary judgment." *Hilfirty v. Shipman*, 91 F.3d 573, 578 (3d Cir. 1996) (internal citation omitted).

[2] *Deakyne v. Selective Insurance Co.*, 728 A.2d 569, 570 (Del. Super. 1997) (internal citation omitted).

[3] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

[4] *Guy v. Judicial Nominating Com'n.*, 659 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. 1994).

IV. DISCUSSION

GP argues the statute of limitations has run on any claim Techton may have had. GP argues that, at most, Techton had four years after the sale of the goods to bring suit under 6 *Del. C.* § 2-725(1). As the sale was in 1999, GP concludes this suit, filed May 27, 2004, is time-barred.

Techton counters that the statute of limitations is extended because there was a warranty for future performance – that the succinimide be tested and acceptable to the Korean company. Techton concludes this extends the time the cause of action accrues to the time the breach is discovered. Techton also argues GP continued to make attempts to cure the problem as late as 2002 so that GP should be estopped from advancing a statute of limitations defense.

The court concludes the contract was for the sale of goods and thus controlled by the provisions of the Uniform Commercial Code ("UCC").[5] The UCC mandates that an action "must be commenced within 4 years after the cause of action has accrued."[6] 6 *Del. C.* § 2-725(2) clearly indicates "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the

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[5] 6 *Del. C.* § 2-102.

[6] 6 *Del. C.* § 2-275(1).

goods . . ."[7] The statute begins to run, even if the buyer does not know the goods are defective.[8] If, however, there is a warranty of future performance, the time the cause of action accrues is extended to the time "the breach is or should have been discovered."[9]

Allegations that defendant's promise to cure the defect caused plaintiff to delay bringing suit generally do not preclude the running of the statute of limitations.[10] A defendant's fraudulent concealment of a cause of action may toll the statute of limitations.[11] Fraudulent concealment requires allegations of both defendant's knowledge of the alleged wrong as well as an affirmative act of concealment by the defendant of the alleged wrong.[12] Defendant's promise to make repairs or remedy the alleged breach is insufficient to toll the statute of limitations.[13]

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[7] 6 *Del. C.* § 2-275(2).

[8] *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 175 (Del. Super. 1986) (internal citation omitted).

[9] *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 652 (Del. Super. 1985).

[10] *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261, 1272 (D. Del. 1983).

[11] *Sellon v. General Motors Corp.*, 571 F. Supp. 1094, 1099 (D. Del. 1983).

[12] *Id.* at 1099-1100; *see also Lecates*, 515 A.2d at 176 (internal citation omitted).

[13] *Ensminger v. Merritt Marine Constr., Inc.*, 597 A.2d 854, 855 (Del. Super. 1988) (holding party must allege facts to indicate defendant affirmatively acted to mislead and induce that party from bringing suit to support a theory of estoppel to toll the statute of limitations).

For the purposes of analyzing the present Motion to Dismiss, the court will assume there was a warranty for future performance.[14] Even with a warranty of future performance, the statute of limitations begins to run once the defect is known.[15] The court concludes the statute of limitations began running no later than January 31, 2000 when GP sent 5000 pounds of succinimide to "replace a portion of the failed prior shipments."[16] The court concludes Techton must have been aware that the October 1999 shipment failed to meet the standards of the Korean company by this time or there would not have been a replacement shipment. Even with a warranty of future performance, the breach occurs once the "defect is or should be known."[17] The court concludes the statute of limitations had run by no later than January 31, 2004.

The court finds nothing in the pleadings or other material submitted that would extend the time of discovery of the defect to beyond May 26, 2000. Viewing the facts in a light most favorable to the non-moving party, the court finds the most favorable date for the running of the statute of limitations to have

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[14] Whether there is actually a warranty for future performance is a question of fact that ordinarily would be left for the fact-finder. In viewing the facts in a light most favorable to the non-moving party, the court, for the sake of argument, will assume there was such a warranty.

[15] *Pack & Process*, 503 A.2d at 652

[16] Docket # 5, ¶ 13.

[17] *Pack & Process*, 503 A.2d at 652.

commenced was January 31, 2000. The court concludes the statute of limitations had run prior to May 27, 2004 when the instant suit was filed.

Techton cannot rely on GP's promises to cure to extend the time they had to bring suit.[18] It is clear that Techton had given up on GP's ability to provide acceptable succinimide at least by October 2002. There is no explanation of why Techton then waited until the end of May 2004 to bring suit. The court finds the offers to cure did not continue beyond the time Techton had to file suit. Had the offers to cure been made close to the time when the statute of limitations had run, the court would reach a different conclusion on an estoppel argument.[19]

The court concludes that if other courts will not toll the statute of limitations for attempts to cure in actions by consumers of retail products against manufacturers,[20] there is even less reason to toll the running when the parties are sophisticated businesses such as the parties to the present suit. The court is mindful that parties should be encouraged to work to cure problems with the quality of the goods or other potential breaches of contract and not immediately rush to court with a lawsuit. The court concludes, however, that the generous time allowed for an aggrieved party to bring suit under the provisions of the UCC[21]

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[18] *See Ontario Hydro*, 569 F. Supp. at 1272.

[19] *Id.*

[20] *See Lecates*, 515 A.2d at 175; *and Sellon*, 571 F. Supp. at 1099.

[21] As noted above, the UCC has a four-year statute of limitations. 10 *Del. C.* § 8106 gives a three-year statute of limitations for other breach of contract actions.

precludes tolling the statute of limitations for attempts to repair or replace the goods, absent an express agreement to the contrary between the parties. Neither party argues there was any such agreement here. The court concludes there was none.

V. CONCLUSION

For the above reasons, the court finds the statute of limitations has run on Techton's claims. The court, therefore, **GRANTS** GP Chemicals, Inc.'s Motion to Dismiss.

IT IS SO ORDERED.

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Calvin L. Scott, Jr.
Superior Court Judge