Acadia Ins. Co. v. L&B Truck Serv., Inc., No. 477-9-07 Wmcv (Howard, J., July 18, 2008)

STATE OF VERMONT
WINDHAM COUNTY, SS.

ACADIA INSURANCE COMPANY,
Plaintiff,

v. **WINDHAM SUPERIOR COURT**
DOCKET NO. 477-9-07 Wmcv

L&B TRUCK SERVICE, INC. d/b/a
L&B FREIGHTLINER STERLING
WESTERN STAR and FREIGHTLINER LLC,
Defendants.

DECISION ON FREIGHTLINER'S MOTION FOR SUMMARY JUDGMENT, ACADIA'S MOTION FOR DEFAULT JUDGMENT AGAINST L&B, AND L&B'S MOTION FOR ENLARGMENT OF TIME TO FILE

This is a subrogation action to recover damages to a truck owned by Beaudry Enterprises, Inc. (Beaudry) and insured by Acadia Insurance Company (Acadia). Acadia claims that Defendant L&B Truck Service (L&B)'s negligent repair work caused a fire in the truck and, alternately, that Defendant Freightliner LLC (Freightliner)'s improper design and manufacture caused the fire. Currently pending are Freightliner's motion for summary judgment, Acadia's motion for default against L&B, and L&B's motion for enlargement of time to file and answer.

Freightliner's Motion for Summary Judgment

First presented in an amended complaint of December 17, 2007, the specific claims against Freightliner allege "causal negligence or breach of express and implied

warranties." On March 31, 2008, after answering but before discovery had begun, Freightliner moved for summary judgment contending that Acadia's claim is barred by the economic loss rule, by the expiration of all express warranties, and because Freightliner effectively disclaimed any implied warranties.

A motion for summary judgment must establish that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Zukatis v. Perry, 165 Vt. 298, 300(1996). Although it does not require that discovery be completed, this standard necessarily assumes that the nonmoving party has had a reasonable opportunity for discovery to develop its factual case. *Id*.

Although it is undisputed that the parties in this case have yet to engage in any formal discovery, Freightliner asserts that summary judgment is still appropriate because Acadia has already had access to the relevant facts by virtue of its relationship with Beaudry. In this regard, it is undisputed that the truck fire occurred on February 6, 2007, and that the instant lawsuit was filed more than seven months later. As Beaudry's insurer and subrogee, the Court agrees that it was within Acadia's power to undertake a basic investigation of the evidence in Beaudry's possession and control during this time. See e.g. *Smith v. Nationwide Mut. Ins. Co*., 2003 VT 61, ¶ 19, 175 Vt. 355(describing typical cooperation clause in insurance agreement and noting duty of good faith and fidelity which runs between insured and insurer). Acadia has offered no reason which might explains its failure to do so. In the absence of a compelling justification, it is only fair that Acadia be expected to exercise this basic investigative power before asserting Beaudry's rights to relief and that it be held to knowledge of such basic documents as concern Beaudry's purchase of the fire damaged truck. For this reason, Acadia's attempt

to evade proposed undisputed material facts for lack of discovery time is rejected and the following facts proffered by Freightliner accepted as undisputed.

Freightliner manufactures a vehicle commonly referred to as a WST Western Star Truck. One of these was sold to L&B, and L&B thereafter sold that truck to Beaudry on or about January 3, 2005. Freightliner warranted the truck pursuant to the terms of a written limited warranty which provided, *inter alia*, that for a period of one year or 100,000 miles of use, whichever occurred first, Freightliner "warrants that each new vehicle will be free from defects in material and workmanship that occur under normal use within the applicable warranty period, subject to certain limitations and exclusions as specified….." Additionally, in a section entitled **Limitations**, the warranty states:

> THIS WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES OF ANY KIND WHETHER WRITTEN, ORAL, OR IMPLIED INCLUDING, BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE THIS WARRANTY SPECIFICALLY EXCLUDES ANY OTHER WARRANTIES OF CONDITION PROVIDED FOR BY LAW, WHETHER STATUTORY OR OTHERWISE.
>
> [FREIGHTLINER'S] SOLE OBLIGATION UNDER THIS WARRANTY SHALL BE TO REPAIR OR REPLACE, AT [FREIGHTLINER'S] DISCRETION, ANY DEFECTIVE COMPONENT OR PART. SUCH REPAIR OR REPLACEMENT SHALL BE WITHOUT COST TO PURCHASER WHEN PERFORMED WITHIN THE APPLICABLE WARRANTY PERIOD (TIME, DISTANCE, OR HOUR LIMIT, WHICHEVER OCCURS FIRST).

(emphasis in original). The "in service" or warranty start date on the truck was January 3, 2005, and the fire occurred on February 6, 2007. The complaint seeks damages for losses to the truck only.

Under the economic loss rule, "[n]egligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless one's

conduct has inflicted some accompanying physical harm." *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 314(2001) citing *Gus' Catering, Inc. v. Menusoft Systems*, 171 Vt. 556, 558(2000) (mem.). Under this doctrine, loss of the benefit of one's contractual bargain – i.e., loss of the value of the negligently manufactured or sold product itself – is properly the subject of an action for breach of contract/warranty, and cannot be recovered through a negligence action. See, e.g., *Hamill v. Pawtucket Mutual Ins. Co.,* 2005 VT 133, ¶ 7, 179 Vt. 250, 254. "Indeed, the economic loss rule serves to maintain the boundary between contract law, which is designed to enforce parties' contractual expectations, and tort law, which is designed to protect citizens and their property by imposing a duty of reasonable care." *Id.* Lack of duty provides the philosophical basis for the doctrine; negligence is a breach of a duty to exercise reasonable care, and absent some physical harm, there is no duty to exercise reasonable care to protect another's economic interests. *Id.*

In this context, intangible economic damages consist of damages for inadequate value, costs of repair and replacement of the defective product or attendant loss of profits without any claim of personal injury or damage to other property. *Gus' Catering, Inc. v. Menusoft Systems*, 171 Vt. at 558-59(citing Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum. L. Rev. 917, 918(1966). Therefore, where the only claimed loss is damage to the defective property, all losses are economic.

According to the court in *Springfield Hydroelectric,*

> The underlying premise of the doctrine is that negligence actions are best suited for 'resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.'

172 Vt. at 314 citing *Spring Motors Distribs. v. Ford Motor Co*., 489 A.2d 660, 672 (N.J.1985). While *Springfield Hydroelectric* holds that the economic loss rule applies to more than claims for diminished commercial expectations associated with a product, its roots are clearly in product liability law. 172 Vt. at 315(citing, in part, *Town of Alma v. AZCO Constr., Inc*., 10 P. 3d 1256, 1259 (Colo. 2000)(describing development of economic loss doctrine to stem tide of product liability cases and to prevent tort law from swallowing law of contract).

Spring Motors, for example, like the current case, involved both negligence and warranty claims against a truck manufacturer for defective trucks. Rejecting the plaintiff's negligence claim on account of the economic loss rule the *Spring Motors* court explained,

> a seller's duty of care generally stops short of creating a right in a commercial buyer to recover a purely economic loss. Thus viewed, the definition of the seller's duty reflects a policy choice that economic losses inflicted by a seller of goods are better resolved under principles of contract law. In that context, economic interests traditionally have not been entitled to protection against mere negligence.

498 A. 2d at 672. In reaching this conclusion the court also reasoned as follows:

> Presumably the price paid by Spring Motors for the trucks reflected the fact that Ford was liable for repair or replacement of parts only. By seeking to impose the risk of loss on Ford, Spring Motors seeks, in effect, to obtain a better bargain than it made. In such a context, the imposition of the risk of loss on the manufacturer might lead to price increases for all of its customers, including individual consumers. As between commercial parties, then, the allocation of risks in accordance with their agreement better serves the public interest than an allocation achieved as a matter of policy without reference to that agreement.

Id. at 671(citation omitted).

Vermont jurisprudence recognizes an exception to the economic loss rule which may arise in cases where a special relationship exists between the parties such that a defendant owes a duty of care independent of contract. *Springfield Hydroelectric,* 172 Vt. at 316(acknowledging potential significance of exception but declining to find that defendants had a duty to the particular plaintiff). In this matter, citing *Lamel Lumber Corp. v. Newstress Intern., Inc.*, 2007 VT 83, 18 Vt. L. W. 315, Plaintiff alleges that Freightliner owed an independent duty of care based on its status as manufacturer to exercise reasonable care and responsibility in design and construction of its product. Although Lamel involved a mixed contract for the sale of goods and services, the court determined it was primarily one of a service nature and the defendant's tort liability derived from its professional negligence in the design and construction of a lumber drying kiln on the plaintiff's business premise rather than from the purchase and sale of the kiln's component parts. *Id*. at ¶¶ 15-16; cf. *EBWS, LLC v. Britly Corp*., 2007 VT 37, 18 Vt. L. W. 136(for similar reasons but with different result, rejecting negligence complaint for construction defects because defendant was a construction contractor, not a professional architect and because plaintiff had not relied on defendant to provide *professional* design services). *Id*. ¶ 32. Rather than suggesting that a manufacturer generally owes a duty of care independent of contract, a theory that would contradict the essential foundation of the economic loss rule, the exception recognized in *Lamel* emphasizes the importance of distinct professional services and the effect that negligence liability would have on similar transactions.

The facts in the current case are far more straightforward since there is no claim that Freightliner provided anything to Beaudry other than a manufactured product. Like

Spring Motors rather than *Lamel*, it does not support a special relationship exception but is a classic example for application of the economic loss rule. For those same reasons outlined in *Spring Motors*, the sales contract best represents the party's negotiated acceptance of risk, an agreement with which tort liability should not interfere. As a matter of law the economic loss rule bars recovery of the damages asserted by Acadia.

Turning to warranties, Freightliner asserts that its one year express warranties had expired before the fire ever occurred. Apparently conceding this point, Acadia makes no attempt to offer either factual or legal argument to contradict Freightliner's position. Accordingly and without regard to how the express warranties might have functioned if still in effect at the time of the fire, Acadia is not entitled to claim relief under Freightliner's express warranties for damages occurring after they expired.

With regard to implied warranties, Freightliner asserts that it effectively disclaimed any warranty of merchantability or fitness for a particular purpose. Although the Uniform Commercial Code (UCC) implies such warranties in contracts for the sale of goods, it also permits parties to disclaim or modify these warranties in certain circumstances. 9A V.S.A. §§ 2-314, 2-315, and 2-316. Specifically, 9A V.S.A. § 2-316 provides that a contract may exclude or modify implied warranties using a conspicuous written format that, in the case of merchantability, expressly mentions "merchantability." The statement of limitation found in the instant warranty, formatted with capital letters and expressly declining both implied warranties of merchantability and fitness, meets this criteria. See *Corey v. Furgat Tractor & Equip., Inc*., 147 Vt. 477, 479(1986)(holding similar language satisfies 9A V.S.A. § 2-316). While subsection 2-316(5) does prevent a seller from excluding implied warranties where the goods sold are new or unused

consumer goods or services, Plaintiff offers no facts from which even an inference that Beaudry, a corporate entity, had purchased the truck for a personal family or household use can be inferred. See 9 V.S.A. § 2451(a)(defining "consumer"); 147 Vt. at 478-79. Accordingly, even without benefit of discovery from Freightliner, Acadia is barred from claiming relief under implied warranties.

For the reasons set out above concluding that the economic loss rule applies and that neither express nor implied warranties are applicable in this matter, Freightliner is entitled to judgment as a matter of law and its motion for summary judgment is **granted**.

Acadia's Motion for Default and L&B's Motion for Enlargement of Time

The facts underlying these related motions are as follows. Plaintiff filed its original complaint on September 12, 2007.[1] L&B was served on September 20th. When no answer or appearance was filed on L&B's behalf, Acadia moved for default on April 23, 2008. The very next day, Attorney Richard Coutant filed notice of appearance for L&B as well as a motion in opposition to the default requesting additional time to answer. Pursuant to that opposition, L&B explained that it had notified its insurance carrier of the claim after being served and was advised that the carrier would retain defense counsel. Neither L&B nor Attorney Coutant were aware that the complaint had gone unanswered until the motion for default was filed.

Pursuant to V.R.C.P. 55(a), when a party against whom a judgment for affirmative relief is sought fails to answer or otherwise defend and that fact is made to appear by affidavit or otherwise, a default shall be entered against them. Where the defendant has been faulted for failure to appear and is not an infant, incompetent or

[1] Acadia also filed an amended complaint on December 17, 2007, adding Defendant Freightliner.

servicemember, and the claim is for a sum certain, upon order of the Presiding Judge issued without notice or hearing, the clerk may enter judgment against the party. V.R.C.P. 55(b). Rule 55 also provides, however, that for good cause the court may set aside an entry of default. V.R.C.P. 55(c). Where judgment has already been entered, relief may be granted in accordance with Rule 60(b).

Pursuant to V.R.C.P. 60(b) the court may relieve a party from judgment for five enumerated reasons, and subsection (6) allows relief for "any other reason justifying relief from the operation of the judgment." In relevant part, the enumerated reasons include mistake, inadvertence, excusable neglect, and newly discovered evidence. V.R.C.P. 60(b). Subsection (6) may be invoked only when a ground justifying relief is not encompassed within any of the first five subsections of the rule. *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 24(1999)(quotation omitted) citing *Olde & Co. v. Boudreau*, 150 Vt. 321, 323(1988). While relief from judgment is a matter for the court's discretion, precedent advises a special indulgence for opening defaults in the absence of culpable negligence or dilatory intent on account of the due process concerns raised by the denial of a defendant's right to be heard. *Nobel/Sysco Food Services, Inc. v. Giebel*, 148 Vt. 408, 409-410(1987) citing *Vahlteich v. Knott*, 139 Vt. 588, 590(1981) and *Childs v. Hart*, 131 Vt. 241, 242-43(1973). Nonetheless, unexcused failures to comply with lawful notice, particularly in the absence of any demonstration of a meritorious defense, will not warrant relief. See, *Childs v. Hart* ("where the default is generated by a capricious disregard of legally adequate notice ...the trial court is then properly justified in denying access to the default relief process"); *Kotz v. Kotz*, 134 Vt. 36, 41 (1975) (defendant seeking relief from default must demonstrate good or meritorious defense to the claim

upon which default was granted); *Desjarlais v. Gilman*, 143 Vt. 154, 157 (1983)(no abuse of discretion in denying relief from default where claim of meritorious defense insufficiently established); *Goodall and Federle, LLC v. Proctor*, 935 A.2d 1123 (Me. 2007)(no abuse of discretion in denial of extension of time after deadline and entry of default where party presented no extraordinary circumstances for excusable neglect in missing deadline by over a month) .

In this case, although no judgment has yet been entered, Plaintiff was plainly entitled to an entry of default based on L&B's failure to appear prior to April 23. In light of this entitlement, the court considers L&B's late appearance according to the standards set out in Rule 60(b). While it is well established that an attorney's failure to act does not necessarily require the court to find neglect unexcused, the omissions of counsel may be imputed to the client if "a defendant is fully aware of a pending suit against him, and entrusts the matter to an attorney to act on his behalf, but thereafter neglects to maintain contact with his agent counsel, or to inquire as to the status and progress of his case, that neglect may likewise be inexcusable." 143 Vt. at 158 citing *Howard v. Williams*, 253 S. E. 2d 571, 573(1979); see also *In re Town of Killington,* 2003 VT 87A, ¶ 17, 176 Vt. 60, 69 (where the neglect "stems from factors totally within the control of a party or its attorney" a "hard line" is to be used in judging motions to excuse it).

Such is the case in this matter. Although L&B was aware of Acadia's suit, and even though it had access to independent counsel, L&B concedes that it failed to monitor the progress of its own defense. L&B offers no reasonable excuse for its inattention. Months passed after the initial deadline and any referral to the insurance company. L&B had a responsibility to keep abreast of developments and needs in its case and cannot

simply ignore it for that length of time and then claim excusable neglect. *H&W Transfer And Cartage Serv., Inc. v. Griffin*, 511 So.2d 895, 899 (Miss. 1987)(failure to follow up for 5 months after sending papers to insurance company is not excusable neglect to avoid default judgment); *Griffin v. Rajan*, 514 N.E.2d 1122, 1125 (Ohio App. 1987)(neglect of insurance company is imputable to the defendant where passage of time shows no effort to check on status of matter). This is not a case of missing a deadline by a few days or even weeks. Likewise, though it now proffers a *pro forma* answer to the original complaint, it makes no effort to explain why that defense will succeed. *Desjarlais v. Gilman*, 143 Vt. at 157 (in determining whether to set aside default judgment aside, trial court should consider "whether the failure to answer was the result of mistake or inadvertence, whether the neglect was excusable under the circumstances, and whether the defendant has demonstrated any good or meritorious defense to the plaintiff's claims").

For these reasons, the Court concludes that L&B is not entitled to relief from its default and **grants** Acadia's motion. L&B's motion for enlargement is **denied**.

ORDER

Defendant Freightliner's Motion for Summary Judgment is **GRANTED.** Defendant L&B's Motion for Enlargement of Time is **DENIED** and Plaintiff's Motion for Default Judgment is **GRANTED** as to Defendant L&B.

Dated at Newfane, VT, this _____ day of July 2008.

_____
David Howard

Presiding Judge