The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Hooksett Sewer Commission

v.

Penta Corporation,
I. Kruger, Inc. d/b/a/ Kruger, Inc.
and
Graves Engineering, Inc.

No. 13-CV-540

ORDER

The Plaintiff, Hooksett Sewer Commission ("Hooksett"), brought this action against the Defendants, Penta Corporation ("Penta"), I. Kruger, Incorporated d/b/a Kruger Incorporated ("Kruger"), and Graves Engineering, Incorporated ("Graves Engineering"), asserting various claims, including breach of contract, negligence, and breach of the implied warranty of fitness for a particular purpose. The action stems from the failure of the Plaintiff's wastewater treatment facility in March of 2011. Before the Court is Defendant Penta's motion for summary judgment on the Plaintiff's claims of breach of the implied warranty of fitness for a particular purpose (Counts V and VI). Count V alleges that Hooksett relied on Penta's subcontractor, Kruger, in selecting the Kruger system and that Penta thereby violated the implied warranty of fitness for a particular purpose. (Complaint,¶ 52.) Count VI alleges that Hooksett relied upon Penta's skill and knowledge and that Penta breached its own implied warranty of fitness for a particular purpose. (Id.) The Plaintiff objects. For the reasons set forth below, the Defendant's motion for summary judgment is DENIED.

I

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, sufficient . . . to indicate that a genuine issue of fact exists so that the party should have the opportunity to prove the fact at trial . . . ." Phillips v. Verax, 138 N.H. 240, 243 (1994) (citations and quotations omitted). A fact is material if it affects the outcome of the litigation under the applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party, together with all reasonable inferences therefrom. Sintros v. Hamon, 148 N.H. 478, 480 (2002). Mindful of this standard, the Court sets forth the pertinent facts below.

Before 2010, Hooksett owned and operated a wastewater treatment facility in Hooksett, New Hampshire capable of treating 1.1 million gallons of wastewater per day. To help accommodate projected population and development growth, Hooksett hired Penta and Kruger[1] to construct a system capable of treating 2.2 million gallons of wastewater per day.

Given the geographic restraints associated with the existing facility, Hooksett could not install additional tanks for treatment and processing. Thus, to accommodate for the expansion of Hooksett's treatment capacity, Kruger recommended that Hooksett utilize an Integrated Fixed Film Activated Sludge ("IFAS") system, coupled with a small

[1] In its memorandum in support of its opposition to summary judgment, the Plaintiff refers to an entity called AnoxKaldness, which was acquired by Kruger. For clarity, the Court will refer to the two entities simply as Kruger.

disc called an "M-Chip," in order to process the desired amount of wastewater while still maintaining permit loadings and achieving certain design specifications. Notably, the IFAS system would allow Hooksett to maintain the existing infrastructure without installing more tankage but would also allow Hooksett to increase its treatment capacity.

Relying on Kruger's representations, Hooksett commissioned Graves Engineering to design the expansion of its wastewater treatment facility based on Kruger's IFAS system or a comparable system. Graves Engineering's final design, entitled the "Phase 2A Capital Improvements," represented that an "IFAS biological process shall help increase the nitrification capacity of the existing activated sludge tanks to obtain an effluent quality of less than 1.0 mg/l NH_3-N at 10° C." (Pl.'s Ex. A § 1.2(C)). The final design also states that "[t]he process shall not require additional aeration tank volume to achieve the anticipated secondary effluent characteristics at the design flow." (Id.) Additionally, the final design represented that it would be able to treat 2.2 million gallons of wastewater per day. The final design incorporated many of Kruger's recommendations. Indeed, the final design provides: "The design is based on the [Kruger] IFAS process. Approved equals will be accepted provided that the equipment is at least of equal or better quality, function and performance, and can meet the design requirements without requiring additional aeration tank volume." (Id. § 2.1(A)).

Hooksett accepted bids for the project on October 23, 2009. Following the bidding process, Penta was awarded the contract and subsequently signed an agreement to construct the Phase 2A Capital Improvements. (Pl.'s Ex. B.) On November 10, 2009, Penta submitted a purchase order for the Kruger IFAS system, which cost $1,597,000. The cost included millions of M-Chips used in the system. Additionally, Penta needed to

purchase other commercial products to install the IFAS system, such as industrial blowers, vents, valves, hydronic piping, and screens. The estimated cost for these materials was $3,191,575.

In March 2011, the IFAS system failed. As a result of this failure, the Plaintiff filed suit against Penta, Kruger, and Graves Engineering. With respect to Penta, the Plaintiff asserted *inter alia* claims of breach of the implied warranty of fitness for a particular purpose under the New Hampshire Uniform Commercial Code ("UCC") (Counts V and VI). See RSA 382-A:2-315. Count VI alleges that Penta individually breached the implied warranty of fitness for a particular purpose. Count V alleges that Kruger breached the implied warranty of fitness for a particular purpose and, because Kruger was an agent of Penta, Penta is vicariously liable for Kruger's actions.

Defendant Penta moves for summary judgment on Counts V and VI of the Complaint. It first asserts that the UCC does not apply to the contract between the parties; thus, the Plaintiff's claims under the UCC necessarily fail. Second, Penta argues that even if the UCC does apply to the contract, it is nevertheless entitled to judgment as a matter of law. The Plaintiff objects.

A

The Defendant first asserts that summary judgment is appropriate with respect to Plaintiff's Counts V and VI because the contract is not governed by the UCC. It reasons that the UCC only applies to "transactions in goods." RSA 382-A:2-102. "Goods" mean "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." RSA 382-A:2-105 (1). The critical issue is whether the UCC applies to the contract between the parties, which is a

mixed contract for the sale of goods and services.

In In re Trailer & Plumbing Supplies, 133 N.H. 432, 435 (1990), the New Hampshire Supreme Court examined two possible tests for making this determination: the predominant factor test and the gravamen test[2]. The predominant factor test, as articulated in Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974), provides:

> The test for inclusion or exclusion [within the UCC] is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

In re Trailer & Plumbing Supplies, 133 N.H. at 436 (citing Bonebrake, 499 F.2d at 960); see also Colorado Carpet Installation, Inc. v. Palermo, 668 P.2d 1384, 1389 (Colo. 1983).

An alternative test for addressing this issue is known as the "gravamen test," which asks "whether the underlying action is brought because of alleged defective goods or because of the quality of the services rendered." In re Trailer & Plumbing Supplies, 133 N.H. at 436. "If the gravamen of the action focuses on goods, then the UCC governs." Id. "If the focus is on the quality of the services rendered, then common law applies." Id. (citation omitted).

Since 1990 when In re Trailer & Plumbing Supplies was decided, the overwhelming majority of courts which have considered this issue have applied the "predominant factor" test. As the court noted in Double AA Builders, Ltd. v. Grand State Construction, LLC, 114 P.3d 835, 841 (Ariz. App. 2005):

> ...numerous courts in other jurisdictions have addressed whether similar promises or agreements are subject to a statute of frauds or the Uniform Commercial Code pertaining to the sale of goods. If the transaction at issue

[2] While these two tests are discussed by most courts, one commentator has identified several other tests. C. Miller, The Goods/Services Dichotomy: Unweaving the Tangled Web, 59 Notre Dame L. Rev. 717 (1984).

> includes both goods and services, most courts seek to determine whether the predominant aspect and purpose of the contract is the sale of goods or the providing of services. See Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir.1974) (considering whether transaction was within Article 2 of the Uniform Commercial Code and holding that "[t]he test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)"); Yorke v. B.F. Goodrich Co., 474 N.E.2d 20, 22 (1985) (applying the dominant purpose test to determine whether contracts are for the sale of goods or services when both are plainly involved); Care Display, Inc. v. Didde–Glaser, Inc., 589 P.2d 599, 605 (1979) (citing Bonebrake); Integrity Material Handling Sys., Inc. v. Deluxe Corp., 722 A.2d 552, 555 (Ct. App. Div. 1999) ("When a contract is a mixed contract for goods and services, a court must determine whether the sales or services aspect predominates."); Allied Indus. Serv. Corp. v. Kasle Iron & Metals, Inc., 405 N.E.2d 307, 309–10 (Ct. App. 1977) (stating that if contract involves both goods and services, the predominant factor and purpose determines whether sales statutes apply); Cont'l Casing Corp. v. Siderca Corp., 38 S.W.3d 782, 787–88 (Tex. App. 2001) ("[T]o determine whether the UCC statute of frauds applies in this case, we must decide whether the dominant factor or essence of this alleged agreement is a 'contract for the sale of goods.'").

The UCC specifically provides that one of its purposes is "to make uniform the law among the various jurisdictions." RSA 382-A:1-103(a). Under these circumstances, and considering the development of the law since 1990 when In Re Trailer & Plumbing Supplies (supra) was decided, the Court must apply the predominant factor test to the facts of this case.

In holding that the predominant factor test applied to the case before it in In re Trailer & Plumbing Supplies, the New Hampshire Supreme Court cited Colorado Carpet Installation, Inc. 668 P.2d 1384, 1389 (Colo. 1983) which suggests a court should consider the following factors to determine whether a mixed contract falls within the ambit of the UCC:

> (1) the contractual language used by the parties, (2) whether the agreement involves one overall price that includes both goods and labor or, instead, calls for separate and discrete billings for goods on the one

> hand and labor on the other, (3) the ratio that the cost of goods bears to the overall contract price, and (4) the nature and reasonableness of the purchaser's contractual expectations of acquiring a property interest in goods (good being defined as things that are movable at the time of identification to the contract.)

668 P.2d at 1388 (citations omitted).

The contract was for the purpose of an IFAS system and the contract documents described in detail the requirements of the IFAS system. (Pl.'s Ex. B ¶ 2.) The contract provides, in pertinent part, that "[t]he CONTRACTOR will furnish all of the material, supplies, tools, equipment, labor, and other services necessary for construction and completion of the PROJECT. (Pl.'s Ex. B ¶ 2.) The contract further describes the materials necessary for the project and states that the contract was for the installation of these materials. All of these materials were goods when identified to the contract. See Cambridge Plating Co., Inc. v. Napco, Inc. 991 F.2d 25 (1993). The Plaintiff paid the Defendant $4,785,800 under the terms of the contract, of which $3,191,575 applied to the cost of materials. The cost ratio between services and goods demonstrates that the sale of goods predominate the contract. Finally, the IFAS system and other materials were movable goods at the time the Defendant procured them for the project.

The critical aspect of the $4,875,800 contract between Hooksett and Penta is the Kruger IFAS. The purchase order from Penta to Kruger establishes that the cost from Kruger to "furnish and fabricate and deliver FOB jobsite" the IFAS system complete for plans and specifications for the Town of Hooksett was $1,597,000, approximately one third of the contract price. (Pl.'s Ex. C.) Another 30% of the contract price consisted of goods to be used in installation of the Kruger IFAS. Moreover, the contract was not a contract to design, but only a contract to install. As the court noted in Baker v. Compton, 455 N.E.2d 382, 386 (Ind. Ct. App. 1983), in holding that an installation contract was

within the UCC, "[w]e note that the presence of design or engineering services, rather than mere installation services, may tip the thrust of the contract toward the services side. [But] [the] subject contract involves only installation service." Compare Lincoln Pulp and Paper Company, Inc. v. Dravo Corporation, 436 F.Supp. 262, 275 (D.Me. 1977) (engineering and structural contract was the transaction in goods). Penta was not the designer of the project, and was not paid to design the project.

Courts have specifically held that the purchase and installation of a wastewater treatment system is a transaction in goods so that the UCC is applicable. Illustrative is Cambridge Plating (supra) in which the court held that purchase of a wastewater treatment system was a sale of goods, and therefore governed by the UCC. As in this case, the contract in Cambridge Plating "specified the components of the system as the primary subject of the sale." Id. at 24. Indeed, in Cambridge Plating the court stated that the fact that the contract "involved the purchase of engineering installation services, in addition to a sale of goods is of no consequence" since the Massachusetts Supreme Court had followed the predominant factor test. Id. A similar result was reached in United States v. City of Twin Falls, et al., 806 F.2d 862, 871 (9th Cir. 1986) in which the court noted that, as in this case, "the purpose of the City's contract... was to purchase and install equipment which would separate and dispose of sludge produced in the secondary treatment of waste water."

Whether a contract is for the sale of goods, and thus within the ambit of Article 2 of the UCC is a question of fact. Cambridge Plating Co., Inc. v. Napco, Inc., 991 F.2d 21, 24 (1st Cir. 1993); see also City of Twin Falls, 806 F.2d 862 at 870. But here there is no genuine issue of material fact. The predominant purpose of the contract was the sale of goods, the IFAS system. The contract between the parties is a "transaction in goods"

under RSA 382-A:2-105(1), and the UCC governs the transaction.[3]

B

Plaintiff's Counts V and VI allege breach of the implied warranty of fitness for a particular purpose. Count VI alleges breach of the implied warranty by Penta arising from the contract, while Count V alleges breach of the implied warranty by Penta based upon vicarious liability as a result of Kruger acting as its subcontractor. RSA 382-A:2-315, entitled "Implied Warranty: Fitness for Particular Purpose," provides:

> 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 unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

"An implied warranty of fitness, like an implied warranty of merchantability, does not arise out of an agreement between the seller and buyer." Dalton v. Stanley Solar & Stove, Inc., 137 N.H. 467, 470 (1993) (internal citation omitted). "Rather, it is 'imposed by law on the basis of public policy.'" Id. (citing and quoting Elliott v. Lachance, 109 N.H. 481, 483 (1969)). The implied warranty of fitness for a particular purpose arises "by operation of law because of the relationship between the parties, the nature of the transactions, and the surrounding circumstances." Elliott, 109 N.H. at 483-84.

Penta asserts that it is entitled to judgment as a matter of law with respect to both Counts because even if the UCC applies, the goods were provided according to plans and specifications furnished by Hooksett. Thus, according to Penta, Hooksett did not rely on the Defendant when it selected the Kruger IFAS system.

Comment 5 of RSA 382-A:2-315 is instructive here:

[3] Although it is not necessary to the Court's decision, it would reach the same result under the gravamen test.

> If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer's purposes.

The Defendant argues that the final design, which was incorporated into the contract, mandates that the Defendant use the Kruger IFAS system; however, the language of the final design only states that "[t]he design is based on [Kruger's] IFAS process. "*Approved equals will be accepted provided the equipment is at least of equal or better quality, function, and performance, and can meet the design requirements without requiring additional aeration tank volume.*" (Pl.'s Ex. A § 2.1 (A)) (emphasis added). The final design does not mandate that the Defendant use the Kruger IFAS system. In fact, the language of the final design indicates that acceptance of an "approved equal" would be mandatory, not permissive, so long as it satisfied the requirements of the final design. Therefore, as the Plaintiff has alleged, the Plaintiff relied on the Defendant's skill and experience in choosing the proper IFAS system. The comments to UCC 2-315, which relates to the implied warranty of fitness for a particular purpose, state specifically that "[w]hether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting." Comment 1, RSA 382-A:2-315.

Construing all facts and inferences in the light most favorable to the Plaintiff, the Court concludes that a genuine issue of material fact exists regarding whether the Plaintiff relied on Penta's skill and judgment in choosing the IFAS system. Summary judgment cannot be afforded Penta based on its claim that no implied warranty of fitness for a particular purpose could exist because goods were provided pursuant to specification.

C

Penta also argues that summary judgment must be granted in its favor with respect to Count V because the contract itself absolves it of liability for a breach of the warranty of fitness for a particular purpose. Penta points to language contained in the final design, which reads: "The IFAS manufacturer/supplier shall have the sole responsibility for the performance of all components of the IFAS system with the performance and design criteria specified herein." (Pl.'s Ex. A § 2.1 (A)). The Defendant asserts that this language acts as a disclaimer of the warranty of fitness for a particular purpose with respect to the Defendant and places liability for failure of performance on the IFAS manufacturer.

It is true that the language at issue acts as a disclaimer. As the Defendant notes, the language contained in the final design states that the IFAS manufacturer "shall have the sole responsibility for the performance of all components of the IFAS system . . . ." (Pl.'s Ex. A § 2.1 (A)). As the Plaintiff has conceded in its brief, its action against the Defendant is for a defective good—that is, a defective IFAS system—and not defective services. Furthermore, it is undisputed that Kruger manufactured the IFAS system; thus, to the extent the IFAS failed to perform, Kruger would assume responsibility for such a failure of performance.

The Plaintiff argues that this language is insufficient because the UCC provides that to exclude or modify any implied warranty of fitness "the exclusion must be by a writing and conspicuous." Pltf.'s Mem. P.13., citing RSA 382-A:2-316(2). It also argues that the term "conspicuous" is defined as "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." RSA 382-A:1-

201 (10).[4] Id. The Plaintiff argues that the disclaimer is buried within the final design and is not set off by a heading and further has the same font as the surrounding text. However, The Plaintiff's argument misses the mark.

The purpose of the requirement is "to protect a buyer from unexpected and unbargained for language of disclaimer by denying effect to such language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise." RSA 382-A:2-316 cmt. 1. In this case, there is no dispute that the Plaintiff, through Graves Engineering, commissioned the drafting of the final design, which contains the disclaimer. Since it drafted this agreement, the Plaintiff cannot now contend that it was not put on notice of the disclaimer. See Travel Craft, Inc. v. Wilhelm Mende GmbH & Co., 552 N.E.2d 443, 445 (Ind. 1990). To accept the argument that a disclaimer of warranty drafted by the buyer allows the buyer to argue that the disclaimer was not conspicuous "would turn a buyer's shield against surprise into a buyer's sword of surprise." Id.

However, although the language in the contract was plainly intended to restrict the liabilities that the seller, Penta, would have, it is not clear that the language was intended to act as a disclaimer of the implied warranty of fitness for a particular purpose. As the Plaintiff notes, the contract does not specifically state, as the UCC suggests, when a disclaimer of implied warranties is intended, that "there are no warranties which extend beyond the description of the face hereof." RSA 382-A 2-316

[4] Conspicuous terms include "a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size" and "language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language."

(2). While UCC 2-316(3) specifically provides that implied warranties may be excluded by the language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain there is no implied warranty, the Court believes that when the evidence is considered in the light most favorable to the Plaintiff a genuine issue of material fact exists with respect to whether or not the disclaimer language constituted a waiver of the implied warranty of fitness for particular purpose.

D

Finally, Penta asserts that it is entitled to judgment as a matter of law with respect to Count V which seeks to hold it liable for the implied warranty of fitness for a particular purpose running from Kruger, which sold the IFAS system to it. Neither Hooksett nor Penta have provided any authority for the proposition that a contractor can be vicariously liable either on an agency theory for breach of implied warranty of fitness for a particular purpose or by virtue of being a reseller of a product it purchased[5].

As a general rule, whether an agency relationship has been established is a question of fact. Boynton v. Figueroa, 154 N.H. 592, 604 (2006). Considering the evidence, as the Court must, in the light most favorable to the nonmoving party, the Court cannot find that no issue of fact exists with respect to whether or not Kruger was the agent of Penta so that Penta is vicariously liable for implied warranty of fitness for a particular purpose with respect to the IFAS system.

[5] Penta also argues that Kruger could not possibly have been acting as Penta's agent because Kruger's interactions with Hooksett regarding the efficacy of the IFAS system occurred prior to any contractual relationship between Plaintiff and Penta. Def.'s Memo in Support of Summary Judgment p. 11. But Hooksett points out that implied warranties of fitness for a particular purpose are measured from the date of contracting for the quotes. See RSA 382-A: 2-315 ("Where the seller at the time of contracting has reason to know…"). According to the Plaintiff, Hooksett contracted with Penta on November 4, 2009 to build a system, and on November 10, 2009 Penta issued a purchase order to provide the IFAS system that would satisfy the contract specifications.

II

In sum, the Court concludes that the UCC applies to the parties' contract. A genuine issue of material fact exists as to whether the language contained in the Phase 2A agreement disclaims the implied warranty of fitness for a particular purpose with respect to Penta and summary judgment must be DENIED on Count VI of the Complaint. In addition, genuine issues of material fact exist regarding whether an agency relationship exists between Kruger and Penta, summary judgment must be denied with respect to Count V of the Complaint, which seeks to hold Penta liable for warranties created by the sale of the IFAS system as a result of its subcontractor relationship with Kruger. Therefore, Penta's Motion for Summary Judgment must be DENIED with respect to Count V and VI of the Plaintiff's complaint.

SO ORDERED.

8/12/15 *s/Richard B. McNamara*

DATE Richard B. McNamara,
Presiding Justice