UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PANOLAM INDUSTRIES INTERNATIONAL, INC., and PIONEER PLASTICS CORPORATION, Plaintiffs	:	
v.	:	CIVIL ACTION NO. 3:03-cv-2174 (JCH)
NESTE RESINS CORPORATION, NESTE RESINS CANADA, INC., and DYNEA U.S.A., INC. Defendants.	:	APRIL 12, 2005

RULING RE: DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS [DKT. NO. 35]

The plaintiffs filed their First Amended Complaint on November 1, 2004. [Dkt. No. 34]. The complaint alleges four counts, breach of contract, violation of the unfair trade practices act, negligent misrepresentation, and bad faith. The complaint alleges that on or about April 7, 1998, Neste Resins Canada, Inc. ("Neste Canada") and Pioneer Plastics Corporation ("Pioneer") contracted for provision of phenolic resin by Neste Canada to Pioneer. Id. at ¶ 4. Panolam Industries International Inc. ("Panolam"), a corporation incorporated organized under Delaware law with its principal place of business in Shelton, Connecticut, acquired Pioneer at some time, not specified in the complaint. On March 27, 2001, the parties extended the contract through August 31, 2005. At the time of the March 27, 2001 agreement, Pioneer was, and is today, a wholly-owned subsidiary of Panolam. Panolam contends that the defendants improperly calculated the costs of goods supplied over the course of performance of the contract which miscalculations resulted in an overcharge in excess of $1,600,000.

The defendants have filed a motion for judgment on the pleadings with respect to all four claims. The defendants argue first that the plaintiffs' breach of contract claim is limited by Connecticut's four-year statute of limitations for such claims, thus limiting any claim and any resulting damages to the period of four years immediately preceding the initiation of this lawsuit on December 16, 2003. They next argue that Connecticut law bars application of CUTPA to the instant action. Third, they argue that the economic loss doctrine bars the plaintiffs' negligent misrepresentation claim. Last, the defendants claim that controlling law does not allow for an independent claim of bad faith on either a tort or contract theory. The court heard oral argument on April 12, 2005.

I. DISCUSSION

A. Standard of Law

The defendants have filed a motion pursuant to Rule 12(c). Fed. R. Civ. P. 12(c). "[T]he legal standards for review of motions pursuant to Rule 12(b)(6) and Rule 12(c) are indistinguishable." DeMuria v. Hawkes, 328 F.3d 704, 706 n. 1 (2d Cir. 2003). "On a motion to dismiss or for judgment on the pleadings we 'must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor.'" Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003) (quoting Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir.2001)). "A case should not be dismissed unless the court is satisfied that the complaint cannot state any set of facts that would entitle the plaintiff to relief." Id.

B. The Applicable Statute of Limitations on Panolam's Breach of Contract Claim

Where a statute of limitations limits a right, this court will apply the statute of limitations in the law of forum which governs the right. Where a statute of limitations is simply procedural, and governs access to a remedy, this court will apply the law of the forum, in other words, the Connecticut statute of limitations. Under Connecticut law, "[i]t is undisputed that, as a principle of universal application, remedies and modes of procedure depend upon the lex fori." Thomas v. Ensign-Bickford Co., 131 Conn. 665, 668 (1945).

The plaintiffs argue that Ontario law, which provides for a six-year statute of limitations, Limitations Act, R.S.O. 1990, c. L.15, Sec 45(g), ought to provide the statute of limitations. Connecticut law provides only a four year statute of limitations. Conn. Gen. Stat. § 42a-2-725(1). "Connecticut law has well developed criteria that determine whether a statute of limitation is procedural or substantive for choice of law purposes." Baxter v. Sturm, Roger & Co., 230 Conn. 335, 339 (1994). A statute of limitations or statute of repose is considered substantive for the purposes of choice of law only when the limitation period "applies to a new right created by statute." Id. at 340. "[I]n cases where the statutory limitation in the jurisdiction of the cause of action's origin prescribes a longer period than does that of the forum, the law is well settled that, if the limitation is so interwoven with the statute creating the cause of action as to become one of the congeries of elements necessary to establish the right, that limitation goes with the cause of action." Thomas Iron Co., 131 Conn. at 669. Because a cause of action for breach of contract existed in Ontario at common law, the statute of limitations is

procedural and related to the remedy available rather than to the right itself. See Clarke v. Goodall, 44 S.C.R. 284 at ¶ 27 (1911). The statute of limitations provided for in Connecticut law governs this case.

The court, therefore, grants the motion for judgment on the pleadings to the extent that contract damages run four years back from the date of the filing of the complaint on December 16, 2003. At oral argument, however, Panolam suggested that it may have a claim for tolling of the applicable Connecticut statute of limitation. The court will, therefore, allow the plaintiff twenty days in which to amend its complaint as a matter of right to assert such a basis.

C. Panolam's Claims Under the Connecticut Unfair Trade Practices Act

The defendants argue that Maine law governs the tort claims; plaintiffs argue that Connecticut law applies. While Connecticut has "traditionally adhered to the doctrine that the substantive rights and obligations arising out of a tort controversy are determined by the law of the place of injury, or lex loci delicti . . . in certain circumstances in which the traditional doctrine does not apply, the better rule is the analysis contained in the Restatement (Second) of the Conflict of Laws." Williams v. State Farm Mutual Automobile Insur. Co., 229 Conn. 359, 370 (1994); see O'Connor v. O'Connor, 201 Conn. 632 (1986). The Restatement (Second) requires that this court consider which state "has the most significant relationship to the occurrence and the parties." Such determination will require consideration of factors including "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the

parties is centered." The relative importance of these factors is determined with respect to the instant issue.

The Connecticut Unfair Trade Practices Act (CUTPA) provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts of practices in the conduct of any trade or commerce." Conn. Gen. Stat. §42-110b. That statute defines the terms trade and commerce as "the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value in this state." Conn. Gen. Stat. §42-110a (emphasis added).

The plaintiffs concede that CUTPA cannot apply to the 1998 contract, entered into prior to Panolam's acquisition of Pioneer, a Maine company. It argues, however, and the court agrees, that as the 2001 contract was negotiated and entered into by Panolam, a corporation headquartered in Connecticut. The court cannot conclude, as a matter of law and on the face of the pleadings, that such a contract is not an "offer[ ] for sale . . . in this state." Conn. Gen. Stat. §42-110a; see also Robert M. Langer, John T. Morgan & David L. Belt, Connecticut Unfair Trade Practices §3.7 (2003); Uniroyal Chemical Co. Inc. v. Drexel Chemical Co. Inc., 931 F.Supp. 132, 140-41 (D. Conn. 1996) (citing cases). Therefore, the motion for judgment on the pleadings is denied insofar as it applies to the 2001 contract, but granted with respect to the 1998 contract.

D. Panolam's Claim for Negligent Misrepresentation

The defendants argue that the economic loss doctrine precludes the plaintiffs' negligent misrepresentation claim as a matter of law. Regardless of whether Connecticut or Maine law applies, this claim cannot stand. Connecticut law recognizes a claim for negligent misrepresentation where "the declarant has the means of knowing, ought to know, or has the duty of knowing the truth." Williams Ford Inc. v. Hartford Courant Co., 232 Conn. 559, 575 (1995). However, "commercial losses arising out of the defective performance of contracts for the sale of goods cannot be combined with negligent misrepresentation." Flagg Energy Development Corp. v. General Motors Corp., 244 Conn. 126, 153 (1998). Even where lower courts have read Flagg narrowly and limited its holding, such courts have stated that Flagg's holding applies to those cases "where both the plaintiff and the defendant are sophisticated commercial parties, and their dispute arises from the defendant's allegedly defective performance under a contract for the sale of goods." Santoro v. A.H. Harris & Sons, Inc., 2004 WL 2397155, *3 (Conn. Super., September 23, 2004); see generally Metcoff v. NCT Group, Inc., 2005 WL 288769, *5 (Conn. Super., January 10, 2005) (citing various lower court cases interpreting Flagg). Such is the instant case. Therefore, the plaintiffs' claim for negligent misrepresentation cannot stand.

E. Panolam's Claim for Bad Faith

At oral argument, plaintiffs conceded that its claim for bad faith is simply an alternate pleading of its breach of contract claim, which they claim may entitle it to

further remedies. Construing it as such, the court denies the motion for judgment on the pleadings.

II. CONCLUSION

For the reasons discussed above, the defendants' motion for judgment on the pleadings is GRANTED in part and DENIED in part. Plaintiffs may amend, as described above, their complaint as of right within twenty days as of this ruling.

SO ORDERED

Dated at Bridgeport, Connecticut this 12th day of April, 2005.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge