

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOM, INC., d/b/a CHIPCO)
INTERNATIONAL, LTD.,)
)
 PLAINTIFF)
)
v.)
)
ADELL PLASTICS, INC.,)
)
 DEFENDANT)

Civil No. 96-156-P-H

ORDER ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

The defendant Adell Plastic, Inc.’s (“Adell”) motion for summary judgment on all the tort counts of the Amended Complaint is **DENIED**. It is true that both Maine and Maryland, the only relevant states in question, have recognized the so-called economic loss doctrine whereby no tort recovery is available when the only damage is to the property purchased under the contract. See Oceanside at Pine Point v. Peachtree, 659 A.2d 267, 270-71 (Me. 1995) (describing the rule and its rationale); Morse v. Osmose Wood Preserve, 340 Md. 519, 530-33 (1995) (same). Here, however, the product purchased by the plaintiff JOM, Inc. (“JOM”) from the manufacturer Adell was plastic resin pellets. JOM converted this product into gaming chips using chemical agents supplied by Adell. The chips were then shaped, printed with artwork and denominations and imbued with trace elements as an anti-counterfeiting measure. JOM claims that as a result of defects in the resin, the gaming chips have faded, cracked and otherwise failed to perform to the satisfaction of JOM’s casino customers.

I conclude that the economic loss doctrine does not prevent tort recovery. The chips here are more than the resin pellet component. Although the resin may be ninety-nine per cent of the physical elements in the chip, the chip itself is a product distinct from the resin pellets and the failures of the resin, it is asserted, have caused damage to the chips. On the underlying tort issues—negligent manufacture and fraudulent and negligent misrepresentation—there are genuine issues of material fact. Although the standard for fraudulent misrepresentation may be clear and convincing evidence, that standard can sometimes be met by circumstantial evidence.

On the contractual and warranty issues, summary judgment is **DENIED** despite the ten-day limit on objections imposed by Adell's invoice. The ten-day limit was not part of the original agreement, which is not alleged to have had such a limitation; it first appeared in the Adell invoice. Although JOM did not specifically object to the unilateral addition of this term, additional terms are not incorporated into an existing contract if they materially alter the agreement. U.C.C. § 2-207(2)(b).¹ The commentary gives as an example “a clause requiring that complaints be made in a time materially shorter than customary or reasonable.” *Id.* at cmt. 4. The ten-day limit for any objections was not reasonable here under the circumstances for manufacturing and marketing the chips, particularly since Adell refused or failed to provide specifications in a timely manner.

On damages, however, summary judgment is **GRANTED** to Adell for any amounts beyond the purchase price. This term also first appears in the Adell invoice. JOM made no objection to the provision, it does not materially alter the agreement and the offer did not expressly limit acceptance

¹ Because both Maine and Maryland have adopted the relevant portions of the Uniform Commercial Code, see 11 M.R.S.A. § 2-201 et seq.; Md. Code Ann., Com. Law I, § 2-201 et seq., all citations will be to the U.C.C. rather than the individual statutes.

to its terms (the JOM purchase order basically had no terms). See U.C.C. § 2-207.² See also Lincoln Pulp & Paper Co v. Dravo Corp., 445 F. Supp. 507, 516 (D. Me. 1977) (recognizing that the U.C.C. permits parties to a contract to limit consequential damages). The limitation of remedies to the amount of the purchase price is not unconscionable and circumstances do not cause the remedy “to fail of its essential purpose.” U.C.C. § 2-719(2), (3).³

Adell’s motion for summary judgment on its counterclaim for the purchase price is **DENIED**. This follows from my denial of summary judgment on the claims for breach of contract and warranty.

Accordingly, the motion is **GRANTED IN PART** and **DENIED IN PART** as set forth above.

SO ORDERED.

DATED THIS 8TH DAY OF JANUARY, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

² JOM refers to U.C.C. § 2-718, but that section deals with liquidated damages and is not applicable here.

³ JOM’s sole argument on this score is:

The Defendant contends that “[t]he essential purpose of the agreed upon remedy was to compensate CHIPCO for its dissatisfaction with the resin” and that the provision limiting the damages to the purchase price did not cause this essential purpose to fail. . . . CHIPCO’s “dissatisfaction” had, and continues to have, far-reaching financial effects that were, from the start, within the contemplation of the parties. CHIPCO’s “dissatisfaction” occasioned by the delivery of defective resin from Adell far exceeds the amount paid for the raw resin and, accordingly, the limiting provision fails its essential purpose.

Pl.’s Opp’n to Def.’s Mot. for Summ. J., at 18 n.6.