

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

UNTITLED ELECTRIC COMPANY, L.P.,	:	October Term, 2001
D/B/A MAGIC AIRE,	:	
	:	
Plaintiff,	:	No. 01555
	:	
v.	:	
ALLSTATES MECHANICAL LTD, D/B/A:	:	Commerce Program
ALLSTATES CONSTRUCTION GROUP,	:	
And RLI INSURANCE COMPANY,	:	
	:	
Defendants,	:	Control Number 031961
	:	
v.	:	
CHASE AND ASSOCIATES, INC.,	:	
	:	
Additional Defendant.:	:	

**ORDER**

**AND NOW**, this 17<sup>th</sup> day of June, 2004, upon consideration of the Motion for Summary Judgment of Plaintiff United Electric Company, L.P. d/b/a Magic Aire to the Counterclaim of Defendant Allstates Mechanical Ltd, d/b/a Allstates Construction Group and the Counterclaim of Additional Defendant Chase and Associates, Inc., responses in opposition, Memoranda, all matters of record and in accord with the Memorandum Opinion, it hereby is **ORDERED** and **DECREED** as follows:

1. Plaintiff's Motion for Summary Judgment to Defendant Allstates Mechanical Ltd, d/b/a Allstates Construction Group's Counterclaim is **Denied** as to Count I (breach of contract), Count III (detrimental reliance), Count IV (breach of express warranty) and Count V (breach of implied warranty) and **Granted** as to Count II (negligent misrepresentation).
2. Plaintiff's Motion for Summary Judgment to Defendant Chase and Associates, Inc.'s Counterclaim is **Denied**.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**

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ALLSTATES CONSTRUCTION GROUP,	:	
And RLI INSURANCE COMPANY,	:	
	:	
Defendants,	:	Control Number 031961
	:	
v.	:	
CHASE AND ASSOCIATES, INC.,	:	
	:	
Additional Defendant.:	:	

**MEMORANDUM OPINION**

Presently before the court is the Motion for Summary Judgment of United Electric Company, L.P. d/b/a Magic Aire (“Magic Aire”) against the Counterclaim of Defendant Allstates Construction Group (“Allstates”) and the Counterclaim of Additional Defendant Chase and Associates, Inc. (“Chase”).<sup>1</sup> For the reasons that follow the court grants in part and denies in part Magic Aire’s Motion for Summary Judgment against the Counterclaim of Defendant Allstates and denies Magic Aire’s Motion for Summary Judgment against the Counterclaim of Defendant Chase.

**DISCUSSION<sup>2</sup>**

**A. Standard of Review**

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Destefano & Associates, Inc.

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<sup>1</sup> In addition to the instant motion, there are three companion motions filed by the various parties which will be addressed in separate orders.

<sup>2</sup> The court adopts and incorporates the Background set forth in the Memorandum Opinion addressing Allstates Mechanical, Ltd.’s Motion for Summary Judgment. See, Memorandum Opinion, October Term, 2001, No. 01555, Control Number 020729.

v. Cohen, 2002 WL 1472340,\* 2 (Pa. Com. Pl. 2002) (J. Herron). Under Pa. R.C. P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to evidence which indicates that the plaintiff is unable to satisfy an element of his cause of action. Id. The nonmoving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the moving party, “summary judgment is proper when if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory he has pled.” Id. (quoting Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999))( citing Pa. R. Civ. P. 1035.2). Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

**B. Magic Aire is Not Entitled to Summary Judgment on Counts I, III, IV and V of Allstates Counterclaim.**

Magic Aire maintains that it is entitled to summary judgment on all counts of Allstates Counterclaim<sup>3</sup> since the damages claimed by Allstates for costs and equipment in excess of \$238,810.28 were not agreed to by Magic Aire. In support thereof, Magic Aire relies upon the language contained within the warranty provisions<sup>4</sup> which Magic Aire claims is for parts only, excluding labor costs as well as consequential damages. In response, Allstates argues that the motion for summary judgment should be denied since questions of fact exist as to which terms and conditions control the transaction and whether Allstates received the applicable terms and conditions for the sale.

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<sup>3</sup> Allstates’ Counterclaim includes claims for breach of contract (Count I), negligent misrepresentation (Count II), detrimental reliance (Count III), breach of express warranty (Count IV) and breach of implied warranty (Count V).

<sup>4</sup> Magic Aire contends that the warranty provisions are set forth in the bid submitted by Chase dated April 12, 1999 (Exhibit “1” to Plaintiff’s Motion for Summary Judgment), Chase’s terms and conditions allegedly attached to the bid (Id.) and Magic Aire’s terms and conditions which are found on the reverse side of the invoices. (Exhibit “2” to Plaintiff’s Motion for Summary Judgment).

Based upon the record produced by the parties, the court is unable to determine at this time whether the damages claimed by Allstate are excluded by the limited warranty provisions. The court was not provided with any information as to the breakdown of the damages and therefore is unable to determine if indeed the damages are excluded by the provision. Moreover, Allstates posits that it is not bound by the terms and conditions of sale purportedly attached to the bid issued by Chase on April 12, 1999 since the terms and conditions were not attached. Allstates also posits that it is not in receipt of the terms and conditions contained on the reverse side of the Magic Aire invoices. Allstates' argument implicates a factual controversy which precludes this court from entering summary judgment. Accordingly, Magic Aire's Motion for Summary Judgment with respect to Counts I, III, IV and V of Allstates' Counterclaim must be Denied.

**B. Magic Aire is Entitled to Summary Judgment on Allstates Counterclaim for Negligent Misrepresentation (Count II).**

Magic Aire also argues that Allstates' claim for negligent misrepresentation is barred by the two year statute of limitations. In response, Allstates argues that the claims for negligent misrepresentation should not be time barred by the statute of limitations due to the length of time it took for the course of pleadings to progress to the point where it could file a counterclaim. For the reasons that follow, the court finds that the negligent misrepresentation claim is time barred by the statute of limitations.

The general rule in Pennsylvania [is] that a cause of action which would be barred as an original action, because of the statute of limitations, may not be asserted as a counterclaim after the expiration of the statutory period. Amoco Oil v. Penn State Aluminum Co., Inc., 20 Pa. D. & C. 3d 623, 625 (1981). Nor does the filing of Plaintiff's

complaint toll the statute of limitations for defendant. If defendant was unable to file its counterclaim any sooner, then it should have brought its own separate action. Id.

In this case, Allstates alleges that Magic Aire made multiple representations that the equipment to be supplied would be in accordance with the terms set forth in the purchase order dated May 18, 1999. The last of the equipment was shipped in November 1999. Allstates' Counterclaim was filed on August 4, 2003 almost four years later. Allstates does not contest that the statute of limitations for negligent misrepresentation is two years. Rather, Allstates claims that the statute of limitations period was tolled because preliminary objections were pending before the court which delayed their ability to file the Counterclaim. Allstates does not argue that they were duped into believing that such a claim did not exist or that there was any fraud on the part of Magic Aire. Rather, Allstates solely relies upon the delay in resolving the pleadings filed by the parties.

The court does not find Allstates argument persuasive. The delay in resolving the pleading dispute does not toll the statute of limitations. Allstates should have taken some affirmative action such as filing a separate action within the limitations period to protect its claim. Since Allstates filed its Counterclaim for negligent misrepresentation after the two year statute of limitations expired, the court will Grant Magic Aire's Motion for Summary Judgment on this claim.<sup>5</sup>

**C. Magic Aire is not Entitled to Summary Judgment on Chases' Counterclaim.**

Magic Aire argues that it is entitled to summary judgment on Chases' Counterclaim because the condition precedent contained within the Sales Representative Agreement

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<sup>5</sup> Magic Aire's claim that Allstates' negligent misrepresentation claim is barred by the economic loss doctrine is not addressed by the court since the court found that the claim was barred by the statute of limitations.

has not been satisfied, namely payment from the customer. In response, Chase argues that its right to payment is not conditioned upon Magic Aire's right to full payment.

“A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation.” Cal-Tex Lumber Co., Inc. v. Owens Handle Co., Inc., 989 S.W.2d 802, 809 (Tex. App.-Tyler 1999) (quoting Centex Corp. v. Dalton, 840 S.W. 2d 952, 956 (Tex. 1992)).<sup>6</sup> A party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied. Id. In order to determine whether a condition precedent exists, we must ascertain the intention of the parties by examining the entire contract. Id. Such terms as “if” “provided that”, or “on condition that” or some similar phrase of conditional language are normally required to create a condition precedent. Id. While there is no requirement that such phrases be utilized, their absence is probative of the parties' intention that a promise be made, rather than a condition imposed. Id. Moreover, because of their harshness in operation, conditions precedent are not favored in law. Id. (citing Criswell v. European Crossroads Shopping Center., 792 S.W.2d 945, 948 (Tex. 1990)). Courts will not construe a contract provision as a condition precedent unless they are compelled to do so by language that may be construed in no other way. Id. However, where a contract does contain a condition precedent, it must either have been met or excused before the other party's obligation can be enforced. Id.

The contractual provision which Magic Aire alleges is a condition precedent is set forth in Section V Sales and provides that the Company will remit Representative's mark up over Company's price to Representative within ten days after receipt from Customer.

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<sup>6</sup> According to the Sales Representative Agreement, disputes concerning the contents of the agreement are to be governed by Texas law.

(Id. Section V Sales) (emphasis added). Applying the above principles of law to the contract provision at issue, the court finds that “after receipt from Customer” constitutes a condition precedent to Chase being paid its mark up.

The fact that the contract provision at issue constitutes a condition precedent does not resolve the issue. Chase has been paid \$5,919.51 as “commission ...for the portion collected.” (Exhibit “D” to Chases’ Response to Magic Aire’ Motion for Summary Judgment). The payment of some of the commission due to Chase on the sale to Allstates creates a genuine issue of material fact as to whether the condition precedent has been excused before the other party’s obligation can be enforced. Accordingly, Magic Aire’s Motion for Summary Judgment to Chases’ Counterclaim is Denied.

### **CONCLUSION**

Based on the foregoing, the court grants in part and denies in part Plaintiff Magic Aire’s Motion for Summary Judgment to Defendant Allstates Mechanical Ltd Counterclaim and Chase and Associates’ Counterclaim as follows:

1. Plaintiff’s Motion for Summary Judgment to Defendant Allstates Mechanical Ltd, d/b/a Allstates Construction Group Counterclaim is **Denied** as to Count I (breach of contract), Count III (detrimental reliance), Count IV (breach of express warranty) and Count V (breach of implied warranty) and **Granted** as to Count II (negligent misrepresentation).
2. Plaintiff’s Motion for Summary Judgment to Defendant Chase and Associates, Inc.’s Counterclaims is **Denied**.

A contemporaneous Order will follow.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**