THIRTY-FIRST JUDICIAL CIRCUIT OF VIRGINIA
PRINCE WILLIAM COUNTY
CITIES OF MANASSAS AND MANASSAS PARK

CHAMBERS OF
CRAIG D. JOHNSTON
JUDGE

CIRCUIT COURT CHAMBERS
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September 9, 2009

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RE: CL 04-67519 – Royal Indemnity Company, et al vs. SimplexGrinnell LP, et al

Dear Counsel:

I took under advisement Defendant SG's Motions for Summary Judgment as to Count II, as more fully set forth in Order entered June 30, 2009. (I note the order recites the correct date at the heading, but is misdated July 30, 2009 at the conclusion; I intend to amend the order nunc pro tunc to reflect the correct date of June 30, 2009, unless counsel makes some objection to such amendment.)

There are three issues to be addressed:

1. What Statute of Limitations applies, the UCC or the traditional statute relating to written contracts?
2. When did the cause of action accrue under the applicable Statute of Limitations?
3. Does the waiver of subrogation clause bar this action?

Discussion:

1. Statute of Limitations:

The contract in question is the contract between ACC and SG, which, under the stipulated facts (Paragraph 6), was expressly for the benefit of Plaintiffs. That contract, while not specifically attached to the stipulated facts, is the contract attached as Exhibit D to the Motion for Summary Judgment, to which contract both counsel have referred in their written and oral argument. The contract was for the "design and installation of a fire protection system." Stipulations, paragraph 7. Pursuant to this, SG "designed the ...system" and "selected the components" and "installed the ...system." Stipulations paragraph 7. While the sprinkler heads were part of the system installed, the heads themselves were not designed, manufactured, or assembled by SG. Stipulations paragraph 8. They were "designed, assembled and sold by TFP," a different defendant. Stipulations paragraph 9.

Mr. Bartolacci appears to have identified the correct test for determining whether a contract of the type in question in this case is for the sale of goods, which is whether the "predominant thrust" of the contract is the purchase of goods. Among the factors to be considered are the language of the contract itself, the principal business of the contractor, and the intrinsic worth of the materials. As counsel notes, construction contracts are often found not to be contracts for the sales of goods.

Under this test, SG's contract was one calling for SG to supply all "labor, materials, equipment and services" (page 1 of Exhibit D) for a "Fire Sprinkler System" (heading of page 5, Exhibit D). The contract, while it includes materials to be supplied as part of the undertaking, does not identify any particular goods to the contract, does not provide for any particular payment for any identifiable goods, and calls for such materials to be installed as part of a system in a building to be affixed to real estate. As a result, the contract itself does not appear to be predominately the sale of goods, but rather the provision of materials as part of an overall provision of the service of the design and installation of a "turnkey" construction subcontract.

SG's primary business is identified as being the "designing, installing, and servicing fire protection systems." Stipulations, paragraph 4. SG is the successor to another entity, Grinnell Fire Protection Systems Company, whose primary business at the time of the contract is less specifically described in the stipulations, but whose name implies a similar

business, and who is described as having "designed" and "purchased and installed" the system in question. Neither company is identified as being or having been in the business of selling goods except as incident to their business of designing, supplying, and installing fire protection "systems."

There is no stipulation as to the intrinsic worth of the materials supplied by SG or its predecessor. As noted, the contract does not appear to supply any breakdown of the cost of any particular goods, a fact which tends to negate any finding that the contract was primarily a sale of goods.

Based upon the foregoing, I find that the sale was not a sale of goods under the UCC, and that accordingly the general statute of limitations for written contracts, 8.01-246, is applicable.

2. Accrual of cause of action:

With respect to this question, I agree with Ms. Boyce's analysis on page 2. The cause of action is alleged to be based on providing sprinkler heads which failed to function some years after installation due to corrosion, which corrosion was in turn due to use of faulty materials in the sprinkler heads. This use of faulty materials constituted a breach of the agreement to provide a fire protection system "free from defects in materials and workmanship and fit for its intended use as a fire protection device." The breach, if it existed, occurred when the sprinkler heads were installed containing materials that would corrode over time. I note that there is no stipulation or apparently any evidence as to when the sprinkler heads in fact corroded to the point they would fail in the event of a fire. The occurrence of a fire was apparently necessary to test whether the sprinkler heads would function.

To rule that it is only in the event of a fire, which event might never occur, that the cause of action accrues, would have the effect of making the contract an infinitely long warranty of future performance. I have already ruled that the contract is not one of future performance, due to the lack the specificity necessary to create such a contract. Applying the "discovery rule" in this situation would have the same effect, and is not proper under the circumstances.

Having so decided, the five-year statute of limitations started to run upon installation of the sprinkler heads, on or about June 1997. The statute then expired on or about June 2002. The fire giving rise to this suit occurred in February 2003, and this suit was filed in December of 2005. Accordingly, Count II of the Amended Motion for Judgment is barred by the Statute of Limitations, and I will dismiss it for this reason.

3. Waiver of subrogation:

While I took this question under advisement, I am not certain I need to resolve it in light of my ruling above. Additionally, as I noted in argument

before me, paragraph 13.4 of the contract, Exhibit D, appears to waive subrogation as to damages covered by the "builders risk" insurance required under the contract. Before deciding that this is a waiver of subrogation as to all types of insurance which might thereafter cover the structure or the owners and occupants thereof, I would request further memoranda on the point, as well as on the question of whether an ambiguity exists such that some evidence is needed before deciding the parties' intent. Accordingly, I will not decide this question at this point, and leave it to counsel to request further consideration if they wish me to do so.

Sincerely,

Judge Craig D. Johnston

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

ROYAL INDEMNITY COMPANY, as subrogee of FIRST CENTRUM, LLC and CENTRUM-PRINCE WILLIAM L.P., et al.,	*	
Plaintiff,	*	
v.	*	At Law No. CL07067519-00
SIMPLEXGRINNELL, LP, et al.,	*	
Defendants.	*	

FINAL DISMISSAL ORDER

THIS MATTER CAME before the court, on SimplexGrinnell, LP's Motion for Summary Judgment and Plea in Bar to the Amended Motion for Judgment. On June 30, 2009, after hearing argument of counsel and considering memoranda filed on behalf of the parties, the court entered an order dismissing certain counts of the Amended Motion for Judgment, but reserving its ruling as to count II. Now, for the reasons stated in this court's September 9, 2009 letter opinion, which is incorporated herein by reference, in which the court concluded that the statute of limitations bars this claim, and as Count II is the only count remaining as to this defendant, it is hereby

ORDERED that SimplexGrinnell, LP be and hereby is dismissed from this case with prejudice.

ENTERED this 28 day of Sept., 2009.

C. D. Johnston
JUDGE

WE ASK FOR THIS:

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SEEN AND OBJECTED TO FOR THE FOLLOWING REASONS: The Court erred in granting the Motion for Summary Judgment and the Plea in Bar. The statute of repose does not bar any claims as to Simplex Grinnell, the claims against Simplex Grinnell were not barred by the statute of limitations, the breach of warranty of future performance was established by the facts and the applicable law, the claims arising from the construction contracts were not barred by the statute of limitations or any limitation on remedies, the court erred in denying plaintiffs leave to file a second amended motion for judgment, the plaintiffs claims for negligent post sale and post installation duty to warn were improperly dismissed, the plaintiffs claims for fraud and misrepresentation were properly pled and supported by the evidence and documents submitted in opposition to the motions filed by Simplex Grinnell. Plaintiffs incorporate all of the arguments made in their briefs, memoranda and letter supplement to the Court with regard to the motions filed by the defendants, and their arguments at the several hearings on the motions and pleas in bar filed by the defendants.

/See attached/

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Assignments of Error

1. The Trial Court erred in sustaining Simplex Grinnell's plea in bar on the ground that the F960/Q46 sprinkler head was "ordinary building materials" rather than equipment and holding that Simplex Grinnell, Tyco, was entitled to protection under the Virginia Statute of Repose.

2. The Trial Court erred in dismissing the plaintiffs' warranty cause of action on the grounds that the statements concerning the F960's future performance under the Virginia Uniform Commercial Code did not constitute a warranty of future performance. The Court further erred in holding that the U.C.C. statute of limitations, therefore, began to run on the date of delivery, rather the date of the injury.

3. The Trial Court erred in dismissing Count IV of plaintiffs' amended motion for judgment without determining whether a post-sale duty to warn based on negligence principles existed in Virginia law.