KOPPERS INDUSTRIES, INC.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 98-00,631
	:	
TAMPELLA POWER CORPORATION,	:	
d/b/a KVAERNER, INC. and/or	:	
KVAERNER PULPING, INC. and	:	
KVAERNER, INC. AND KVAERNER	:	
PULPING, INC., in their own right,	:	
	:	DEFENDANTS' PRELIMINARY
Defendant	:	OBJECTIONS

OPINION AND ORDER

We are asked to determine the pending Preliminary Objections filed November 14, 1997, by Tampella Power Corporation, *et al*. (hereinafter collectively "Defendants"), as well as Plaintiff Koppers Industries, Inc.'s (hereinafter "Plaintiff") Motion for a Protective Order, filed June 3, 1998. These matters were stayed by Order of Court November 19, 1998, upon agreement of the parties, pending alternative dispute resolution proceedings. Having been advised[1] by defense counsel Joseph E. Linehan, Esq., that those efforts have concluded unsuccessfully, the issues raised can now be decided by this Court.

This case was instituted by Complaint filed in Westmoreland County September 25, 1997. Plaintiff purchased boilers and related equipment from Defendants, which it intended

[1] No notification exists in the record. Mr. Linehan contacted this Court by telephone several weeks ago pursuant to a continuance request. At that time, he mentioned to the Court's law clerk that the ADR proceedings had ended. Mr. Linehan stated he had previously informed a prior law clerk of this (also by telephone) several months ago, and was advised no further notification- by letter or filing- would be required. Unfortunately, we have no record of the prior conversation. On June 2, 1999, we received a letter from Gary L. Weber, Esq., who indicated he was formally advising the Court this decision was now due.

to use to modernize and reopen a manufacturing plant in Westmoreland County, also purchased by Plaintiff from Defendants. Plaintiff avers the equipment was faulty and Defendants are liable for resultant damages under Breach of Contract, Breach of Warranty, Misrepresentation and Negligence claims.

Defendants filed Preliminary Objections as noted, alleging improper venue and failure to plead a claim of fraud with particularity. Defendants also raised various objections in the nature of demurrers.

By Decision and Order of Court March 2, 1998, filed to No. 5830 of 1997, Judge Gary P. Caruso, Judge, Court of Common Pleas of Westmoreland County, granted Defendants' Preliminary Objection with regard to venue and transferred the case to this Court for further disposition. In so doing, the Westmoreland Court affirmed the validity of a forum selection clause, included in Defendants' Proposal, that any action arising out of the contract between the parties be brought only before the Lycoming County Court of Common Pleas.

Plaintiff subsequently filed its Motion for Protective Order in this Court, in response to a Request for Production of Documents and Notice of Deposition served on Plaintiff by Defendants May 8, 1998, wherein Plaintiff indicated it intended to depose a corporate designee relative to eleven specific items in the Complaint. Defendants objected to this deposition at a stage in the proceedings where no responsive pleading had yet been filed and the Preliminary Objections had not yet been ruled upon.

Initially, we note that argument was held July 9, 1998, ostensibly to address both the Preliminary Objections and the Motion for a Protective Order. Briefs were submitted by both sides with respect to the former, but not the latter. Regardless whether the parties had sufficient

opportunity to address whether the Motion should be granted, upon the determination of the Preliminary Objections the basis for the Motion (stage of the proceedings) will be absent; hence, the Motion will be rendered moot and accordingly, denied by this Court.

Defendants filed a first "Brief in Support of Preliminary Objections" with the Westmoreland County Court, then a second "Brief in Support of Preliminary Objections" with this Court. In this second brief, filed June 26, 1998, Defendants indicated that, based upon representations made in Plaintiff's Brief in Opposition filed in Westmoreland County January 16, 1998, Defendants were withdrawing their objections concerning its demurrer with respect to the economic loss doctrine and also Plaintiff's failure to plead fraud with particularity. Defendants also acknowledged the improper venue claim had been determined by the Westmoreland County Court.[2] Accordingly, the remaining issues before this Court, as framed by Defendants, are:

(1) a demurrer to Counts I and II for failure to plead a condition precedent;

(2) a demurrer to Count II based upon disclaimer of implied warranties;

(3) a demurrer to Counts I, II, III and IV based upon a contractual limitation of remedies provision; and

(4) a demurrer on behalf of defendant Kvaerner, Inc. for failure to plead any claim against Kvaerner, Inc., or, in the alternative, a motion for more specific pleading on behalf of all Defendants.

Defendants' Brief p. 3.

[2] Plaintiff then filed a "Supplemental Brief" July 7, 1998, in response to Defendants' brief.

Preliminary Objections in the nature of a demurrer test the legal sufficiency of a complaint. ***Turner v. The Medical Center, Beaver, Pa. Inc.***, 686 A.2d 830 (Pa.Super. 1996) (*allocatur denied*). To sustain preliminary objections in the nature of a demurrer, it must appear certain that upon the factual averments and all inferences which may be fairly deduced from them, the law will not permit recovery by a plaintiff. ***Halliday v. Beltz***, 514 A.2d 906 (Pa.Super. 1986).

Defendants argue that the Westmoreland Court ruling on the terms of the contract are binding upon this case under the "law of the case" doctrine, set forth in ***Riccio v. American Republic Insurance Co.***, 705 A.2d 422 (Pa. 1997). Plaintiff denies the law of the case doctrine applies, citing the case of ***Commonwealth vs. Mulholland***, 702 A.2d 1027 (Pa. 1997), wherein the Pennsylvania Supreme Court stated "[t]he grant or denial of a motion for a change of venue or venire does not fall within the category of a legal question that is determinative of the law of the case. *Id.* at 1036. Plaintiff does concede the issue of venue was decided by the Westmoreland Court. Plaintiff's Supplemental Brief p. 7. We are somewhat less clear whether Plaintiff accepts that decision, or believes the determination is also reviewable by this Court, along with the remainder of the issues before us.

When a trial court orders a change of venue in a civil action, an interlocutory appeal as of right exists. ***Goodman by Goodman v. Pizzutillo***, 682 A.2d 363 (Pa.Super. 1996); Pa.R.A.P. 311(c), 42 Pa. C.S.A.[3] If Plaintiff did wish to challenge the change of venue, the proper appeal is directed to an appellate court. We do not believe we have the authority to

[3] The Appellate Court will not reverse a trial court's transfer of venue absent an abuse of discretion; if any proper basis exists for the trial court's decision, it must stand. ***Masel v. Glassman***, 689 A.2d 314 (Pa.Super. 1997).

reconsider Judge Caruso's decision on this issue. Further, we agree with the reasoning set forth by the Westmoreland Court in support of its decision.

We agree with Defendants that, if the Westmoreland Court has ruled on the terms of the contract, that ruling is binding upon this Court under the "law of the case" doctrine as set forth in ***Riccio v. American Republic Insurance Co.***, 705 A.2d 422 (Pa. 1997), particularly in light of the Pennsylvania Supreme Court's inclusion of the coordinate jurisdiction rule into the law of the case doctrine, done so as to create a more comprehensive rule. ***Commonwealth v. Starr***, 664 A.2d 1326, 1333 (Pa. 1995). We disagree, however, with Defendants' conclusion that Judge Caruso did in fact rule on the "terms" (plural) of the contract. Rather, the Decision and Order focused on the forum selection clause in the contract. What the Court actually said, in relevant part, is:

> The plaintiff has alleged that the contract between the parties is made up of a series of verbal representations and warranties as well as a series of written documents. Therefore, it is agreed by the parties that the proposal of February 14, 1995, and its terms, make up at least a part of the agreement between the parties.
>
> The plaintiff contends, and this court agrees, that the proposal alone does not constitute the contract between the parties. In this court's opinion this proposal was an offer by the defendant of certain items that would apply to the agreement to be reached by the parties. Thereafter, the plaintiff made certain counter offers regarding only certain of the terms contained in the proposal of the defendants. These counter offers were contained in the purchase orders sent from the plaintiff to the defendant, Tampella, beginning March 13, 1995. It appears from the terms and conditions contained in the purchase orders, specifically paragraph 2, that the plaintiff was only intending to include their terms and conditions that conflicted with the terms and conditions set forth in the proposal of the defendant, Tampella…The terms and conditions set forth by plaintiff in its purchase orders do not contain any statement regarding the selection of a forum for a law suit. Therefore, the terms and conditions of the plaintiff's purchase

> order do not conflict with the terms of the seller's quotation (proposal) on this matter...*Therefore, this forum selection clause would remain a part of the agreement of the parties, in the same manner as would other provisions of the proposal upon which the plaintiff now relies, such as*, and most importantly to the plaintiff, *the performance guarantees upon which they base their action*. It would be clearly unfair to allow the plaintiff to pick and choose only those provisions of the proposal that are to their benefit and ignore the others.

Decision of the Court, pp. 2-4 (emphasis supplied). Judge Caruso restricted his finding to the question of whether the forum selection clause in Defendants' original written proposal to Plaintiff was valid and controlling. In making this finding, however, the Court engaged in a determination whether the clause conflicted with any other provision or provisions which, taken all together, made up the agreement between the parties.

We are mindful it is Defendants who argue we are bound by Judge Caruso's ruling. Moreover, we believe Judge Caruso's approach to the issue was sound. Accordingly, we believe our duty here is to engage in a similar review of the terms and conditions which constitute the parties' agreement. We will then determine, as did the Westmoreland Court, whether those terms and conditions upon which Defendants rely constitute the parties' agreement on the various issues before us, or whether conflicting provisions exist which must also be considered.

Failure to Plead a Condition Precedent

Defendants point to paragraph 10 of the General Conditions, contained in Defendants' proposal dated "February 14, 1995/March 8, 1995 – As Sold," which states for warranties to be effective, Purchaser [Plaintiff] must immediately notify the Company [Defendants] in writing upon discovery, specifying the particular defect(s) and furnish such

information relating to the defect(s) as may be requested; any defect or breach of warranty not set forth in writing is deemed waived by the Purchaser. *See* Complaint Exhibit A, p. GC-1.

No clearly contradictory provision is evident in the record and we are not satisfied Plaintiff has provided any basis to find they were relieved of this requirement. However, Averment Number 30 of the Complaint states: "At all times material hereto, Koppers fulfilled *all* of its obligations under the contract." (Emphasis supplied). Accepted as true for purposes of determining the Preliminary Objection, a fair inference deduced from this averment would be that either appropriate notice of the defects was provided to Defendants as required under the proposal, or there exists a term or condition negotiated by the parties which relieved Plaintiff of this obligation. Whether this will prove true as these proceedings continue remains to be seen. At this point, the Objection must be overruled.

Disclaimer of Implied Warranties and Contractual Limitation of Remedies Provisions

Defendants point to their Proposal's Terms of Performance Guarantee at p. 5-5 (*see* Complaint Exhibit A), wherein Defendants expressly disclaim any implied warranty of merchantability or fitness for a particular purpose. Defendants also point to Paragraph 10 of their General Conditions of the Proposal, p. GC-1 (*id.*), which states Defendants make no representation, express or implied, with respect to equipment or services provided. Defendants claim Plaintiff's cause of action must be limited accordingly.

However, Plaintiff's Purchase Orders, dated subsequent to Defendant's Proposal, contain a provision on their face that reads: "Acceptance of this purchase order is expressly limited to the terms and conditions on the face and on the reverse side hereof." Complaint Exhibits B, C. Term and Condition Number 17 on the reverse side indicates Koppers is entitled

to all remedies, without limitation, available pursuant to the Uniform Commercial Code [UCC]. This provision was determined by the Westmoreland Court to be part of the entire agreement between the parties.

Implied warranties of merchantability or fitness for a particular purpose are types of warranties contemplated under the UCC. *See* 13 Pa.C.S. §§2314, 2315. Therefore, the provision is clearly in conflict with the disclaimers and limitations Defendants seek to impose. According to the Westmoreland Court ruling, the Purchase Order Provision is part of the entire agreement between the parties. For determination of the sufficiency of the pleading, we agree that a demurrer to Plaintiff's contention is improper. It may well be that, upon subsequent pleading and evidence, Defendants can establish they are not bound by any terms of the subsequent Purchase Orders. However, such a ruling is not appropriate at this point.

Defendants argue their liability (and Plaintiff's recovery) under performance guarantees is limited to twenty-five percent of the total Contract Price of the particular Unit involved. Defendants direct the Court's attention to paragraph 5.3(d) of their Proposal, p. 5-5 of Complaint Exhibit A. This paragraph, read in full, is as follows:

> If it becomes reasonably apparent, based on the results obtained during a performance guarantee test run that the performance of a Unit has not met the guaranteed performance, then additional test runs of that Unit involved shall be made whenever Tampella Power shall so request in writing. In such event, it shall be Tampella Power's responsibility to supply such additional design, engineering, assembly, erection and technical advisory services, and such additional equipment and materials, free of charge, as it considers necessary to rectify the deficiencies; provided however that Tampella Power's responsibility and liability under performance guarantees shall be limited to a maximum outlay equal to twenty-five percent of the total Contract Price of the particular Unit involved. The outlay made by Tampella Power pursuant to its obligations under the performance guarantee section

> shall be calculated by aggregating all costs and expenses incurred by Tampella Power.

This Court questions whether this "limiting" language comes into play only with respect to any test runs or additional services, material and equipment provided by Defendants. However, without deciding this question, we find Defendants' Objection must be overruled in light of the "no limitation" language in Plaintiff's subsequently dated Purchase Orders.

Defendants attempt to argue the "no limitation" on remedies language is not in conflict with the limitation language in Defendants' Proposal, because the word "remedies," contained in Plaintiff's Terms and Conditions, is a concept distinct from "damages," the term used by Defendants. Defendants' Brief p. 18. This position is untenable. Obviously, an award of monetary damages is a remedy provided by the UCC. 13 Pa.C.S. §§2714, 2715.

These Objections must be overruled.

Failure to Plead a Claim against Kvaerner, Inc./Motion for a More Specific Pleading

Defendants contend Plaintiff has failed to plead a claim against Kvaerner, Inc., and request the claim against it be dismissed. In the alternative, Defendants seek a more specific pleading on behalf of all Defendants. Plaintiff responds that the introductory paragraph of their Complaint indicates the Complaint is against Tampella Power Corporation doing business as Kvaerner, Inc./Kvaerner Pulping, Inc. and also against Kvaerner, Inc. and Kvaerner Pulping, Inc., in their own right. In Averment Number 2 of the Complaint, Plaintiff indicates Defendant Tampella Power Corporation is believed to be doing business as Kvaerner, Inc. and/or Kvaerner Pulping, Inc. (hereinafter "Tampella Power"). Therefore, Plaintiff argues each averment applies equally to all named Defendants.

It is clear to this Court that a contractual relationship existed with respect to Defendant Tampella Power and Plaintiff. It is not clear, however, how this relationship extends Kveaerner Inc. "and/or" Kvaerner Pulping, Inc. If, as Plaintiff avers, all Defendants are but one entity titled in different ways, then we fail to understand why Plaintiff claims against Kvaerner, Inc. and Kvaerner Pulping, Inc. "in their own right." We might guess Plaintiff was simply unclear as to Defendants' corporate structure and was attempting thoroughness in his Complaint. Hopefully, at this stage (post ADR proceedings) Plaintiff has a better understanding of the interrelation of Defendants' holdings and can more accurately name those businesses contractually bound as a result of the agreement at issue in this case. Defendants' request to dismiss Kvaerner, Inc. with prejudice will not be honored. However, the Motion for a more specific pleading is a fair request and this Court believes an Amended Complaint is needed.

O R D E R

AND NOW, this 30th day of June, 1999, it is **HEREBY ORDERED** as follows:

1. Plaintiff's Motion for a Protective Order is **DENIED** as it has been rendered moot by this Order of Court.

2. Defendants' Preliminary Objection seeking to dismiss the Complaint against Defendant Kvaerner, Inc. with prejudice is **OVERRULED**; Defendants alternative Motion for a More Specific Pleading with respect to the contractual liability of the various Defendants is **GRANTED**. Plaintiff shall file an Amended Complaint within twenty days of the date of the filing of this Order.

3. The remainder of Defendants' Preliminary Objections which have not been withdrawn or previously determined by the Court of Common Pleas of Westmoreland County are **OVERRULED**.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
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