



Hermit Thrush Brewery, LLC v. Crown Cork and Seal USA, Inc., et al

## DECISION ON MOTION TO DISMISS

Plaintiff Hermit Thrush Brewery alleges defendants Crown Cork & Seal and Mossberg & Co. provided it with defective cans for its sour beer resulting in spoilage and exploding cans. Mossberg moves for dismissal pursuant to Rule 12(b)(3) based on a forum selection clause designating St. Joseph County, Indiana as the proper forum for this litigation. Mossberg also has moved pursuant to Rule 12(b)(6) to dismiss Counts Two, Four, and Six based on plaintiff's waiver of warranty, and the economic loss rule. Hermit Thrush opposes the motion, disputing that it agreed to the forum selection clause or waived any warranty. Hermit Thrush also contends the economic loss rule is not a bar to recovery because the special relationship exception applies.

### Legal Standards

Vermont is a notice pleading state, and this pleading standard is "exceedingly low." *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575. A pleading must only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" and a demand for judgment. V.R.C.P. 8(a). A plaintiff is not required to *prove* her claim at the pleading stage. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 9, 184 Vt. 1. A complaint must only put a defendant on notice of the plaintiff's general claim. *Bock*, 2008 VT 81, ¶ 8.

Rule 12(b)(3) permits a defendant to move to dismiss for improper venue. Vermont's venue statute provides that "[a]n action before a Superior Court shall be brought in the unit in which one of the parties resides, if either resides in the State; otherwise, on motion, the complaint shall be dismissed." 12 V.S.A § 402(a). See, e.g., *Gero v. Pallito*, No. S0048-11 CNC, 2011 WL 13362809, at \*2 (Vt. Super. May 09, 2011) (granting Rule 12(b)(3) motion to dismiss after determining that neither party resided in Chittenden County, where the case was brought).

The standard for determining a Rule 12(b)(6) motion to dismiss for "failure to state a claim upon which relief can be granted" is well established. Courts must "tak[e] all of the nonmoving party's factual allegations as true," and will dismiss a claim only when "it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Davis v. American Legion, Dept. of Vermont*, 2014 VT 134, ¶ 12, 198 Vt. 204 (quoting *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309). "Motions to dismiss for failure to state a claim are disfavored and should rarely be granted." *Bock*, 2008 VT 81, ¶ 4. For purposes of a Rule 12(b)(6) motion, matters outside the

pleadings are not considered. If they are considered, the court must treat the motion as one for summary judgment.

## **Factual Allegations**

The relevant complaint allegations are as follows. Hermit Thrush Brewery's sour beer has a high acidity content and requires special canning specifications. Defendant Crown Cork identified a canning product appropriate for plaintiff's sour beer and provided plaintiff a warranty on that product. In March 2015, the brewery ordered cans for its sour beer from Crown Cork, and the cans satisfactorily packaged plaintiff's beer. In September 2015, Crown Cork informed the brewery that it would no longer sell cans directly to the brewery and provided a list of vendors, including defendant Mossberg & Co., who would sell the same type of cans specified in Crown Cork's warranty. The brewery communicated with Mossberg via email and phone on or about September 28, 2015, and Mossberg confirmed they had the cans the brewery desired. On or about that same day, Mossberg sent plaintiff terms and conditions and pricing. The brewery then ordered "a truckload" of cans from Mossberg on or about October 9, 2015, and continued to purchase cans after that. The cans Mossberg sold the brewery were designed and manufactured by Crown Cork. Mossberg knew the brewery was packaging sour beer. The brewery had no problem with the cans until a purchase of approximately 80,000 cans on May 17, 2018. The brewery had contracted to sell its beer to wholesalers, but discovered that some of the cans were exploding. The brewery was forced to recall its beer from wholesalers and retailers, repay wholesalers who had purchased the product, and stop packaging its uncanned beer. Inspections revealed spoilage and ruptured can liners. The brewery identified no problems with its beer batches and had not changed its recipe. The defects in the can liner caused the beer to come into contact with the aluminum, which generated gas, additional pressure, and spoilage.<sup>1</sup>

## **Mossberg's Motion to Dismiss for Lack of Venue**

Mossberg contends the brewery agreed to a forum selection clause designating Indiana as the appropriate forum for this litigation pursuant to the 'terms and conditions' it emailed the brewery in 2015. The brewery disputes that it agreed to the 'terms and conditions' and forum selection clause.

A forum selection clause is prima facie enforceable in Vermont. *International Collection Service v. Gibbs*, 147 Vt. 105, 107 (1986). To avoid enforcement, a party must "clearly show that enforcement of a forum selection clause would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Chase Commercial Corp. v. Barton*, 153 Vt. 457, 460 (1990); *Mazur v Mywebgrocer, Inc.*, No. 639-7-17 Cncv, 2018 WL 8666305, at \*3 (Vt. Super. Ct. Mar. 05, 2018). If plaintiff agreed to a forum selection clause, the court will be required to enforce it, in the absence of a showing that such enforcement would be unreasonable.

However, the court does not consider this matter to be a question of venue or find a Rule 12(b)(3) motion to be appropriate. "[W]hether a forum-selection clause should be enforced is a matter of

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<sup>1</sup> On June 28, 2021, the court granted the brewery's motion to amend its complaint to add allegations that the liner in the cans for the May 2018 order was not the same liner in cans previously supplied by Mossberg or Crown, and add a Count Seven against Mossberg for breach of contract.

contract, not an issue of proper venue.” *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002). While some federal courts have enforced forum selection clauses in response to motions to dismiss filed under F.R.C.P. 12(b)(3), as well as F.R.C.P. 12(b)(1) and (b)(6), there is no specifically designated federal rule for such enforcement. *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 475 (2d Cir. 2011). The same is true for Vermont, and the Vermont Supreme Court has not approved the use of a Rule 12(b)(3) motion to enforce a forum selection clause. Since venue is used in the Vermont statutes to specifically refer to the county where a case may be filed based on the residence of the parties, the court must interpret the reference to venue in the Civil Rules in conformity with that meaning.

Hermit Thrush pleads that it is based in and operating in Windham County, and these facts are not in dispute. Venue in this court is therefore proper pursuant to 12 V.S.A. § 402. *Sylvester Material, Inc. v. John Carlo, Inc.*, No. 3:04CV7686, 2005 WL 1176054, at \*3 (N.D. Ohio May 17, 2005) (denying Rule 12(b)(3) motion to dismiss for improper venue when it was based on a forum selection clause because if venue is proper under § 1391, a forum selection clause “will not serve as the basis for granting a motion to dismiss for improper venue”).

Even if Mossberg’s Rule 12(b)(3) motion were appropriate, the dispute about whether plaintiff agreed to the forum selection clause prevents the court from granting the motion. “The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it.” *Powers v. Off. of Child Support*, 173 Vt. 390, 395 (2002). A motion to dismiss can be granted when the face of the complaint shows plaintiff is not entitled to pursue its claims, but that is not the case here. See, e.g., *Fortier v. Byrnes*, 165 Vt. 189, 193 (1996) (complaint can be dismissed when allegations show the action is time barred).

Mossberg’s Rule 12(b)(3) motion is denied.

### **Counts Two, Four, and Six: Failure to State a Claim under Rule 12(b)(6)**

Mossberg moves to dismiss count two, breach of express warranty and implied warranty for a specific purpose. Defendant attaches to its motion ‘terms and conditions’ purportedly accepted by plaintiff; the terms include a waiver of warranty claims. If the brewery did in fact agree to these terms, its warranty claims against Mossberg would be barred. Mossberg’s exhibits, however, are matters outside the pleadings that the court declines to consider. The court finds the brewery’s complaint is sufficient to state a claim for breach of warranty. The motion to dismiss count two is denied.

Mossberg also moves to dismiss counts four and six based on the economic loss rule. The economic loss rule seeks to preserve a distinction between tort and contract law, so that parties are not suing in tort when their damages are governed entirely by contract. *Long Trail House Condo. Ass’n v. Engelberth Const., Inc.*, 2012 VT 80, ¶ 10, 192 Vt. 322. To this end, tort recovery is typically barred when physical injuries have not been inflicted, and the only harm is economic. See, e.g., *EBWS, LLC v. Britly Corp.*, 2007 VT 37, ¶ 30, 181 Vt. 513.

The physical harm may be to property rather than persons, but injury to the product or property that is the subject of a contract is generally considered a disappointed economic expectation for which relief lies in contract rather than tort law.... [W]ith respect to property damage, the economic-loss rule generally applies to bar tort claims when the alleged damage is to property that is the subject of a

contract between the parties. *Walsh v. Cluba*, 2015 VT 2, ¶ 28, 198 Vt. 453. Plaintiff agrees that the economic loss rule bars its claim unless the ‘special relationship’ exception applies.

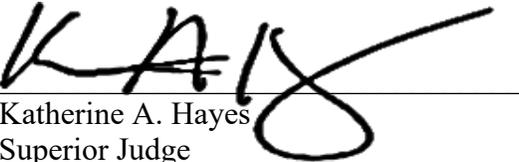
A party seeking to recover for economic losses must establish that defendant had a duty to plaintiff independent of its obligations under a contract. See *Long Trail House Condo. Ass’n*, 2012 VT 80, ¶ 13. “[A] legal duty may arise when a person undertakes, gratuitously or for consideration, to render to another services that the person should recognize as necessary to protect the other.” *Sutton v. Vermont Reg’l Ctr.*, 2019 VT 71A, ¶ 27 (citation and quotation omitted). “[T]hose who, in the course of their business, profession, or employment, perform services for the benefit of a limited group of persons may be subject to liability for pecuniary loss caused to those who relied upon the service by a failure to exercise reasonable care in performing the service.” *Sutton*, 2019 VT 71A, ¶ 32. Accordingly, a ‘special relationship’ or violation of a professional duty may give rise to an exception to the economic loss rule. *Long Trail House Condo. Ass’n*, 2012 VT 80, ¶ 13. Typical examples of a special relationship include doctor-patient and attorney-client. *Walsh*, 2015 VT 2, ¶ 30.

Taking plaintiff’s allegations as true, however, plaintiff’s complaint wholly fails to point to any special relationship between the parties. Moreover, the complaint does not allege that Mossberg owed any duty to plaintiff apart from its obligations under the alleged contract. The brewery’s tort claims as alleged would fail even under the analysis adopted by the *Walsh v. Cluba* dissent, where Justice Robinson argued that the tenant had a common law duty not to damage the landlord’s property independent of the lease agreement. *Walsh*, 2015 VT 2, ¶ 49 (Robinson, J., dissenting). Plaintiff’s complaint is devoid of any allegations of an independent duty.

## Order

In summary, Defendant Mossberg’s motion to dismiss for lack of venue is denied, although Mossberg may pursue its defense based on the forum selection clause at summary judgment, if it deems appropriate. Defendant’s motion to dismiss count two is denied. Defendant’s motion to dismiss counts four and six is granted.

It is so ordered.

  
Katherine A. Hayes  
Superior Judge  
July 20, 2021