

LEXSEE 2000 US DIST LEXIS 577

BY-LO OIL CO., INC., Plaintiff(s), v. PAR TECH, INC., Defendant(s).

Case No. 99-72908

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
MICHIGAN, SOUTHERN DIVISION

2000 U.S. Dist. LEXIS 577

January 12, 2000, Decided

January 12, 2000, Filed

**DISPOSITION:** [\*1] Defendant's motion for summary judgment GRANTED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant moved for summary judgment in matter in which plaintiff claimed defendant materially breached their software servicing agreement by failing to provide them with adequate assurances of performance with respect to their demand that defendant ensure that plaintiff's computers be year 2000 compliant.

**OVERVIEW:** Plaintiff claimed defendant materially breached their software servicing agreement by failing to provide adequate assurances of performance with respect to plaintiff's demand that defendant ensure that plaintiff's computers be year 2000 compliant. This matter came before the court on defendant's motion for summary judgment. The court found as a matter of law that plaintiff did not have reasonable grounds for insecurity justifying its purchase of a completely new computer system. The issue was whether defendant anticipatorily repudiated its obligation under the agreement. There was no question that there was no such repudiation on the part of the defendant. Moreover, to the extent that plaintiff could demonstrate it suffered any damages, the plaintiff's failure to reasonably mitigate them barred its recovery. Finally, the court found there was no breach of warranty. The defendant's motion for summary judgment was granted.

**OUTCOME:** Defendant's motion for summary judgment was granted. Defendant did not anticipatorily breach servicing agreement to ensure plaintiff's computers were year 2000 compliant. Plaintiff failed to mitigate damages and there was no breach of warranties.

LexisNexis(R) Headnotes

**Civil Procedure > Summary Judgment > Summary Judgment Standard**

[HN1] Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed.R. Civ. P. 56(c)*. The central inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial.

**Civil Procedure > Summary Judgment > Summary Judgment Standard**

[HN2] The movant for summary judgment has an initial burden of showing the absence of a genuine issue of material fact. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient.

**Civil Procedure > Summary Judgment > Summary Judgment Standard**

[HN3] The court must believe the non-movant for summary judgment's evidence and draw all justifiable inferences in the non-movant's favor. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could reasonably find for either the plaintiff or the defendant.

**Contracts Law > Breach**

[HN4] See *Mich. Comp. Laws Ann.* § 440.2610.

**Contracts Law > Breach**

[HN5] The first official comment to this *Mich. Comp. Law* § 440.2610 states, anticipatory repudiation centers upon an overt communication of intention or an action which

renders performance impossible or demonstrates a clear determination not to continue with performance. It further explains that repudiation can result from action which reasonably indicates a rejection of a continuing obligation. It is well-settled that repudiation involves a clear, definite, and unequivocal intent not to continue performance.

**Contracts Law > Breach**

[HN6] See *Mich. Comp. Laws Ann. § 440.2609*.

**Torts > Products Liability > Breach of Warranty**

[HN7] There can be no breach of warranty when there is nothing wrong with the product.

**COUNSEL:** For BY LO OIL COMPANY, INCORPORATED, plaintiff: Thomas S. Bishoff, Mark E. Hauck, Dykema, Gossett, Detroit, MI.

For BY LO OIL COMPANY, INCORPORATED, plaintiff: David A. Keyes, O'Sullivan, Beauchamp, Port Huron, MI.

For PARTECH, INCORPORATED, defendant: Jeffrey G. Raphelson, Kimberley R. Crouch, Bodman, Longley, Detroit, MI.

**JUDGES:** Nancy G. Edmunds, U. S. District Judge.

**OPINIONBY:** Nancy G. Edmunds

**OPINION:**

**OPINION & ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on Defendant's motion for summary judgment. Plaintiff claims Defendant materially breached their software servicing agreement by failing to provide them with adequate assurances of performance with respect to their demand that Defendants ensure that Plaintiff's computers be Y2K compliant. As discussed below, the Court finds as a matter of law that Plaintiff did not have reasonable grounds for insecurity justifying its purchase of a completely new computer system by early June of 1998. The Defendant's motion for summary judgment is GRANTED.

**I. Facts**

Defendant, ParTech, Inc. ("ParTech") provides computer support for [\*2] Plaintiff By-Lo Oil Co., Inc.'s ("By-Lo") business. In 1984, a predecessor in interest to Par-Tech entered into an agreement with By-Lo pursuant to which By-Lo purchased computer hardware and licensed ParTech's software, known as "ProfiMax" and

"PetroMax." Pursuant to this agreement, Par-Tech's predecessor agreed to provide continuing computer support services for By-Lo for a fixed monthly fee. (Pl.'s Exb. C at 8). For purposes of this motion, the parties assume that under this agreement ParTech was required to provide By-Lo with Y2K ready software.

In September 1997 and in again in January 1998, Plaintiff sought information from Defendant regarding the software's Y2K readiness and threatening suit. Specifically, Plaintiff's Controller, Thomas Masters, wrote to "Terry" (a Par-Tech employee) on September 18, 1997. Among other things, the memo mentioned, "I would also like to talk to Mary Beth [Eng, director of ParTech's Host Accounting Systems] regarding software and hardware options with your software and the concern of reaching the year 2000." ParTech did not respond to this letter.

Masters sent a letter to Mary Beth Eng on January 7, 1998. This correspondence demanded a written [\*3] response from ParTech by January 31, 1998 which would ensure that Plaintiff's software would be Y2K complaint. The letter stated, "I expect a written response from you by January 31, 1998 of ParTech's commitment that the software we own will function after December 31, 1999 with no problems." (Pl.'s Exb. F) The letter also threatened suit. It stated, "If this does not occur, we may have to take other options such as purchasing new software and suing ParTech for any costs involved in order for our business to operate beyond December 31, 1999." Id.

Eng responded on January 30, 1998 that Defendant's upper level management would have to make all Y2K readiness decisions after review of the appropriate data, that Defendant was in the process of gathering the information for management review, and that Plaintiff would be notified in writing once the decision was made.

According to Eng's affidavit, Plaintiff never expressed any concern about whether the system was Y2K ready for the start of its fiscal year, which commenced on May 31, 1999. If Plaintiff had made any such inquiry, it would have been told that the necessary modifications for fiscal year Y2K compliance were made in June [\*4] 1990 and there was no need for concern.

On May 1, 1998, without additional notice to Defendant, Plaintiff filed suit in St. Clair County against Defendant asserting that Defendant had "refused to make the necessary modifications" which would allow Plaintiff's computer systems "to properly operate for the year 2000" and alleging claims for breach of contract, breach of warranties, and violation of the Michigan Consumer Protection Act.

By early June 1998, and without additional notice to

Defendant, Plaintiff purchased a new computer system at a cost of over \$175,000.

On November 20, 1998, Defendant responded to Plaintiff's Y2K inquiries assuring Plaintiff that it would supply all the necessary software to make their system ready for the year 2000 without cost to Plaintiff. (Eng Affidavit, P 10). The correspondence indicated:

There are a few programs that must be changed and sent to you prior to January 1, 1999. These programs will be sent to you in December 1998. **You will need to load these software updates prior to January 1, 1999.** Loading these programs in advance should not cause any problems and will eliminate program errors due to the date check plus one year routine. [\*5]

Pl.'s Exb. H (emphasis in original).

In keeping with its promise, and unaware that Plaintiff had already purchased an alternate computer system months before, on December 18, 1998 Defendant sent Plaintiff the first upgrade via Federal Express. The upgrade addressed the date check plus one year routines, along with detailed instructions for installation, including notice that the software should be installed by December 31, 1998.

On May 12, 1999, an Amended Complaint n1 was filed in state court asserting that Defendant failed to provide Plaintiff with adequate assurances that its computer system would be made year 2000 compliant, and alleging claims of: (1) breach of contract, (2) breach of express and implied warranties, (3) violation of the Michigan Consumer Protection Act, and (4) product liability. Defendant removed the action to federal court in June 1999 on diversity grounds. Subsequently, three counts were voluntarily dismissed. The only remaining issues involve breach of contract and breach of express and implied warranties. (Counts I and II of the Amended Complaint).

n1 Plaintiff attempts to ignore the relation back rule and contends that the lawsuit was commenced when the amended complaint was filed May 12, 1999, rather than when the suit was originally filed on May 1, 1998. The Court notes that pursuant to *Fed.R.Civ.Pro. 15(c)(2)*, "an amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.]" *Fed.R.Civ.Pro.*

*15(c)(2)*. Plaintiff's attempt to recharacterize the commencement date of this lawsuit is rejected.

[\*6]

## II. Standard for Summary Judgment

[HN1] Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed.R. Civ. P. 56(c)*. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

[HN2] The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). [\*7] To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *Liberty Lobby*, 477 U.S. at 252.

[HN3] The court must believe the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. *Liberty Lobby*, 477 U.S. at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could "reasonably find for either the plaintiff or the defendant." *Liberty Lobby*, 477 U.S. at 255.

## III. Analysis

### A. Breach of Contract

The Court assumes, as the parties do, that Defendant was obligated under the contract to provide Plaintiff with Year 2000 ready software. Count I of Plaintiff's Amended Complaint contends that Defendant breached that portion of the agreement regarding continuing software support services. (Pl.'s Exb. C at 8). That agreement requires ParTech to, inter alia, modify the software programs to improve the overall operation of the system, and to up-

date the software to ensure compatibility with operating system updates. (Pl.'s Exb. [\*8] C at 8, PP 3-4).

The Amended Complaint alleges that Defendant materially breached the terms and conditions of the contract by, inter alia, failing to timely provide necessary modifications, repairs, or replacement which would allow the software to operate properly, and by failing to provide continuing support services as required under the contract. (Amended Compl. at P 32). In sum, By-Lo contends that ParTech materially breached its obligation under the contract to respond to its requests for information related to Y2K compliance in a "timely manner," thereby justifying By-Lo's decision to purchase an entirely new computer system in late May — early June of 1998, nearly a year and a half before the millennium.

Under these circumstances, the Court must consider whether ParTech anticipatorily repudiated its obligation under the agreement. [HN4] The relevant statute provides:

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any [\*9] remedy for breach (section 2703 or section 2711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

*Mich. Comp. Laws Ann. § 440.2610* (footnote omitted).

[HN5] The first official comment to this section states, "anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." *Id.*, at Comment 1. It further explains that "repudiation can result from action which reasonably indicates a rejection of a continuing obligation." *Id.* at Comment 2. It is well-settled that repudiation involves a clear, definite, and unequivocal intent not to continue performance. *UMIC Government Securities v. Pioneer Mortgage Co.*, 707 F.2d 251 (6th Cir. 1981);

*Frohlich v. Independent Glass Co.*, 144 Mich. 278, 107 N.W. 889 at 889-90 (Mich. 1906); *Carpenter v. Smith*, 147 Mich. App. 560, 383 N.W.2d 248 (1985). [\*10]

There is no question that on these facts there is no such repudiation on the part of the Defendant. The only communication which could possibly be interpreted as repudiation is the ParTech's January 30, 1998 letter to By-Lo which did not unequivocally state that it would not perform, but rather clearly stated that they were in the process of performing, that is, that they were working on it and would get back to them when the issue was resolved. This is not a clear expression of intent not to perform.

This case is more clearly framed under [HN6] *Mich. Comp. Laws Ann. § 440.2609*, which addresses repudiation in the context of insecurity by one party with respect to performance. The relevant language provides:

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

...

(4) After [\*11] receipt of a justified demand failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

*Mich. Comp. Laws Ann. § 440.2609(1) & (4)* (emphasis added).

The Plaintiff's January 8, 1998 letter to Defendant demanded adequate assurance of performance. ParTech's January 30, 1998 letter is the response. Even assuming Plaintiff had reasonable grounds for insecurity justifying demand, as a matter of law, By-Lo cannot establish that Defendant failed to provide it with adequate assurances of Y2K compliance within a reasonable time. Plaintiff made Y2K inquiries in September 1997 and in January 1998. Impatient with Defendant's January 1998 response that it was investigating the matter and would get back with Plaintiff, Plaintiff, without further contact with Defendant, filed suit against Defendant in May 1998 and purchased a new \$175,000 computer system. As

Defendant concedes, it may have been bad customer service to wait ten months to provide Plaintiff with a more definitive answer than that contained in its January 30, 1998 letter, however, it did [\*12] not constitute a material breach of parties' contract thus allowing Plaintiff to be reimbursed for the late May / early June 1998 purchase of the \$175,000 new computer system.

Moreover, to the extent that Plaintiff can demonstrate it suffered any damages, the Plaintiff's failure to reasonably mitigate them bars its recovery. *Fothergill v. McKay Press*, 374 Mich. 138, 132 N.W.2d 144 (1965); see also *Farm Credit Services of Michigan's Heartland v. Weldon*, 232 Mich. App. 662, 679-80, 591 N.W.2d 438 (1999); *M & V. Barocas v. THC, Inc.*, 216 Mich. App. 447, 449, 549 N.W.2d 86 (1996)(It has long been recognized that the law should encourage a potential plaintiff to take reasonable actions to minimize the extent of damages arising from the wrongful breach of a contract.). With a year and a half to go before the Y2K deadline, there were a number of things Plaintiff could have done instead of taking the extreme measure of going out and purchasing an entirely new computer system.

The Court must examine this case as of the filing date of the action: May 1, 1998. It was on that date that By-Lo claimed ParTech had materially breached its obligation [\*13] to make their computers Y2K compliant. May 1, 1998 is seven months before December 31, 1998 which was the deadline for correcting the date check plus one year routines and one year and seven months from the deadline for correcting any Y2K errors. It is undisputed that when By-Lo filed suit, any Y2K glitches related to the start of their fiscal year, which began on March 31, 1999, had already been corrected in June of 1990. It was unreasonable as a matter of law for Plaintiff to purchase an entirely new system over a year and a half before the year 2000.

The Plaintiff also has no claim based on the theory that Defendant breached the contract in December 1998 by failing to provide it with adequate time to install the first installment of Y2K modifications. Plaintiff cannot establish a casual connection between its May or June 1998 purchase of new equipment and the December 1998 shipment of Y2K software modifications. At this point, the Court can only speculate whether there would have been a problem had Plaintiff been more patient and waited for Defendant's Y2K modifications in December 1998. The Defendant's motion for summary judgment is GRANTED on Plaintiff's breach of contract claim. [\*14] n2

n2 The Court is mindful of the recent passage

of the Y2K Act, 15 U.S.C. § 6601, et. seq., which places severe limitations on the filing of lawsuits such as this, and establishes a clear policy that such disputes are better resolved in a non-litigious manner so as to avoid a waste of resources. 15 U.S.C. § 6601(a). The Act applies retroactively to suits filed on or after January 1, 1999. By its terms, the Act does not apply to this case. The initial compliant in this matter was filed May 1, 1998. Although the Plaintiff filed an amended compliant on May 12, 1999, any amendments relate back to the original date of filing. *Fed.R.Civ.Pro.* 15.

### B. Breach of Warranties

The final issue is with respect to Plaintiff's claim for breach of the implied warranty of merchantability (Pl.'s Compl. at P P 36, 40) and breach of express warranties (Pl.'s Compl. at P 39). In their briefs, the parties argue about whether there were warranties, whether they were disclaimed, [\*15] and whether or not any limited remedy failed of its essential purpose. Regardless of these issues, Plaintiff has come forward with absolutely no evidence that the software failed of its essential purpose or that it was not fit for its intended use. There is also no evidence that the Y2K upgrades failed of their essential purpose. (Eng Affidavit, PP 4-6). Had Plaintiff been more patient it would have received the necessary upgrades in time to install them, and according to Defendant's brief none of the upgrade installations it has performed caused any substantial difficulty. There is simply no genuine issue of material fact with respect to whether a breach of any warranty occurred. [HN7] There can be no breach of warranty when there is nothing wrong with the product. *Jacobs v. E.I. Du Pont & De Nemours & Co.*, 67 F.3d 1219, 1241-42 (6th Cir. 1995).

### IV. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows:

The Defendant's motion for summary judgment is GRANTED.

SO ORDERED.

Nancy [\*16] G. Edmunds

U. S. District Judge

Dated: JAN 12 2000