

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

ABC, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
XYZ, )  
 )  
Defendant. )

CIVIL ACTION NUMBER:  
2:15-cv-1234-TMP

PRETRIAL ORDER

A pre-trial conference will be held in the above-styled case on \_\_\_\_\_, 20\_\_ at \_\_\_\_\_ a.m., at which the following matters were discussed and orders entered:

1. **Appearances:**

For plaintiff: PLAINTIFF'S COUNSEL

For defendant: DEFENDANTS' COUNSEL

2. **Jurisdiction and Venue:** Subject matter jurisdiction is based upon 28 U.S.C. § 1332 by reason of the amount in controversy and the admitted diversity of citizenship. [Alternatively, Subject matter jurisdiction is based on 28 U.S.C. § 1331 by reason of the questions of federal law raised. Jurisdiction over state-law claims exists pursuant to supplemental jurisdiction under 28 U.S.C. § 1367(a).]

3. **Parties and Trial Counsel:** Any fictitious defendants included in any pleading are hereby DELETED. The remaining parties before the court and the designated trial counsel for each party are set forth below:

PARTIES

TRIAL COUNSEL:

Plaintiff/Counterclaim Defendant:  
ABC

John Doe  
DOE, DOE & FOE

Defendant/Counterclaim Plaintiff:  
XYZ

Sam Spade  
SPADE, RAKE & PLOW

4. **Pleadings:** The following pleadings have been allowed: Complaint filed on \_\_\_\_\_. Answer to Complaint and Counterclaim filed on \_\_\_\_\_. Answers to the Counterclaim filed on \_\_\_\_\_ and \_\_\_\_\_. Amendment to Counterclaim filed on \_\_\_\_\_. Amended Answer to Counterclaim filed on \_\_\_\_\_.

5. **Statement of the Case:**

(a) **Agreed Summary:** This case arises from the sale of porch posts by the Plaintiff to the Defendant. After these posts were installed and had been in place for some time, Defendant reported problems with them to Plaintiff. The parties disagree as to the cause of these problems. Plaintiff has sued for the contract price of the porch posts sold to defendant, and defendant has counterclaimed

(b) **Plaintiff's Position:**

(1) Plaintiff originally filed claims based on open account, fraud and misrepresentation, unjust enrichment, breach of contract and breach of warranty. The Court has granted summary judgment in favor of Plaintiff on Plaintiff's claims based on open account. Plaintiff voluntarily dismissed its fraud count by motion. Any other claims raised in the Original Complaint are hereby dismissed.

Based on its claim, the Plaintiff asserts the following types or categories of damages for recovery:

Contract price of porch posts

Interest/Lost time use of money

Attorneys fees, costs, and expenses of this action

(2) Plaintiff's first defense to Defendant's counterclaim is based on the binding settlement agreement between the parties. A valid and enforceable settlement agreement has previously been reached between the parties with regard to the very problems with the porch posts that API now attempts to make the subject of its counterclaim. The evidence to be used to support this defense includes the executed settlement agreement and all drafts of such agreements; correspondence discussing such settlement agreement; and deposition testimony.

(3) Further, as to Defendant's counterclaim, there is no affirmative evidence as to what caused the problems with the porch posts. As Defendant has admitted, they do not actually know what caused these problems. Accordingly, evidence which creates no more than mere speculation as to the cause of the injury or damage is insufficient to support a cause of action. It is the position of the Plaintiff that the problems with the porch posts were caused by their improper installation by Defendant, contrary to the written instructions provided by the Plaintiff. The evidence to be used to support this defense, among others, includes the Specifications and Installation Instructions for ABC Porch Posts; the architectural plans for the construction project; and deposition testimony.

(4) The express warranty limited recovery to repair or replacement of defective columns. Plaintiff performed in accordance with this warranty. Additionally, the express warranty limited recovery to no more than the original purchase price of the column, and Plaintiff

has already exceeded this obligation. The evidence to be used to support this defense includes, among others, the Limited Lifetime Express Warranty and deposition testimony.

(5) Plaintiff properly limited Defendant's right to damages under any implied warranties. Further, there is no implied warranty of fitness for a particular purpose because Defendant did not rely on Plaintiff's expertise or judgment in purchasing the porch posts, and Defendant was actually in a position of greater knowledge. The evidence to be used to support this defense includes, among others, the Plaintiff's Invoice for Prototype Porch Posts; the Limited Lifetime Express Warranty; Purchase Orders and Invoices for Porch Posts; and deposition testimony.

(6) Defendant's fraudulent misrepresentation claim cannot be established, because the evidence establishes that the only potential testing that was ever discussed was with regard to the initial wood core post, long before there was any redesign of the post to the steel core replacement posts that were sent to Defendant in the fall of 2003. The evidence to be used to support this defense includes, among others, the deposition testimony.

(7) Defendant's breach of settlement agreement claim fails because there is no affirmative evidence that the replacement posts were non-conforming.

(c) **Defendant's Position:** The issues remaining for trial are those raised by Defendant in its counterclaim against Plaintiff and whether Defendant has a right of set-off against Plaintiff's judgment for open account.

## **COUNTERCLAIM**

**Count I, Breach of Contract.** Defendant claims that Plaintiff breached its contract by producing and selling to Defendant 448 porch columns that were not of workmanlike quality. The evidence will include testimony of the principals and documents exchanged between the

parties showing that Plaintiff made two (2) attempts to comply with the terms of the contract and failed on each occasion. Plaintiff has not rectified the problem. Plaintiff's failure to provide products which conformed to the contract resulted in damages for replacement and for consequential damages as well.

**Count II, Breach of Express Warranty.** As a result of the failure of the first columns provided pursuant to contract, both testimony and documents will be presented to demonstrate that Plaintiff made an unsuccessful attempt to replace the porch posts and created further damage to Defendant as a consequence.

**Count III, Breach of Implied Warranty Merchantability.** Plaintiff had an obligation under the Alabama version of the UCC to provide merchantable goods. Testimony and documents will demonstrate that the porch posts crumbled in the Michigan winter and, thus, were not merchantable. Plaintiff's attempt to replace the defective porch posts was equally unsuccessful.

**Count IV, Breach of Implied Warranty of Fitness for Particular Purpose.** It is common knowledge that Michigan winters are cold. Testimony and documents will show that Plaintiff knew that the porch posts ordered by Defendant would be used in Michigan. Plaintiff knew that API was relying on Plaintiff's expertise in selecting a product satisfactory. Certainly, when Plaintiff attempted to replace the original porch posts pursuant to its warranty, Plaintiff knew that (1) the original porch posts had failed due to the Michigan winter and (2) that Defendant was relying on Plaintiff and the replacements would not crumble during the Michigan winter. Thus, Plaintiff was aware of the particular use for the porch posts and assured Defendant the posts would be satisfactory. The failure of the posts damaged Defendant.

**Count V, Fraudulent Misrepresentation.** Plaintiff represented to Defendant that the replacement porch posts provided in the fall of 2003 had been tested for bitter cold weather and would not crack or damage in the Michigan winter. Testimony and documents will be offered to show that Defendant relied upon this material misrepresentation to its detriment and suffered damages as a result.

**Amended counterclaim.** Count VI contains an allegation of breach of the settlement agreement. Plaintiff contends that it complied fully with its warranty and that all claims involving the porch posts were resolved by settlement when Plaintiff furnished replacement porch posts. Defendant denies that all claims were resolved and, instead claims any alleged settlement concerned only payment. Nevertheless, to the extent that Plaintiff defends the counterclaims based upon settlement and release, Defendant alleges that Plaintiff breached its settlement agreement by providing defective porch posts as its consideration for any alleged settlement. Testimony and documents will establish that the replacement porch posts were no more acceptable in the Michigan winter than were the initial ones and, thus, led to further damages, including punitive damages.

**6. Discovery and Other Pre-trial Procedures:**

(a) The parties do not seek leave to proceed with further discovery as all discovery disputes have been resolved.

(b) Pending motions:

(1) Defendant's Motion for Attorney' Fees

(2) Plaintiff's Opposition to Defendant's Motion for Attorneys' Fees

**7. Motions in Limine and Jury Instructions:** Each party will file any motions in limine at least ten (10) days before the date the case is set for trial. Any requested jury

instructions and special interrogatories should be submitted by \_\_\_\_\_. At the time the case is called for trial, or as necessary during trial, the parties may present to the court any special questions or topics for voir dire examination or the jury venire, or any additional jury instructions.

8. **Trial:** The trial of this matter is expected to last \_\_\_\_ days. The case is set for jury trial on \_\_\_\_\_.

9. **Damages:** Any party claiming damages or seeking relief shall serve and file a list itemizing all damages and equitable relief being claimed or sought, by no later than \_\_\_\_\_, showing the amount and the method and basis for the computation of damages. Any objection to the list of itemized damages shall be filed and served no later than 14 days after the itemized list is served.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.