

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MONTGOMERY COUNTY,	:	
	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 97-6331
	:	
MICROVOTE CORPORATION,	:	
CARSON MANUFACTURING COMPANY, INC.,	:	
and WESTCHESTER FIRE INSURANCE	:	
COMPANY,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM

ROBERT F. KELLY, J.

JUNE 25, 2001

Presently before the Court, and addressed in this third and final Memorandum regarding the Post-trial Motions of the parties in this case, are the Motions filed by the Plaintiff, Montgomery County, Pennsylvania ("the County"), which include: (1) Motion to Mold the Jury Verdict; (2) Motion for Judgment as a Matter of Law; and (3) Motion for New Trial on Its Breach of Contract, Breach of Express Warranties and Fraud Claims. For the reasons that follow, the County's Motions will be denied.¹

¹Because the facts of this case have been set forth in prior Memorandum Opinions, they will not be repeated here. See Montgomery County v. Microvote Corp., No. 97-6331, 1998 WL 54394 (E.D. Pa. Jan. 30, 1998); 1998 WL 665473 (E.D. Pa. Sept. 24, 1998), rev'd in part, 175 F.3d 296 (3d Cir. 1999); 23 F. Supp.2d 553 (E.D. Pa. Oct. 15, 1998); 2000 WL 134708 (E.D. Pa. Feb. 3, 2000), op. corrected by 2000 WL 341566 (E.D. Pa. Mar. 31, 2000); 2000 WL 289560 (E.D. Pa. Mar. 16, 2000); 2000 WL 575085 (E.D. Pa. May 9, 2000).

I. MOTION TO MOLD THE JURY VERDICT.

A. Breach of Warranty Damages.

The County first moves, pursuant to Federal Rule of Civil Procedure 59(e), to mold the jury's verdict to include the County's assessment of damages for breach of warranty pursuant to law and this Court's prior ruling. The County contends that the jury utilized the wrong damages figure in computing its verdict from the County's trial exhibit P-241 which showed the breach of warranty damages as the trade-in value of the machines instead of \$2,473,500, which the County contends are its actual breach of warranty damages. The County also argues that the jury acted contrary to the law in this district and circuit in erroneously deducting \$300,000 as a credit to the Defendant Microvote Corporation ("Microvote") for the April, 1996 election. Additionally, the County requests in this Motion that this Court mold the verdict to include an assessment of prejudgment interest at the rate of 6% per year beginning on March 1, 1996 against Microvote, and prejudgment interest beginning on October 10, 1997 against Defendant Westchester Fire Insurance Company ("Westchester"). The County also moves, pursuant to Rule 59(e), to mold the damage award to include post-judgment interest on the judgment and costs from November 3, 2000 to the present pursuant to the federal statutory rates prescribed by 28 U.S.C. section 1961.

Microvote contends that the County's demand for prejudgment interest is not appropriate because (1) the amount which the County claims it was owed by Microvote was not a "liquidated sum;" (2) the written agreement between the County and Microvote did not include a provision to pay a definite sum of money; and (3) prejudgment interest only applies when there is a specific time at which a duty to pay commenced, a condition which is not present in the business dealings among the parties in this case.

In support of its Motion, the County first argues that damages for breach of implied warranty are the difference between the value of the goods as delivered from what was promised to be delivered. See 13 Pa. C.S.A. § 2714. The County quotes the following language of this Court at the Final Pretrial Conference:

I think the measure of damages as warrantee under the code would be the difference in the value of what was delivered from that of what was promised to be delivered. The difference at the time and place of acceptance between the value of the goods accepted and the value that they would have had if they had been as warranted, plus incidental and consequential damages.

(N.T., 9/21/00, p. 17.)

According to Westchester, the County's Motion must be denied because it is an improper attempt to have the Court engage in the unconstitutional process of additur. Westchester argues

that the cases cited by the County do not support its Motion and the only case cited by the County in which the amount of a damage award was changed was Lubecki v. Omega Logging, Inc., 674 F. Supp. 501 (W.D. Pa. 1987), a case in which a non-jury trial was held and the court reduced the judgment from \$16,000 to \$1,600 pursuant to Rule 59(e), conforming the judgment to the plaintiff's expert's testimony. Id. at 512. In another case cited by the County, Rosario v. Livaditis, 963 F.2d 1013 (7th Cir. 1992), cert. denied, 506 U.S. 1051 (1993), the United States Court of Appeals for the Seventh Circuit reversed the trial court's denial of a new trial on the damage counts where the jury found the defendants liable, but awarded zero damages. Id. at 1022. Another case cited by the County, Gallelli v. Professional Insurance Management, No. 92-5812, 1994 WL 45729 (E.D. Pa. Feb. 10, 1994), involved decreasing a jury verdict instead of increasing a jury verdict, the relief the County currently seeks.

Westchester also notes that, although the County seeks to change the judgment amount, it is not requesting a new trial as to damages. Westchester contends that even if the County did request a new trial on damages, it cannot show that it is entitled to a new trial on the ground that the damages awarded by the jury are inadequate. Westchester cites testimony from Microvote's witnesses that the fair market value of the machines was \$3,400 per machine, not the trade-in price of \$1,500 per

machine. Because 899 machines were resold, the total fair market value of the machines was \$3,056,600 and when that sum is subtracted from the total amount the County paid for the machines under the contract, \$3,822,000, the difference is \$765,400. Thus, Westchester states that the jury's \$1,048,500 damage award cannot be said to be so grossly inadequate as to shock the conscience of the court.

Westchester also argues that the County is not entitled to prejudgment interest because in this case, the damages were unliquidated and uncertain and therefore not permitted under Pennsylvania law, which provides for allowable interest at the legal rate of six percent (6%) from the date payment is wrongfully withheld when damages are liquidated and certain. See Girard Bank v. John Hancock Mut. Life Ins. Co., 524 F. Supp. 884 (E.D. Pa. 1981). Here, Westchester claims that the recoverable damages ranged from nothing at all to limited damages for machines the County could prove were defective to the difference in value between the machines as warranted and the machines as delivered.

The County maintains that prejudgment interest is mandated in contract actions involving liquidated or ascertainable damages. (County's Reply Br. in Supp. Post-Tr. Mots. at 6) (citing Knop v. McMahan, 872 F.2d 1137 (3d Cir. 1989); Movie Distrib. Liquidating Trust v. Reliance Ins. Co., 595 A.2d

1302, 1308 (Pa. Super. 1991), appeal denied, 604 A.2d 249 (Pa. 1992)). However, a jury award of an amount less than the requested amount does not transform the damages into an unliquidated amount on which interest did not accrue. Movie Distrib., 595 A.2d at 1308. The County states, in a footnote in its Reply Brief, that Microvote misquotes the holding in American Enka Co. v. Wicaco Machine Corp., 686 F.2d 1050 (3d Cir. 1982), a case which supports the County's argument. Then the County, without support, states that "[t]he damages award of \$1,048,500 was the \$1,348,500 in trade-in value of the machines minus \$300,000 that Microvote alleged it spent on the April 1996 election and therefore was based on the 'market value' of the voting system in June 1996." (County's Reply Br. in Supp. Post-Tr. Mots. at 6 n.5.) Microvote contests the County's statement that the method used by the jury to reach its verdict was through some mathematical calculation different from a calculation Microvote speculates was used by one of the jurors. Because the verdict form contains no written indication as to the method used by the jury to calculate the damages, Microvote argues that the County's argument for additional damages for breach of warranty is inapposite. Because there is no true way for this Court to know the method by which the jury reached its verdict, and because this Court is not persuaded by the County's suppositions regarding the route taken by the jury to obtain its final

verdict, the County's argument is rejected.

B. Prejudgment Interest.

In Pennsylvania tort cases, prejudgment interest is not allowable as a matter of law. Peterson v. Crown Fin. Corp., 661 F.2d 287, 293 (3d Cir. 1981). As Westchester notes, however, in contract actions in Pennsylvania, prejudgment interest is allowable at the legal rate of six percent (6%) from the date payment is wrongfully withheld where the damages are liquidated and certain. (Westchester's Mem. Law in Opp'n Mot. to Mold Jury Verdict at 4) (citing Girard Bank, 524 F. Supp. 884). Westchester contends that the County is not entitled to pre-judgment interest since its damages, if any, were not liquidated and certain. (Id.) Microvote also raises this argument.

The County argues that this Court is permitted to mold the verdict to conform to the amount of the damages recoverable at law or award it a new trial on damages. According to the County, a new trial may be awarded on damages for breach of warranty because the jury award is grossly inadequate and contrary to law. (County's Mem. Law in Supp. Mot. To Mold Jury Verdict at 10) (citing Hammarskjold v. Fountain Powerboats, 782 F. Supp. 1032 (E.D. Pa. 1992)).

Microvote challenges the County's statement that:

[t]he jury also erroneously deducted \$300,000 as credit to Microvote for the April, 1996 election. No evidence of this purported \$300,000 was admitted at the trial.

Microvote did not submit any supporting documentation and merely baldly alleged that they spent this amount. It is simply not credible that the cost of approximately twenty employees for a day cost \$300,000.

(Id. at 4.) Further, according to Microvote, the trial transcript will show that not only did two Microvote witnesses, James M. Ries and Christopher Ortiz, confirm that Microvote expended that sum of money for the April, 1996 election, but the \$300,000 consisted of much more than just the cost of employing twenty County employees for one day. First, the employees who worked in Montgomery County on the April, 1996 election were there more than one day, as confirmed by Christopher Ortiz. Secondly, both witnesses testified that Microvote expended funds to educate voters, conduct training sessions, visit local shopping malls and instruct voters on the use of the machines, produce a videotape for use in instructing on the use of voting machines, produce a poster for instruction on the use of the machines, and pay for other ancillary costs comprising the sum of \$300,000. Microvote contends that if the County thought that this sum was incorrect, it had the opportunity to rebut it during cross-examination, but did not do so. Therefore, the Motion to Mold the Jury Verdict is without basis and should be denied, according to Microvote.

Microvote further provides the following as a basis for denial of the County's Motion for prejudgment interest: (1) the

amount which the County claims from Microvote was not a liquidated sum; (2) the written agreement between the County and Microvote did not include a provision to pay a definite sum of money; and (3) prejudgment interest only applies when there is a specific time at which there was a beginning of a duty to pay, a situation that was not the case between these two parties. In the instant case, no money was withheld from the County by Microvote. In fact, none of the machines was withheld from the County by Microvote, therefore the first part of this test does not apply. Secondly, Microvote notes that in Hussey Metals Division of Copper Range Co. v. Lectromelt Furnace Division McGraw Edison Co., 417 F. Supp. 964 (W.D. Pa. 1976), aff'd, 556 F.2d 566 (3d Cir. 1977), the court held that prejudgment interest is only recoverable where the defendant commits a breach of contract to pay a definite sum of money. Id. at 967. That is not the factual scenario in this case. Therefore, because there was never a definite agreement to pay a sum of money between the County and Microvote, Microvote claims that the County's Motion seeking prejudgment interest must fail.

As the County notes, "[p]rejudgment interest is a matter of right in breach of contract cases." McDermott v. Party City Corp., 11 F. Supp.2d 612, 632 (E.D. Pa. 1998) (citing Spang & Co. v. USX Corp., 599 A.2d 978, 983 (Pa. Super. 1991) (citing Fernandez v. Levin, 548 A.2d 1191, 1193 (Pa. 1988))). Further,

“the right to interest begins at the time payment is withheld after it has been the duty of the debtor to make such payment.” Id. (quoting Fernandez, 548 A.2d at 1193). As set forth in Krain Outdoor Displays, Inc. v. Tennessee Continental Corp., No. 85-2052, 1986 WL 8842, at *3-4 (E.D. Pa. Aug. 12, 1986), the Third Circuit has summarized when prejudgment interest may be awarded as a matter of law in Pennsylvania as follows:

prejudgment interest may be recovered only if
(1) a defendant commits a breach of a contract to pay a definite sum of money; or
(2) a defendant commits a breach of contract to render a performance the value of which in money is stated in the contract; or (3) a defendant commits a breach of contract to render a performance the value of which is ascertainable by a mathematical calculation from a standard fixed in the contract; or (4) a defendant commits a breach of contract to render a performance the value of which in money is ascertainable from established market prices of the subject matter.

Id. (citing Black Gold Corp. v. Shawville Coal Co., 730 F.2d 941, 943 (3d Cir. 1984)). In the instant case, the jury found that Microvote did not breach its contract with the County.

The Third Circuit has also “emphasized that although [section 337(a) of the Restatement of Contracts] does not use the term ‘liquidated damages,’ the concept is implicit in this section, so that prejudgment interest may not be awarded unless the underlying debt is liquidated as that term has been defined

by Pennsylvania law.”² Krain, 1986 WL 8842, at *4 (citing Penneys v. Pa. R.R. Co., 183 A.2d 544 (Pa. 1962)). Thus, in order for the County to recover prejudgment interest under this standard, it must demonstrate that the damages were liquidated; that is, either stated in the contract or ascertainable by application of a formula stated in the contract. These damages clearly were not calculated by reference to a specific formula found in the contract between the County and Microvote. Because these damages do not meet the above criteria, the County is not entitled to prejudgment interest.

Even if the County is not entitled to prejudgment interest as a matter of law, “[u]nder Pennsylvania law, prejudgment interest may be awarded on a claim involving unliquidated damages at the discretion of the trial court.” Krain, 1986 WL 8842, at *4 (citing Feather v. United Mine Workers of Am., 711 F.2d 530 (3d Cir. 1983) and Eazor Express, Inc. v. Int’l Bhd. of Teamsters, 520 F.2d 951, 973 (3d Cir. 1975), cert. denied, 424 U.S. 935 (1976)). This Court is guided by several factors in determining whether an award of prejudgment interest is appropriate, including: “1) the diligence of the plaintiff in

²In Pennsylvania, section 337(a) of the Restatement of Contracts has been recognized as the standard under which prejudgment interest is to be awarded as a matter of right. Krain Outdoor Displays, Inc. v. Tenn. Cont’l Corp., No. 85-2052, 1986 WL 8842, at *4 (E.D. Pa. Aug. 12, 1986) (citing Penneys v. Pa. R.R. Co., 183 A.2d 544 (Pa. 1962)).

prosecuting the action; 2) whether the defendants have been unjustly enriched; 3) whether the award would be compensatory; and 4) whether there are countervailing equitable considerations which militate against an award of prejudgment interest." Id. (citing Feather, 711 F.2d at 540). Although the County diligently prosecuted this action and there would be some compensatory value in the award of prejudgment interest, Microvote was not unjustly enriched, and in the absence of this element, this Court declines to award prejudgment interest. As in Krain, "the mere fact" that Microvote "had the use of the money rightfully paid it under the terms of the contract does not indicate that it was unjustly enriched." Krain, 1986 WL 8842, at *4. Rather, Microvote was paid, and a genuine dispute later arose as to the quality and performance of the voting machines. There is support in the record that Microvote attempted to work out a solution to the problem with the County, but there was a genuine dispute as to who was responsible for the problem which developed. Accordingly, any request for a discretionary award of prejudgment interest is denied.

C. Post-Judgment Interest.

Neither Westchester nor Microvote address the issue of post-judgment interest in their respective opposition Memoranda. However, in a January 31, 2001 Order, this Court granted Microvote and Westchester's Motions for Stay of Proceedings and

ordered Microvote to post a bond in the amount of the judgment plus 6.241% interest pursuant to 28 U.S.C. section 1961, thereby awarding the County post-judgment interest at the statutory rate from the judgment date, November 3, 2000, through January 31, 2001. Accordingly, the County's Motion for post-judgment interest is denied as moot since this Court previously granted the requested relief, albeit for the limited period from November 3, 2000 through January 31, 2001.

II. MOTION FOR JUDGMENT AS A MATTER OF LAW.

The County moves for judgment as a matter of law on its breach of contract claim, contending that "[t]he evidence presented, including multiple admissions by Microvote, is so overwhelming that reasonable minds could not differ on whether Microvote breached its contractual obligations." (County's Mot. for J. as Matter of Law at 3.) The County points to evidence in the record which it states shows numerous breaches by Microvote. Moreover, the County states, without providing citations to the record, that the Defendants' employees admit that the product was defective and the manufacturer of Microvote's voting machines admitted numerous defects in the voting system that Microvote was aware of before the November, 1995 election but failed to disclose to the County. (N.T., 10/19/00, pp. 15-16, 26-27, 29, 30-31, 35; N.T., 10/23/00, pp. 3-4, 8-9, 10, 36.)

The County also contends that this Court's jury charge

regarding the FEC standards was erroneous. (County's Mem. in Supp. Mot. for J. as Matter of Law at 5.) The contract, according to the County, limits the FEC Standards to pre-bid specifications, but excludes them from the contract's intent of the specifications, warranties, and service and support provisions. The County also contends that the jury charge caused the jury to believe that notice was a material obligation by the County and failure to comply with it would preclude the County from recovering for breach of contract. (Id.) Therefore, according to the County, the Court improperly emphasized a post-default notice in the Agreement between the County and Microvote which served to extinguish Microvote's and Westchester's obligations to the County. (Id.)

This Court also erred, according to the County, when it excluded evidence of a pre-emptive lawsuit filed by Microvote against the County which is a substantial reason, according to the County, why "written notice" was not sent and the notice provision of the contract was not material. (Id. at 5-6.) The County also states that the Court's instruction that the jury should focus primarily on the contractual documents prejudiced the County because the jury then ignored "the overwhelming evidence of systemic [voting machine] defects." (Id. at 6.) The County argues that "the overwhelming evidence of [voting machine] defects compels entry of judgment on Montgomery County's breach

of contract claim, and therefore its breach of express warranties claim for the warranties set forth in the contract." (Id.)

The Court's specifically charged the jury regarding the FEC standards and the breach of contract claim that:

In this case we are concerned with the agreement or the various agreements, there was the original agreement and the addendum, and we're concerned with what is it the parties agreed to do. And I'm not going to read this contract but I am going to refer to a couple of parts of it.

. . .

And those are those other documents, the bid and specifications were made a part of the contract.

. . .

[t]hese are the areas in which the parties, the dispute over the contract revolves. You will recall and we have heard testimony in the trial about various, I don't know, incidents or problems during these elections, and the specifications which have been incorporated into this contract. And it really comes down to whether or not the machines and the software, and the instruction and the other things that Microvote was to do under this contract, and whether or not they substantially performed their obligations under the contract.

In evaluating that, Microvote says the standard to determine whether or not they performed was the FEC standards.

. . .

It has been argued that the Federal Election Commission Standards are voluntary. Now, I'm not - other than this case, I'm not familiar with them, and I assume that they say that

they are voluntary. But once you incorporate those standards in your contract, they aren't voluntary for you anymore; they may be voluntary to the whole wor[l]d but, if you enter into a contract that incorporates them and you're obligated to live up to those standards, then they're no longer voluntary for you.

. . .

You must review those paragraphs to see their scope and you must make a decision whether or not the FEC standards apply to the field operations of these machines. The plaintiffs contend that because of the exclusions from the operation of Paragraph 6 that they are only for the purpose of testing pre-field use. The defense argues that they are for use in the field and that they are to be used to determine whether or not this voting system operated in accordance with those standards and whether or not, therefore, they satisfied the requirements of this contract.

(N.T., 10/31/00, pp. 109-112.) (emphasis added). This Court also stated:

Of course, in this -- as to the terms of the contract, it is Microvote's position that no written demand was ever made upon them to furnish replacements for the original equipment, and they were not given 60 days after receipt of a written request to do that, and therefore, they contend that there was a breach of the contract in that regard by Montgomery County. After considering all of the evidence and considering the provisions of the contract, you must decide whether or not Montgomery County has proven by a preponderance of the evidence that the defendant breached the contract and, if so, what damages are to be awarded.

. . .

Members of the jury, you will have with you

in the jury room, along with the exhibits -- and I'm going to ask counsel to specifically put together the agreement and the specifications, separate them, because you may review whatever you think is important or you may go from your recollection of what has been testified to.

(Id., pp. 112-113, 121.) (emphasis added). From this excerpt, it is clear that this Court's instruction on the FEC standards was not prejudicial to the County because the jury was provided with a review of the arguments of all the parties regarding the FEC standards. It is also clear that the jury was not instructed that it should "focus primarily on the contractual documents," as the County contends. There is also no evidence that the charge caused the jury to believe that notice was a material obligation of the County and failure to comply with it would preclude the County's recovery for breach of contract. Finally, this Court did not emphasize a post-default notice in the Agreement which extinguished the Defendants' obligations to the County. Rather, because this was, in part, a breach of contract action, this Court pointed out to the jury the contract documents and informed them that "you may review whatever you think is important or you may go from your recollection of what has been testified to." Id. at 121.

With respect to its fraud claim, the County contends that the overwhelming and undisputed evidence in this case compels entry of judgment in its favor, specifically: (1)

Microvote admitted that it knew about defects in its voting systems because other counties in other areas of the country experienced identical problems prior to the November, 1995 election, but Microvote failed to disclose them to the County, while continuing to urge the County to purchase more Microvote voting machines; (2) Microvote admitted that its software was not certified for use in the Commonwealth of Pennsylvania, although it materially misrepresented to the County that it in fact was certified; and (3) the overwhelming and undisputed evidence shows that Microvote misrepresented to the County that each machine would have a back up battery when it only produced fifty (50) batteries. According to the County, this evidence is so one-sided that no reasonable juror could find that Microvote did not commit fraud.

The jury was instructed regarding the fraud claim that "[a]s to fraud, the burden of proof must be by clear and convincing evidence. Evidence is clear and convincing where it is clear, direct, weighty and convincing to as to enable you, the jury, to come to the truth of the facts in issue." (N.T., 10/31/00, p. 116.) Microvote submitted a one-paragraph response to the County's Motion for Judgment as a Matter of Law, stating that this Motion should be denied because the County is essentially attempting to re-try the evidence as heard by the jury. Microvote states that the County's "memory of the evidence

is clearly contrary to the evidence which actually came in, and it must, therefore, be rejected." (Microvote's Resp. to County's Post-Tr. Mots. at 6.)

As we stated in our decision involving Microvote's Post-Trial Motions, judgment as a matter of law should be granted very sparingly and only "if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." LePage's Inc. v. 3M, No. 97-3983, 2000 WL 280350, at *1 (E.D. Pa. Mar. 14, 2000) (citations omitted). Although the County enumerates three separate instances in which it contends that Microvote engaged in fraudulent conduct, these are not sufficient to allow a jury to reasonably find, in light of the County's clear and convincing burden of proof, that Microvote actually committed fraud. Thus, the County's Motion for Judgment as a Matter of Law with respect to its fraud claim is denied.

Because the County contends that it is entitled to judgment as a matter of law on its breach of contract and breach of express warranty claims, it also contends that Westchester is liable to it under the performance bond. The County also claims that this Court's jury instruction regarding prejudice to Westchester constituted a directed verdict for Westchester in the amount of \$150,000 and is contrary to law. This instruction,

according to the County, was unduly prejudicial and poisoned the jury into believing that notice was a material obligation by the County and the failure to comply with the notice provision would preclude the County from recovering for breach of contract.

Westchester responds to this Motion by citing Reeves v. Sanders Plumbing Products, Inc., ____ U.S. ____, 120 S. Ct. 2097 (2000), in which the Supreme Court, in examining the standard for granting judgment as a matter of law, recently stated that:

although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.' Id. at 300.

Reeves, 120 S. Ct. at 2110. Applying this standard, Westchester claims that it is obvious that the County is not entitled to judgment as a matter of law because the County failed to present any credible evidence to support its case. Westchester notes that it was within the province of the jury to disbelieve much of the evidence presented by the County's witnesses and the County even submitted a jury instruction to that effect. According to Westchester, the jury found Microvote's witnesses more credible than the County's witnesses and the County did not "adduce any

concrete evidence on which a reasonable juror could return a verdict in its favor.” (Westchester’s Mem. Opp’n County’s Mot. J. as Matter of Law at 4.) Westchester further states that there was either substantial conflicting testimony on each of the issues contained in the County’s instant Motion, or the evidence presented by the County on a particular issue did not support the County’s case.

The conflicting testimony involved, according to Westchester, both machine performance, since the County re-sold 899 of its alleged fatally defective machines to other jurisdictions, and certification of the software as part of the Commonwealth of Pennsylvania’s certification process. Westchester states that the County’s exhibit P-49, which was a statement prepared by Gary Greenhalgh, Microvote’s former National Sales Director, for Jim Ries, Sr., Microvote’s Chairman, does not state that as of February 1, 1996, Microvote’s software was being submitted for certification by the Commonwealth of Pennsylvania. Rather, according to Westchester, the statement actually says that as of February 1, 1996, the software had been submitted to an independent laboratory for certification. Thus, the County lacks support for its contention that the software was not certified. (Id. at 6-7.)

Moreover, Westchester reiterates its arguments raised in its own Motion for Judgment as a Matter of Law regarding this

Court's instruction on prejudice to Westchester for failure to provide notice that the County considered Microvote to be in default of its contract. This Court's prior analysis is contained in the Memorandum Opinion regarding Westchester's Motion for Judgment as a Matter of Law. There, this Court assumed, *arguendo*, that it erred when it instructed the jury regarding the letter of credit. We inquired into "whether the charge, 'taken as a whole, properly apprise[d] the jury of the issues and the applicable law.'" O'Grady v. British Airways, 134 F. Supp.2d 407, 410 (E.D. Pa. Mar. 7, 2001) (citing Phillips v. Tilley Fire Equip. Co., No. 97-0033, 1998 WL 808526, at *7 (E.D. Pa. Nov. 23, 1998), *aff'd*, 203 F.3d 817 (3d Cir. 1999) (quoting Smith v. Borough of Wilkinsburg, 147 F.3d 272, 275 (3d Cir. 1998) (citation omitted))). After reviewing the charge as a whole, we concluded that it properly apprised the jury of the issues and the applicable law involved in this case. Therefore, in accordance with our prior decision, the County's Motion for Relief from Judgment is denied.

III. MOTION FOR NEW TRIAL ON BREACH OF CONTRACT, BREACH OF EXPRESS WARRANTIES AND FRAUD.

The County does not seek a new trial on its breach of implied warranty claims, the only claims for which the jury found in its favor. Instead, the County moves for a new trial on its claims for breach of contract, breach of express warranties and fraud on the basis that it was prejudiced by errors in the jury

instructions and the conduct of the Defendants at trial.

(County's Mem. Law in Supp. Mot. for New Trial at 16.)

Specifically, the County argues that: (1) the Court's instruction erroneously directed a verdict that Westchester was prejudiced by failing to receive notice from the County; (2) the Court's instruction erroneously directed a finding that the County was obligated to give Microvote written notice on its breach of contract claim; and (3) the jury charge contained a confusing and erroneous instruction on the County's claims for breach of contract, breach of express warranties and fraud.

When evaluating a motion for a new trial on the basis of trial error, the Court must first determine whether an error was made in the course of trial, and then must determine "whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice." Farra v. Stanley-Bostitch, Inc., 838 F. Supp. 1021, 1026 (E.D. Pa. 1993), aff'd, 31 F.3d 1171 (3d Cir. 1994). "Absent a showing of 'substantial' injustice or 'prejudicial' error, a new trial is not warranted and it is the court's duty to respect a plausible jury verdict." Goodwin v. Seven-Up Bottling Co. of Phila., No. 96-2301, 1998 WL 438488, at *3 (E.D. Pa. July 31, 1998) (citing Videon Chevrolet, Inc. v. Gen. Motors Corp., No. 91-4202, 1994 WL 1888931, at *2 (E.D. Pa. May 16, 1994), aff'd, 46 F.3d 1120 (3d Cir. 1994)).

All three of the County's reasons for its Motion for New Trial are based on alleged errors of this Court in instructing the jury. According to Federal Rule of Civil Procedure 51, "[n]o party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." FED. R. CIV. P. 51.

The County first contends that it is entitled to a new trial on the issue of notice to Westchester and Microvote for breach of contract and breach of express warranty pursuant to Federal Rule of Civil Procedure 59(a). It claims that "[t]he erroneous jury instructions on notice and the jury interrogatory about the \$150,000 letter of credit tainted the jury deliberations on Montgomery County's claims for breach of contract and breach of express warranty. The prejudicial directed verdict was contrary to the law and to the contractual documents." (County's Mot. for J. as a Matter of Law or New Trial at 18.) This claim has already been addressed and denied in Section II, supra.

The second reason provided by the County for a new trial is that this Court's charge gave undue weight to the post-default provision of the contract which purportedly required the County to demand in writing that Microvote take back its

defective machines and provide replacements. In addition, the County notes that this Court also refused to charge the jury on constructive notice. This argument is meritless because, as previously discussed, there was no error committed regarding this Court's charge on the post-default provision of the contract. See supra, section II.

Finally, the County states that, as set forth above, the Court's instructions on notice to both Westchester and Microvote prejudicially affected the jury deliberations on the County's claims for breach of contract, breach of express warranties and fraud. (County's Mot. for New Trial at 22.) Further, the County contends that because this Court failed to read the proposed jury instructions which the County submitted, the jury was confused. The County states:

[d]espite acknowledging the usefulness of such instructions, in lieu of the instruction, the Court's charges focused intensely on a **post-default** provision of the contract. The Court further directed the jury to review solely the contractual documents and to forego review of the overwhelming evidence of systemic and pervasive defects admitted into evidence.

(Id.)

Westchester's response to this Motion is that this Court correctly instructed the jury on the County's failure to provide written notice of its claim. It notes that there was no evidence in the record that the County made any written request

required by the contract. Without the written request, a condition precedent to liability and damages, the allegation that Microvote failed, neglected or refused to furnish the replacement for any equipment which the County contended was not up to the requirements of the contract is "utterly superfluous."

(Westchester's Mem. in Opp'n County's Mot. New Tr. at 9.)

Westchester further argues that the County did not dispute that it failed to provide a "written" demand that Microvote "remove and replace" the machines, and the County did not substantiate any oral demand that Microvote remove and replace the machines. Although the County repeatedly argues that it provided Microvote with an oral demand to take the machines back, that demand was legally insignificant and insufficient, according to Westchester, because it was made at a February 1, 1996 meeting by one of the three County Commissioners who had no individual authority to act on the County's behalf and expressed his opinion that the "best option" would be for Microvote to take back the machines. (Id. at 10.)

As discussed in Section II, supra, this Court did not direct the jury to solely review the contractual documents and forego review of other evidence, as the County suggests. Moreover, the County has not shown that any alleged errors were so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice. Thus, the County's Motion

for New Trial based on this Court's alleged error in this regard is denied.

VI. CONCLUSION.

For the reasons set forth above, the County's Motions are denied.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MONTGOMERY COUNTY,	:	
	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 97-6331
	:	
MICROVOTE CORPORATION,	:	
CARSON MANUFACTURING COMPANY, INC.,	:	
and WESTCHESTER FIRE INSURANCE	:	
COMPANY,	:	
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 25th day of June, 2001, upon consideration of the County's Post-trial Motions, and all Responses and Replies thereto, it is hereby ORDERED that the Motion to Mold the Jury Verdict (Dkt. No. 391), the Motion for Judgment as a Matter of Law (Dkt. No. 387) and the Motion for New Trial on its Breach of Contract, Breach of Express Warranties, and Fraud Claims (Dkt. No. 387) are DENIED.

BY THE COURT:

Robert F. Kelly,	J.
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