

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**CENTER STREET LOFTS CONDOMINIUM
ASSOCIATION,
Plaintiff,**

v.

**Case No. 13-135591-CK
Hon. James M. Alexander**

**CENTER STREET PARTNERS, LLC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants Sachse Construction and Development's, AZD Associates', and L&A, Inc.'s motions for summary disposition. This case arises out of the design and construction of a multi-story residential condominium project in Royal Oak known as the Center Street Lofts.

Plaintiff is a homeowners' association representing the owners of condominiums at the Lofts. Defendant Center Street Partners was the owner-developer of the project. Defendant Sachse served as the general contractor on the development. Defendant AZD served as the project's architect. And Defendant L&A was the project's engineer.

Plaintiff brought its claims based on multiple "destructive water leaks [found] throughout the structure." The construction project began in approximately 2006 and was completed sometime in 2007. The City of Royal Oak issued certificates-of-occupancy for individual units between January and June 2007.

As the project neared completion, a dispute apparently arose between Center Street Partners and Sachse. On June 15, 2007, these parties entered into a Settlement Agreement to resolve their dispute. Under this Agreement, the parties agreed, in relevant part, that:

1. Sachse is fully complete with all of its work in connection with the Project and the Contract to the full and complete satisfaction of Center Street. . . .
2. Center Street [Partners] does fully accept Sachse's work performed in connection with the Contract and the Project; and to the fullest extent permitted by law, Center Street [Partners] does release and discharge Sachse, its subcontractors, employees, officers, directors, and suppliers from and against any and all claims of whatsoever kind or nature arising out of or related to the Contract or Project except for . . . (b) a warranty for labor and/or materials supplied by Sachse for one year beginning the date of substantial completion for that particular unit or area of the Project.

It is undisputed that several of Plaintiff's homeowners submitted claims relating to water intrusion in individual units and common areas beginning in 2007, and Sachse attempted to resolve these issues. Water intrusion claims continued through 2009, with one unit (#301) presenting continuing issues to Sachse through March 2011. Plaintiff claims that Sachse was never able to fix the issues, and in spring 2011, it sought to find a cause for the water intrusion.

To this end, Plaintiff hired a contractor to investigate the source of the leaks and make any necessary repairs. This contractor, Kearns Brothers, began their work on August 18, 2011. Kearns ultimately discovered that flashing was not installed at the doorwall sills. Although Kearns made repairs, the leaking continued.

Plaintiff then decided to pursue further investigation, "this time with a licensed architect, Stephen Auger & Associates" (Auger). The investigation resulted in an August 22, 2012 meeting based on an August 10, 2012 written report that concluded that certain areas needed to be redesigned to stop the water intrusion. This work was estimated at some \$450,000. Plaintiff eventually obtained a construction loan to pay for the repairs.

Plaintiff then sued the moving and other Defendants to recover these damages on claims of: (Count I) breach of contract (against Center Street Partners); (Count II) breach of contract/professional negligence (against AZD and L&A); (Count III) breach of contract / breach of warranty (against Sachse); (Count IV) breach of one-year warranty (against Sachse); (Count V) indemnification (against Sachse); (Count VI) indemnification (against AZD and L&A); (Count VII) unlicensed practice (against AZD); (Count VIII) gross negligence (against AZD and L&A); (Count IX) breach of warranty (against Center Street Partners); (Count X) unjust enrichment (against Sachse, AZD, and L&A); and (Count XI) fraud (against Center Street Partners and Sachse).

Defendant Sachse later filed a Third-Party Complaint against Ingram Roofing – the subcontractor allegedly responsible for construction of the defective areas.

Defendants Sachse, AZD, and L&A now move for summary disposition for varying reasons under both MCR 2.116(C)(7) and (C)(10). A motion under (C)(7) determines whether a claim is barred, among other grounds, by a release. And a (C)(10) motion tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

1. Defendant Sachse’s Motion

Sasche generally argues that it is entitled to summary disposition of Plaintiff’s claims because: (1) the settlement Agreement expressly released it for all claims relating to the project; (2) the statute of limitations bars Plaintiff’s claims; and (3) it performed all warranty work as required under the Settlement Agreement.

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008),

citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Plaintiff claims that the basis for its claims arise from the June 15, 2007 Settlement Agreement between Sachse and Center Street Partners. This is so because Plaintiff claims that it “received an assignment of all contract rights from the developer [Center Street Partners] (specifically including [Center Street Partner’s] settlement agreement rights which contains the new warranty), entitling the Association to pursue direct claims against the design team and constructor of the faulty project.”

In other words, for purposes of the Settlement Agreement, Plaintiff stands in the shoes of Center Street Partners, and therefore, expressly agreed that Sachse’s work was finished and done to Plaintiff’s “full and complete satisfaction.” Additionally, under said Agreement, Center Street Partners released and discharged Sachse and any affiliates for “any and all claims of whatsoever kind or nature arising out of or related to the Contract or Project” except those for “a warranty for labor and/or materials supplied by Sachse for one year beginning the date of substantial completion for that particular unit or area of the Project.”

This language is important, Sachse argues, because “there is a difference between a breach of contract and a breach of warranty.” The Court agrees. If Plaintiff’s lawsuit is based on defective or incomplete workmanship under the construction agreement, then the same is barred because, by taking the assignment of the Settlement Agreement, Plaintiff agreed that Sachse’s

work was finished and done to Plaintiff's "full and complete satisfaction." And Plaintiff was barred from pursuing (and Sachse released from) any and all claims to the contrary.

If, on the other hand, Plaintiff's lawsuit is based on Sachse's failure to meet the express one-year warranty "for labor and/or materials" contained in the Settlement Agreement, then Plaintiff may have a potential claim.

And to further confuse this point, as Sachse points out in its Reply Brief, "Plaintiff's Complaint pleads both claims of general breach of contract and specific breach of warranty . . . [But] Plaintiff's entire Brief . . . improperly argues that alleged construction defects constitute breaches of the Settlement Warranty."

Because Plaintiff stands in Center Street Partners' shoes with respect to the Settlement Agreement, "**any and all claims**" that Plaintiff may have against Sachse "arising out of or related to the . . . Project" are waived. The only potential claim that is expressly excluded from this broad release are those relating to the one-year warranty for "for labor and/or materials." To conclude otherwise would render the release meaningless.

Based on the plain language of the Settlement Agreement that forms the foundation for its claims, Plaintiff is expressly barred from pursuing "any and all claims" except its breach of one-year warranty claim against Sachse. As a result, the following claims are DISMISSED: (Count III) breach of contract / breach of warranty (against Sachse); (Count V) indemnification (against Sachse); (Count X) unjust enrichment (against Sachse); and (Count XI) fraud (Sachse).

Only Plaintiff's Count IV for breach of the one-year warranty survives as an exception to the broad release contained in the Settlement Agreement. Sachse, however, argues that this claim is barred by the applicable statute of limitations.

The parties dispute which statute of limitations applies – the three-year limitations period for condo units under MCL 559.276¹ or the six-year general contractual period under MCL 600.5807.² Because the one-year warranty is contractual in nature, the Court finds that the general contractual period applies.

Next, the Court must determine when Plaintiff’s claim accrued. On this issue, Sachse argues that the Plaintiff’s warranty claim accrued “no later than June 2007” – when Plaintiff’s homeowners first discovered the water intrusion. As a result, Plaintiff’s August 2013 Complaint was filed more than six years after Plaintiff’s claim accrued and is, therefore, time barred.

Plaintiff, on the other hand, argues that it should not be punished for allowing Sachse the opportunity to perform the warranty repairs that were contracted for. And, as previously stated, Sachse recognized its obligation through at least March 2011 – when Doug Henderson, Sachse’s Warranty Director, emailed about Sachse’s repair efforts in one of the affected units.

Rather, Plaintiff argues that Sachse’s repair efforts should toll the statute of limitations and allow “a reasonable time” for it to determine that said efforts did not actually fix the leaks. There is some caselaw to suggest that tolling during repair efforts is appropriate under certain circumstances. See *Weeks v Slavik Builders, Inc*, 24 Mich App 621, 629; 180 NW2d 503 (1970)

¹ This section provides:

(1) The following limitations apply in a cause of action arising out of the development or construction of the common elements of a condominium project, or the management, operation, or control of a condominium project:

(a) If the cause of action accrues on or before the transitional control date, a person shall not maintain an action against a developer, residential builder, licensed architect, contractor, sales agent, or manager of a condominium project later than 3 years after the transitional control date or 2 years after the date on which the cause of action accrued, whichever occurs later.

(b) If the cause of action accrues after the transitional control date, a person shall not maintain an action against a developer, residential builder, licensed architect, contractor, sales agent, or manager of a condominium project later than 2 years after the date on which the cause of action accrued.

(2) Subsection (1) applies only to condominium projects established on or after the effective date of the amendatory act that added this subsection.

² This section provides: “The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract.”

(another leaky roof case, which reasoned “According to the weight of authority it seems that the statute of limitations is tolled so long as the vendor insists that the defects in the article sold can be repaired and is attempting to do so.”).

The *Weeks* Court also concluded that the appellees in that case had “commenced their action **within a reasonable time after it was determined that repairs would not correct the leaking roof.**” *Weeks*, 24 Mich App at 629. Further, it is undisputed that Sachse was notified **during the warranty period** that there were water intrusion issues in several places. But Sachse never fixed the issues.

The Court is convinced that it would be an absurd result to allow Sachse to escape its warranty obligation under the contract for issues that Sachse not only acknowledged during the warranty period, but attempted to repair through at least March 2011. As a result, the Court finds that Plaintiff’s claim accrued at the time that it was clear that Sachse was unable or unwilling to adequately fix these long-existing water intrusion issues – somewhere between March 2011 and the August 2012 Auger report. In any event, Plaintiff undoubtedly brought its claim within six years of these dates.

For the foregoing reasons, the Court finds that the statute of limitations does not bar Plaintiff’s Count IV for breach of the one-year warranty under the Settlement Agreement, and Sachse’s motion for summary based on the same is DENIED.

2. Defendants AZD and L&A’s Motion

Next, Defendants AZD and L&A, respectively the architect and engineer on the project, argue that they are entitled to summary disposition based the statute of limitations/repose found

in MCL 600.5839(1). The version in effect at the time of these Defendants' involvement in the project provided:

No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, **nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer** performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, **more than 6 years after the time of occupancy** of the completed improvement, use, or acceptance of the improvement, **or 1 year after the defect is discovered or should have been discovered**, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.³

Each of Plaintiff's claims against AZD and L&A arise out of alleged defects and deficiencies in the design and construction of an improvement to real property. As stated, the City of Royal Oak issued certificates of occupancy between January and June 2007 – more than six years before Plaintiff's filed their August 2013 Complaint. As a result, Plaintiff's suit is untimely because it was filed “more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.”

Further, Defendants argue that Plaintiff's suit is also time-barred under the one-year discovery rule in the same statute, which provides that a plaintiff cannot maintain any action to recover damages or for indemnity more than “1 year after the defect is discovered or should have been discovered.”

When considering when a plaintiff “discovered or should have discovered the claim” for purposes of a statute of limitations, our Supreme Court has reasoned that the trial court can rule

³ The statute was amended in 2011, effective January 1, 2012. But this revision did not substantively change the limitations periods contained therein.

as a matter of law “in the absence of disputed facts.” *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 230; 561 NW2d 843 (1997), quoting *Moll v Abbott Laboratories*, 444 Mich 1, 18; 506 NW2d 816 (1993).

Defendants argue that Plaintiff had actual knowledge of the water leaks in 2007 – when its homeowners first complained of the issue. And water intrusion complaints continued consistently every year between 2007 and 2011. Further, and more telling, Plaintiff admits that the Kearns investigation discovered structural problems when it found that “flashing was not installed at the doorwall sills” in August 2011. These facts are undisputed. And these facts are sufficient to establish that Plaintiff knew or should have known of alleged defects and deficiencies in the design and construction by August 2011 at the latest. As a result, Plaintiff’s August 2013 Complaint was filed well outside of the one-year discovery period.

The Court will also note that Plaintiff all but abandoned its claims against L&A in its Response to Defendants’ summary motion. Instead, Plaintiff spent the overwhelming majority of its Brief arguing that it can pursue an independent cause of action against AZD under an unauthorized practice of architecture theory.

Under MCL 339.2010, “A firm may engage in the practice of architecture, professional engineering, or professional surveying in this state, if not less than 2/3 of the principals of the firm are licensees.”

And AZD presents ample evidence that, during the entire duration of the project, Frank Zychowski (a licensed architect) served as AZD’s president, secretary, treasurer. Further, Mr. Zychowski has always been the sole principal of AZD.

In Response, rather than presenting evidence to establish that a question of material fact remains in dispute, Plaintiff presents only **arguments** to the contrary.⁴ The Michigan Court of Appeals has held that:

A party opposing a motion brought under C(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. . . . [W]here the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993) (internal citations omitted).

Because Plaintiff fails to present evidence that establishes the existence of a question of fact, AZD's motion for summary on this issue is properly GRANTED.

Further, assuming arguendo that Plaintiff had presented sufficient evidence to survive summary disposition, the Court is unconvinced that MCL 339.2010 was intended to provide an independent cause of action. But even if it was so construed, Plaintiff's claim still falls outside of the six-year statute of limitations for such claims because AZD's last day of work on the project was in December 2006.⁵ And Plaintiff presents no authority that such claim can be revived outside of said timeframe.

For all of the foregoing reasons, Defendants AZD and L&A's motions for summary disposition are GRANTED, and Plaintiff's Complaint as to only these entities is DISMISSED.

Summary

To summarize, Sachse Construction's motion for summary disposition is GRANTED IN PART. Plaintiff's claims for: (Count III) breach of contract / breach of warranty; (Count V)

⁴ Plaintiff attaches a corporate filing from 2003, but the project apparently did not begin until 2006. The corporate structure in 2003 has no bearing on this dispute.

⁵ The Court rejects Plaintiff's claims otherwise.

indemnification; (Count X) unjust enrichment; and (Count XI) fraud are DISMISSED as to Defendant Sachse.

Sachse's motion with respect to Plaintiff's Count IV for breach of the one-year warranty, however, is DENIED. This claim survives as an exception to the broad release contained in the Settlement Agreement.

Defendants AZD and L&A's motions for summary disposition are GRANTED, and Plaintiff's Complaint as to only these entities is also DISMISSED.

IT IS SO ORDERED.

February 25, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge