STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SCOTTSDALE INSURANCE CO,

Plaintiff,

v

Case No. 2013-134852-CZ
Hon. Wendy Potts

CHARTER TOWNSHIP OF ORION, et al,

Defendants.
_____/

OPINION AND ORDER RE: ALL BUILDING SERVICES AND WILLIAM MATHISEN'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10)

At a session of Court
Held in Pontiac, Michigan
On
MAR 1 2 2015

On July 3, 2011, Basketball America's facility in Orion Township was flooded and suffered extensive damage. The flood was caused by a leak in a water meter on a water supply line that connected the building to the Township's water service. Its insurer, Plaintiff Scottsdale Insurance Company, paid to repair the damage and claims that the costs exceed $380,000. Scottsdale then filed this subrogation action against several parties including the general contractor Defendant L.R. Mullins Contracting, Inc, who installed the water supply line, and Defendants All Building Services, LLC and its principal William Mathisen, who installed a water meter. All Building and Mathisen claim that the flood was caused by a drop-in gasket in the meter that "blew out" causing water to leak. According to Mathisen, the meter was a rebuild and the gasket should have been bolted in. Mathisen claims that the Township gave the meter fully assembled to LR Mullins's employee Jeff Howe, who then gave it to Mathisen for

installation. Mathisen did not disassemble the meter or otherwise inspect it, and claims he could not test it for leaks when he installed it because the water line was not completed and the water was not on. When Basketball America discovered the flood on July 3rd, it called Howe, who shut off the water. The Township's Assistant Director of water and sewer, William Basigkow inspected the meter the day after the flood and also noticed the gasket failure. Scottsdale asserts several claims against Mathisen and All Building claiming that they negligent, grossly negligent, breached their contract and warranties, and violated the Magnuson-Moss Warranty Act.

The matter is now before the Court on All Building and Mathisen's motion for summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint, and (C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The Court notes at the outset that Scottsdale has not presented any argument or evidence in opposition to Defendants' request to dismiss Scottsdale's Count VIII alleging gross negligence. Thus, Mathisen and All Building are entitled to summary disposition of that claim.

Defendants assert that Scottsdale's negligence claim fails because it is based on purported duties regarding the design, manufacture, or inspection of the meter. Defendants assert that they did not owe Scottsdale's insured any duty beyond their contractual obligation to install the meter, and the damages were not caused by the installation. To establish its negligence claim, Scottsdale must demonstrate that Defendants owed a duty and breached that duty. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). Whether a duty exists is generally a question of law for the Court. *Hill*, *supra* at 659. To determine whether a duty exists, the Court considers several factors including (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the burden on the defendant, and (4) the nature of the risk presented. *Hill*, *supra* at 661. The first

two factors – relationship and foreseeability – are the most important and no duty can be imposed if these two factors are absent. *Hill*, *supra*.

Although Mathisen and Basketball America did not have a direct, contractual relationship, Mathisen was performing work at Basketball America's building for its benefit. Thus, a relationship existed, albeit a remote one. Further, it was foreseeable that if the meter was not properly built or assembled, it could cause a water leak. Mathisen's knowledge and experience uniquely qualified him to foresee the possibility of a water leak and take measures to prevent it. Scottsdale's expert asserts that Mathisen, as a professional plumber, could have and should have inspected the meter to determine if it was correctly assembled and did not leak. Mathisen has not demonstrated how requiring him to inspect the meter before installing it would impose an undue burden on him. Based on these considerations, the Court concludes that it is reasonable to impose a duty on Mathisen and All Building to inspect the meter and verify that it was properly assembled.

Defendants also assert that the Township ordinance regarding water connections precluded them from inspecting the meter's gasket. However, the Court agrees with Scottsdale that this is an incorrect interpretation of the ordinance, which states that "no person shall interfere with or move a water meter from any service connection without first receiving permission from the Water Department." Charter Township of Orion, Ordinance No. 68, § 10(H). The ordinance is obviously aimed at preventing consumers from tampering with meters, not at barring a plumber installing water meter from inspecting it. Further, the plain language of the ordinance contradicts Defendants' interpretation because it refers to interfering with a water meter that is already connected to water service. Nothing in this ordinance would have prevented Defendants from checking the connections and gasket on the meter before installing. For all of

these reasons, the Court concludes that Mathisen and All Building owed Basketball America duties to install the meter properly and to take reasonable measures to determine if the meter was correctly assembled or functioning properly. Given the conflicting evidence presented, whether Mathisen or All Building in fact breached this duty is a question for the trier of fact. Thus, these Defendants are not entitled to summary disposition of Scottsdale's negligence claims.

Defendants further assert, and the Court agrees, that Scottsdale's breach of contract claim fails as a matter of law. There was no contractual relationship between Basketball America and All Building. Further, Scottsdale cannot show that its insured was a third-party beneficiary of Mullins's contract with All Building. Basketball America would be a third-party beneficiary only if the contract states that All Building undertook its contractual obligations directly for Basketball America's benefit. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428, 670 NW2d 651 (2003). The fact that Basketball America is incidentally benefited does not give it rights as a third-party beneficiary. *Alcona Community Schools v State*, 216 Mich App 202, 205; 549 NW2d 356 (1996). Because Scottsdale presents no evidence showing a question of fact whether its insured was a third-party beneficiary, the contract claim fails as a matter of law and Mathisen and All Building are entitled to summary disposition of that claim.

Similarly, Scottsdale's breach of express warranty claims fail for lack of evidence that Mathisen or All Building made any express warranties regarding the condition of the water meter. An express warranty occurs where a seller sets forth "a promise or affirmation, description, or sample with the intent that the goods will conform." *Guaranteed Construction Co v Gold Bond Products*, 153 Mich App 385, 390 (1986). Scottsdale presents no evidence of an express warranty and asserts only that summary disposition is premature because discovery in ongoing. However, discovery closed January 15, more than a month before Scottsdale's brief

was filed. Even if discovery was still open, Scottsdale has not explained what additional discovery would be necessary to produce evidence to support its claim. Summary disposition would be premature only if further discovery is likely to yield support for Scottsdale's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Because Scottsdale has not demonstrated a question of fact for trial on any of its express warranty theories, Mathisen and All Building are entitled to summary disposition of those claims.

As for Scottsdale's implied warranty theories, they are all premised on the notion that Mathisen or All Building sold or supplied the meter, however, the evidence shows that the meter was supplied by the Township. Implied warranties of merchantability or fitness for a particular purpose generally arise in the context of a sale of goods. See MCL 440.2314 and 440.2315. Scottsdale presents no argument or authority explaining how the claims would apply to someone who merely installed a device. Because there is no evidence that All Building or Mathisen sold or supplied the meter, and Scottsdale has not demonstrate that further discovery is likely to produce such evidence, the implied warranty claims also fail as a matter of law and summary disposition is warranted.

Defendants next assert that Scottsdale's res ipsa loquitur claim fails because there is no evidence that its damages were caused by an agent or instrumentality within Defendants' exclusive control. *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005). Scottsdale does not cite evidence showing a question of fact on this point, and again asserts that summary disposition is premature due to ongoing discovery. For the reasons stated above, Scottsdale cannot rely on unspecified further discovery to avoid summary disposition of this claim. The Court further notes that even if there was outstanding discovery that was likely to provide support for Scottsdale's res ipsa loquitur theory, it is not a valid cause of action. Rather, res ipsa loquitur is a means for

proving a negligence claim with circumstantial evidence. *Woodard, supra* at 6. Because res ipsa loquitur is not a cause of action and, even if it was, Scottsdale fails to demonstrate a question of fact on the essential elements of the doctrine, Mathisen and All Building are entitled to summary disposition.

In their final argument, Defendants assert that Scottsdale's claim under the Magnuson-Moss Warranty Act fails because it applies only to consumer products intended for personal, family, or household purposes. See 15 USC § 2301(1). The water meter here was plainly supplied for a business or governmental purposes, and Scottsdale presents no argument or authority for the notion that the Act would apply to a water meter supplied by a governmental entity to a business. Thus, Mathisen and All Building are entitled to summary disposition of this claim as well.

For all of these reasons, the Court grants Mathisen and All Building summary disposition of Scottsdale's claims for breach of contract (Count II), breach of warranties (Counts IV, V, VI, and VII), gross negligence (Count VIII), res ipsa loquitur (Count IX), and violation of the Magnuson-Moss Warranty Act (Count X). However, the Court denies summary disposition of Scottsdale's negligence claim (Count I).

IT IS SO ORDERED.

Dated: MAR 1 2 2015

Hon. Wendy Potts