

STATE OF MICHIGAN
IN THE 37th CIRCUIT COURT FOR CALHOUN COUNTY

ALBION COLLEGE,

Plaintiff,

vs.

STOCKADE BUILDINGS, INC.,
a Missouri corporation; and R.W.
MERCER CO., a Michigan
corporation,

Defendants.

Case No. 13-3308-CZ

HON. CHRISTOPHER P. YATES

OPINION AND ORDER RESOLVING DEFENDANTS' MOTIONS
FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(7) & (8)

In 2004, Plaintiff Albion College ("Albion") entered into formal negotiations with Defendant Stockade Buildings, Inc. ("Stockade") for the design and construction of an equestrian facility at the college. Stockade referred Albion to one of Stockade's licensed builders, Defendant R.W. Mercer, Co. ("Mercer"), for construction work. The project took place in two phases, which culminated in the completion of the state-of-the-art facility in August 2007. As construction progressed, the Albion representatives involved in the project noticed leaks in the roof on two separate occasions and then brought those issues to the attention of Stockade, which directed Mercer to address those matters. Nobody at Albion noticed any further leaks until 2012, when extensive water damage materialized as a result of what Albion feared was a design defect. Albion sought redress from Stockade, which in turn cited poor workmanship on Mercer's part. After informal discussions led nowhere, Albion filed suit on October 18, 2013, and the defendants promptly moved for summary disposition under MCR 2.116(C)(7) and (8) in an attempt to put this litigation out to pasture.

I. Factual Background

The defendants have requested summary disposition at the outset of this action pursuant to MCR 2.116(C)(7) and (8). Because a “motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint[,]” the Court must consider “only the pleadings” and accept “well-pleaded factual allegations . . . as true” in considering relief on that basis. See Maiden v Rozwood, 461 Mich 109, 119-120 (1999). The Court has more latitude in weighing relief under MCR 2.116(C)(7) because “[a] party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence.” Id. at 119. Nevertheless, the “contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant[,]” see id., so the Court shall use the allegations in the complaint as a starting point and then adjust those allegations as the record requires.

In 2004, Plaintiff Albion approached Defendant Stockade about designing and constructing an equestrian facility. See First Amended Complaint, ¶ 13. Stockade took on the responsibility “for the overall design and engineering” of the equestrian center, id. ¶ 14, but enlisted Defendant Mercer – which “was an authorized local Stockade builder” – to construct the facility. Id. Then Albion and Mercer entered into several contracts for the construction project, which took place in two phases. See id., ¶¶ 16-17. Albion and Mercer signed a contract for the first phase on March 23, 2004.¹ See Defendant Mercer’s Brief in Support of Motion for Summary Disposition, Exhibit A (Standard Form

¹ That document identifies the agreement date as March 23, 2003. See Defendant Mercer’s Brief in Support of Motion for Summary Disposition, Exhibit A. But Plaintiff Albion did not even approach Defendant Stockade until 2004, see First Amended Complaint, ¶ 13, and Defendant Mercer did not agree to become a licensed Stockade builder until September 9, 2003. See Reply Brief in Support of Defendant Stockade’s Motion for Summary Disposition, Exhibit 1. Thus, the Court can only presume that Albion and Mercer actually entered into their first agreement on March 23, 2004, as opposed to March 23, 2003.

of Agreement Between Owner and Contractor). The two parties thereafter entered into an amended contract for the completion of phase-one construction in August 2004. See id. (Short-Form Proposal & Contract). In December 2004, during the phase-one construction, Plaintiff Albion became aware of leaks in the roof at the equestrian center and promptly notified the defendants. See First Amended Complaint, ¶ 20. Representatives of Defendant Stockade inspected the roof and concluded that “the solution to the problem was to use bigger screws and sealant[,]” id., so the defendants “undertook these repairs.” Id.

On November 15, 2006, Plaintiff Albion and Defendant Mercer entered into a new agreement governing the second phase of the construction project. See Defendant Mercer’s Brief in Support of Motion for Summary Disposition, Exhibit A (Standard Form of Agreement Between Owner and Design/Builder). During the second phase of the construction, Albion “again noticed roof leaks and the same shearing issue and elongation of screw holes in other areas that had previously occurred in 2004.” See First Amended Complaint, ¶ 21. When Defendant Stockade received news about the issue, “once again Stockade attributed the problem to the size of the screws being used on the roof and again recommended the use of heavier duty screws.” Id. Consequently, Mercer not only made those repairs, id., but also finished the entire construction project “by August 2007.” See Defendant Mercer’s Brief in Support of Motion for Summary Disposition, Exhibit B (Affidavit of Andrew L. Neelis, Jr., ¶ 2).

For nearly five years, Plaintiff Albion simply used its new equestrian center without issues. But in the Spring of 2012, Albion once again “observed a number of roof leaks and promptly notified [Defendant] Stockade.” See First Amended Complaint, ¶ 22. Stockade blamed those problems on Defendant Mercer, which “undertook repairs, which included replacing missing screws,” see id., but

Mercer ultimately informed Albion “that it believed the problems were related to the design of the structure and recommended that Albion College hire an engineer to review the problems and make recommendations.” See id. Albion hired an engineering firm, see id., ¶ 23, which “concluded that the design of the Equestrian Facility was improper, inadequate and deficient in numerous respects[.]” Id., ¶¶ 24-26. Albion notified the defendants of those conclusions, but “Stockade denied any design deficiencies and attributed” the problems “to faulty and deficient workmanship, construction and installation on the part of Mercer. See id., ¶ 27. Indeed, when Albion demanded that the defendants undertake the expensive repairs necessary to render the facility fit for its intended purpose, Stockade “failed and refused to do so.” Id., ¶ 30.

On October 18, 2013, Plaintiff Albion commenced this suit against Defendants Stockade and Mercer by filing a complaint in the Calhoun County Circuit Court. Defendant Stockade responded by filing a motion for summary disposition under MCR 2.116(C)(7) and (8) on December 13, 2013. Then, on January 17, 2014, the case was reassigned from the Calhoun County Circuit Court to the Kent County Circuit Court for all further proceedings. On February 13, 2014, Mercer joined the fray by filing its own motion for summary disposition under MCR 2.116(C)(7) and (8). One day later, Albion submitted a “First Amended Complaint and Jury Demand” that added claims for third-party beneficiary and negligence to the three claims set forth in the original complaint. Thus, in its present posture, this action includes claims for breach of contract against both defendants, breach of express warranty against both defendants, breach of warranty of fitness for a particular purpose against both defendants, third-party-beneficiary rights against both defendants, and negligence against both of the defendants. In moving for summary disposition, both defendants contend that none of those claims can be sustained and that all of those claims are barred by the governing statutes of limitations.

II. Legal Analysis

The Court's review at this early stage is narrowly circumscribed. The Court may only award summary disposition under MCR 2.116(C)(8) if "the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" See Maiden, 461 Mich at 119. Although the Court has more latitude under MCR 2.116(C)(7), "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." Id. "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." RDM Holdings, Ltd v Continental Plastics Co, 281 Mich App 678, 687 (2008). "If a factual dispute exists, however, summary disposition is not appropriate." Id. With these principles in mind, the Court must address each of the five claims advanced by Plaintiff Albion in its first amended complaint.

A. Breach of Contract.

Plaintiff Albion accuses both defendants of breach of contract, but Albion has only produced contracts with Defendant Mercer. As a result, Defendant Stockade insists that it has no liability to Albion for breach of contract. According to MCR 2.113(F)(1), "[i]f a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit" in almost all circumstances. Albion's failure to attach to its first amended complaint a written contract between itself and Stockade forecloses Albion from proceeding against Stockade on a breach-of-contract claim. See English Gardens Condominium, LLC v Howell Township, 273 Mich App 69, 81 (2006), rev'd in part on other grounds, 480 Mich 962 (2007). Thus, the Court must grant summary disposition under MCR 2.116(C)(8) to Stockade on that claim.

Defendant Mercer relies solely upon the statute of limitations in seeking summary disposition with regard to Plaintiff Albion's breach-of-contract claim,² which "is governed by the six-year statute of limitations in MCL 600.5807." See Miller-Davis Co v Ahrens Construction, Inc, 489 Mich 355, 365 (2011). "The six-year limitation of MCL 600.5807(8) begins to run 'when the promisor fails to perform under the contract.'" Miller-Davis Co v Ahrens Construction, Inc, 495 Mich 161, ___ (2014). More precisely, "[a] cause of action for breach of a construction contract accrues at the time the work on the contract is completed."³ Employers Mut Cas Co v Petroleum Equip, Inc, 190 Mich App 57, 63 (1991). Mercer completed its work on the Albion equestrian center "by August 2007." See Defendant Mercer's Brief in Support of Motion for Summary Disposition, Exhibit B (Affidavit of Andrew L. Neelis, Jr., ¶ 2). Therefore, the statute of limitations for the breach-of-contract claim would have expired six years later in August of 2013. But on July 23, 2013, the parties entered into an agreement effective July 1, 2013, "to toll the statute of limitations for the filing of any Claim" by Albion against Mercer. See Plaintiff Albion's Answer to Defendant Mercer's Motion for Summary Disposition, Exhibit 15. That tolling agreement was still in effect when Albion filed its complaint on October 18, 2013, so that agreement preserved Albion's breach-of-contract claim. See Pitsch v Blandford, 474 Mich 879 (2005) (order of summary reversal). Thus, the Court must deny Mercer's request for summary disposition under MCR 2.116(C)(7) on the claim for breach of contract.

² Defendant Mercer's brief in support of its motion for summary disposition includes a full-blown argument that Plaintiff Albion's claims must be resolved through arbitration, see Defendant Mercer's Brief in Support of Motion for Summary Disposition at 6-7, but Mercer firmly disavowed that position during oral argument on the defendants' motions for summary disposition.

³ Our Supreme Court recently prescribed this type of analytical approach in noting that the defendant "first failed to perform under the contract when it installed a roof that did not conform to plan specifications" so the "cause of action for *this* breach accrued by April 1999, when Miller-Davis made its last payment to [the defendant] under the subcontract." Miller-Davis, 495 Mich at ___.

B. Breach of Express Warranty.

In Count Two of its first amended complaint, Plaintiff Albion sets forth a claim against both defendants for breach of express warranties. With respect to Defendant Stockade, Albion makes the claim despite the absence of privity of contract. Our Supreme Court has not addressed the viability of such a claim in that circumstance, see Davis v Forest River, Inc, 482 Mich 1123, 1124 n 3 (2008) (Cavanagh, J, dissenting), but our Court of Appeals has held that, under the Michigan version of the Uniform Commercial Code, “where there is no contract, and therefore no ‘bargain,’ there can be no express warranty under MCL 440.2313.” Heritage Resources, Inc v Caterpillar Fin Services Corp, 284 Mich App 617, 635 (2009). To be sure, that holding does not necessarily govern claims arising from circumstances other than the sale of goods,⁴ but any claim for breach of an express warranty, which necessarily rests upon a promise by the seller, must flow from a contract. Id. at 637. Indeed, the notion of an express warranty in the absence of a contract is, at best, anomalous. Accordingly, the Court shall grant summary disposition under MCR 2.116(C)(8) to Stockade on Albion’s claim for breach of express warranties.

In contrast, the Court cannot award summary disposition to Defendant Mercer on the claim for breach of an express warranty. Every contract between Plaintiff Albion and Mercer contains a disclaimer-of-warranties clause, but Part 2 of the November 15, 2006, contract states in section 3.2.9 that Mercer “warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that

⁴ By all accounts, any agreement between Plaintiff Albion and Defendant Stockade involved the design and construction of the equestrian facility. Although Stockade provided materials for the construction project, the predominant purpose of any agreement between the parties was for services. See Frommert v Bobson Construction Co, 219 Mich App 735, 738-739 (1996). Therefore, the claim for breach of express warranty is not governed by the Uniform Commercial Code.

the construction will be free from faults and defects, and that the construction will conform with the requirements of the Contract Documents.” See Defendant Mercer’s Brief in Support of Motion for Summary Disposition, Exhibit A. Such an “express warranty is no different than any other term of the contract[,]” see Heritage Resources, 284 Mich App at 634, so Albion may enforce that express warranty in the same manner that it may rely upon any other term in its contract with Mercer.

Nor is Plaintiff Albion’s claim against Defendant Mercer barred by the statute of limitations. A claim for breach of an express warranty invokes the Court’s authority to afford redress for breach of contract, so that claim had to be filed within the six-year statute of limitations prescribed by MCL 600.5807(8). Frommert v Bobson Construction Co, 219 Mich App 735, 736-737 (1996). Because Mercer completed its work “by August 2007[,]” see Defendant Mercer’s Brief in Support of Motion for Summary Disposition, Exhibit B (Affidavit of Andrew L. Neelis, Jr., ¶ 2), Albion would have had until August 2013 to file its claim. But the parties signed an agreement effective July 1, 2013, to toll the statute of limitations for any claim by Albion. See Plaintiff Albion’s Answer to Defendant Mercer’s Motion for Summary Disposition, Exhibit 15. That tolling agreement remained in effect until Albion filed its complaint on October 18, 2013, so it preserved Albion’s claim for breach of an express warranty. See Pitsch, 474 Mich 879. Accordingly, the Court must deny Mercer’s request for summary disposition under MCR 2.116(C)(7) on the claim for breach of an express warranty.

C. Breach of Warranty of Fitness for a Particular Purpose.

Count Three presents a claim against both defendants for breach of a warranty of fitness for a particular purpose. Michigan’s version of the Uniform Commercial Code includes the concept of an implied warranty of fitness for a particular purpose, see MCL 440.2315, which may be disclaimed

“by a writing” that is “conspicuous.” See MCL 440.2316(2); see also Heritage Resources, 284 Mich App at 641 n 15. But in a case such as this, where the Uniform Commercial Code does not apply, see Frommert, 219 Mich App at 738-739, the controlling principles are significantly murkier. Our Supreme Court had explained that “the doctrine of implied warranty of fitness for use is to promote high standards in business and to discourage sharp dealings[.]” Wade v Chariot Trailer Co, 331 Mich 576, 581 (1951), so a “provision seeking to exclude implied warranties should be strictly construed.” Id. Nevertheless, that language manifestly suggests that such warranties can be disclaimed, just as they may be under the Uniform Commercial Code. See, e.g., McGhee v GMC Truck & Coach Div., General Motors Corp, 98 Mich App 495, 500-501 (1980). Every contract between Plaintiff Albion and Defendant Mercer contains a disclaimer of the warranty of fitness for a particular purpose, and each disclaimer appears in bold typeface with each letter capitalized. See Defendant Mercer’s Brief in Support of Motion for Summary Disposition, Exhibit A. These provisions effectively disclaimed all warranties of fitness for a particular purpose on behalf of Mercer, so the Court must grant Mercer summary disposition under MCR 2.116(C)(8) on Albion’s implied-warranty claim in Count Three.

Defendant Stockade had no written contract with Plaintiff Albion, so Stockade cannot rely upon a disclaimer to defeat Albion’s cause of action for breach of an implied warranty of fitness for a particular purpose. Beyond that, “[o]ur Supreme Court has held, at least in certain circumstances, that an injured plaintiff who is not in privity of contract with a remote manufacturer may nonetheless enforce an *implied* warranty against that manufacturer[.]” Heritage Resources, 284 Mich App at 638 (emphasis added), so lack of privity between Albion and Stockade may not foreclose Albion’s claim against Stockade for breach of an implied warranty of fitness for a particular purpose. See id. at 639 (noting unsettled state of Michigan law on this point). Although Albion’s implied-warranty claim

against Stockade most assuredly does not fall within the heartland of recognized theories under the law in Michigan, the Court cannot conclude that the claim is “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” See Maiden, 461 Mich at 119. Accordingly, the Court must deny relief to Stockade pursuant to MCR 2.116(C)(8).

Defendant Stockade contends that Plaintiff Albion’s breach-of-warranty claim is barred by the statute of limitations. Our Legislature has decreed, however, that “[i]n actions for damages based on breach of a warranty of quality or fitness the claim accrues at the time the breach of the warranty is discovered or reasonably should be discovered.” See MCL 600.5833. Here, the parties have not discussed this discovery rule, so the Court must undertake the analysis on its own. Throughout the course of construction, Albion periodically reported leaks in the roof to Stockade, which responded by directing Defendant Mercer to use heavier-duty screws and sealant to address the issue. See First Amended Complaint, ¶¶ 20-21. Then, for nearly five years after completion of the project, no leaks appeared. See id., ¶ 22. But when Albion found leaks again in the Spring of 2012, Albion hired an engineering firm, which reported that the equestrian center suffered from significant design defects. See id., ¶¶ 23-24. Whether Albion discovered or should have discovered those defects in the Spring of 2012 when it observed the leaks, see Frommert, 219 Mich App at 740, or later that year when it received the engineering firm’s report, Albion can reasonably assert that its claim for breach of an implied warranty of fitness for a particular purpose did not accrue under MCL 600.5833 until 2012. Thus, Albion’s complaint filed on October 18, 2013, satisfied the applicable statute of limitations, so the Court must deny Stockade’s request for summary disposition under MCR 2.116(C)(7).⁵

⁵ In rendering this ruling, the Court recognizes that discovery may yield evidence establishing that Plaintiff Albion knew, or should have known, of the design defects years before it received the engineering firm’s report. If such evidence surfaces, the Court may well revisit its ruling.

D. Third-Party Beneficiary.

After receiving Defendant Stockade's motion for summary disposition, Plaintiff Albion filed an amended complaint adding two new claims, including the cause of action in Count Four labeled as "Third Party Beneficiary." This claim seems to be a somewhat desperate salvage effort aimed at keeping Stockade in the case, but it includes a prayer for relief against both defendants. As a result, the Court must consider whether Albion can proceed against both Stockade and Defendant Mercer on a third-party-beneficiary theory. Michigan law does not recognize an independent cause of action for third-party beneficiary, but "a person who qualifies under the third-party-beneficiary statute gains the right to sue to enforce the contract." Shay v Aldrich, 487 Mich 648, 666 (2010); see also MCL 600.1405. Here, Albion characterizes itself as a third-party beneficiary with respect to the contract between Stockade and Mercer. To avail itself of remedies under that contract, Albion must establish itself as an "intended, not incidental," third-party beneficiary, see Schmalfeldt v North Pointe Ins Co, 469 Mich 422, 427 (2003), which requires a showing that "that contract establishes that a promisor has undertaken a promise 'directly' to or for" Albion. Id. at 428. The Court must "look no further than the 'form and meaning' of the contract itself" to determine whether Albion is an intended third-party beneficiary. Id.

Defendants Stockade and Mercer signed a "Builder's Dealership Contract" on September 9, 2003, that empowered Mercer to act as an authorized Stockade dealer.⁶ See Reply Brief in Support of Defendant Stockade's Motion for Summary Disposition, Exhibit 1. That agreement spelled out

⁶ Plaintiff Albion should have attached to its complaint the contract under which it asserts rights as a third-party beneficiary. See MCR 2.113(F)(1). Defendant Stockade compensated for that omission by attaching the contract to its reply brief. The Court shall treat the document attached to Mercer's reply brief as if it had been properly submitted with the complaint, see MCR 2.113(F)(2), which enables the Court to consider the document in conducting its review under MCR 2.116(C)(8).

how Stockade and Mercer were to interact throughout their relationship, but it made no mention of the Albion project. See id. More broadly, the agreement includes no representations regarding the quality of the designs and materials Stockade would furnish to Mercer. See id. In sum, nothing in the agreement between Stockade and Mercer provides even a hint that Albion would benefit from that agreement in any way.⁷ Across the broad spectrum of potential third-party beneficiaries, Albion has one of the weakest claims the Court can imagine. Consequently, the Court must award summary disposition under MCR 2.116(C)(8) to both defendants on the third-party beneficiary claim in Count Four.

E. Negligence.

The final claim added as Count Five of the first amended complaint accuses both defendants of negligence. Leaving aside the potential substantive defects in this theory, see, e.g., Huron Tool and Engineering Co v Precision Consulting Services, Inc, 209 Mich App 365, 368 (1995) (explaining “economic loss doctrine”), the claim necessarily falls prey to the three-year statute of limitations set forth in MCL 600.5805(10). See Kuznar v Raksha Corp, 481 Mich 169, 172 (2008). ““Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues.”” See Trentadue v Buckler Lawn Sprinkler, 479 Mich 378, 388 (2007). A claim for negligence accrues ““at the time the wrong upon which the claim is based was done[,]”” which is ““when the plaintiff is harmed[.]”” Id. This formulation of the triggering event for accrual focuses on the timing of the

⁷ Plaintiff Albion relies upon Vanerian v Charles L Pugh Co, Inc, 279 Mich App 431 (2008), to support its third-party-beneficiary theory, but that decision reveals the weakness in Albion’s claim. In Vanerian, the third-party beneficiary – a homeowner – was mentioned by name in the contract between the general contractor and the subcontractor. See id. at 436. Here, in contrast, Albion is not mentioned anywhere in the agreement between Defendants Stockade and Mercer. Therefore, the Court finds no support for Albion’s claim in the Vanerian decision.

harm, rather than the date on which the plaintiff discovered the damage. Therefore, the Court cannot base its determination of the accrual date upon when Albion knew, or should have known, about the defects. See id. at 388-393 (concluding that legislative enactments abrogated common-law discovery rule). Instead, the Court must focus exclusively on the point in time when Albion was harmed. That point occurred more than three years before Albion filed suit on October 18, 2013, so the Court must grant summary disposition under MCR 2.116(C)(7) because the negligence claim is barred by the applicable three-year statute of limitations.

III. Conclusion

For the reasons stated in this opinion, the Court shall grant summary disposition to Defendant Stockade on Counts One, Two, Four, and Five of Plaintiff Albion's first amended complaint, and to Defendant Mercer on Counts Three, Four, and Five of that complaint. The remaining claims shall be the subject of discovery, dispositive motions under MCR 2.116(C)(10), and – if necessary – trial within a relatively short period of time.

IT IS SO ORDERED.

Dated: May 30, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge