

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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July 30, 2015

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RE: LTL Acres L.P. v. Butler Manufacturing Co., et al.
C.A. No: 13C-07-025 ESB

Dear Counsel:

This is my decision on the Motions for Summary Judgment filed by Defendants Butler Manufacturing Company and Dryvit Systems, Inc., in this case involving the construction of the “Johnny Janosik World of Furniture” building that is owned by Plaintiff LTL Acres Limited Partnership. The Janosik Building is a uniquely shaped two-story, 180,000-square-foot structure that houses Janosik’s retail and management offices. The retail outlet is on the first floor. The management offices are on the

second floor. The Janosik Building was constructed using Butler products. This included the primary steel frames, secondary steel (girts and purlins), the roof system, and the wall cladding. The Butler wall product that was used is known as the Koreteck/R-Steel System. The Koreteck panel system is a one piece, engineered structural insulated wall system. It consists of a steel wall panel surrounded by expanded polystyrene foam. Merit Builders constructed the Janosik Building. Advanced Wall Systems coated the exterior of the Janosik Building with Dryvit. Dryvit is a plastic, stucco-looking exterior wall coating. Dryvit is somewhat like skin. It was supposed to cover, protect and seal the exterior walls from the environment. The Janosik Building was finished in October of 2006. It leaked from the very beginning during heavy rains. LTL filed this lawsuit against Butler and Dryvit on July 17, 2013. LTL raises warranty, contract and negligence claims against Butler and warranty and contract claims against Dryvit. I have granted the Motions for Summary Judgment filed by Butler and Dryvit, concluding that LTL's claims are time-barred.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of

material issues of fact.¹ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.² The Court views the evidence in a light most favorable to the non-moving party.³ Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.⁴ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.⁵ If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.⁶

Butler

Butler argues that 10 *Del. C.* §8127 bars all of LTL's claims. Section 8127

¹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

² *Id.* at 681.

³ *Id.* at 680.

⁴ *Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

⁵ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

⁶ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

bars all claims alleging defective construction of an improvement to real property that are brought six years after substantial completion of an improvement to real property.⁷ The Janosik Building was substantially complete in October of 2006. LTL filed its complaint against Butler on July 17, 2013. Thus, LTL’s claims against Butler are barred if section 8127 applies. The dispute between Butler and LTL over the application of section 8127 to this case focuses on whether Butler furnished construction of an improvement to real property.

Furnished Construction

“Furnished Construction” is an awkward phrase. A person who furnishes is “one who provides for, equips, supplies or appoints.”⁸ Construction is defined as “including construction, erection, building, alteration, reconstruction and destruction of improvements to real property.”⁹ A number of cases have addressed the issue of what constitutes “furnishing construction.”¹⁰ The distinction that has arisen is that

⁷ 10 *Del. C.* §8127 (b)(1)(f).

⁸ *Becker v. Hamada, Inc.*, 455 A.2d 353, 355 (Del. 1982) citing Webster’s New International Dictionary, 1021 (2d ed., G.&C. Merriam Co. 1951).

⁹ 10 *Del. C.* §8127(a)(2).

¹⁰ *Hiab Cranes and Loaders Inc., v. Service Unlimited, Inc.*, 1983 WL 875126 (Del.Ch. 1983), *City of Dover v. International Tel. and Tel. Corp.*, 514 A.2d 1086 (Del. 1986), *Standard Chlorine of Delaware, Inc., v. Dover Steel, Inc.*, 1988 WL 32044 (Del. Super. March 31, 1988), *Windley v. Potts Welding & Boiler Repair Co., Inc.*, 888 F.Supp. 610 (D. Del. 1995), *Becker*, 455 A.2d 353 (Del. 1982), *Kirkwood Dodge Inc., v. Frederic G. Krapf, Jr., Inc.*, 1989 WL 48639 (Del. Super. May 9, 1989), *Schermerhorn v. Anchor Elec. Co.*, 1992 WL 301636 (Del. Super.

if the items supplied by the defendant were generally available, then the defendant did not furnish construction and section 8127 does not apply.¹¹ However, if the items supplied by the defendant were specifically manufactured by the defendant for the improvements being constructed, then the defendant did furnish construction and section 8127 does apply.¹² Butler argues that its products were engineered and specially fabricated for the Janosik Building. LTL argues that Butler's products were nothing more than generic construction materials used by Merit to construct the Janosik Building.

Butler's Products

Butler is in the business of engineering and specially fabricating materials that comprise metal building systems. Butler's customers are predominantly independent contractors known as "Butler Builders," who have entered into written agreements with Butler known as Butler Builder Agreements. Butler Builders typically order and purchase Butler's un-erected metal building systems and erect those metal building systems for the Butler Builders' customers.

The Whayland Company, Inc., is a Butler Builder and in this case was the

Oct. 5, 1992).

¹¹ *Schermerhorn*, 1992 WL 301636 (Del. Super. Oct. 5, 1992).

¹² *Id.* at *2.

construction manager for LTL. Prior to September 4, 2004, Whayland asked Butler to prepare a quote for the Janosik Building. Whayland provided Butler with all design criteria and design loads, as well as architectural drawings on or about August 17, 2004. The architectural drawings consisted of an overall first floor plan, second floor plan, and elevations that depicted the unique and particular geometric requirements for the Janosik Building. Whayland also provided mechanical specifications and roof top unit information on mechanical drawings and roof top unit cut sheets. Based on the design criteria, design loads and other information and documentation provided by Whayland, Butler issued Quote Number NE044345, dated September 7, 2004.

Butler's Quote Number NE044345 proposed engineering and specially fabricating metal components that would comprise a metal building system that would: (a) Conform to the Janosik Building's geometric requirements such as length, width, height, roof shape and slope, and clearance requirements, both vertical and horizontal; (b) Conform to the specified local codes and standards that describe the application of design loads to the metal building system; (c) Conform to the specified design loads including live, snow, wind, seismic, collateral and auxiliary loads, including information concerning collateral and auxiliary loads required by Whayland; (d) Conform to the Janosik Building's location and building use

categories that affect the importance factors of the specified codes or standards; and

(e) Conform to site and construction conditions that affect design criteria such as conditions causing snow drifting, including location of adjacent structures.

The specially engineered and fabricated materials encompassed by Butler's Quote Number NE044345 included: (a) The end and interior frames for the Janosik Building's metal building system; (b) Horizontal load bracing, purlins, girts, eave members, end wall columns, base angles, and other structural framing required to support the roof and wall panels for the Janosik Building's metal building system; (c) Nuts and bolts for steel to steel connections of the structural framing for the Janosik Building's metal building system; and (d) Exterior metal roof, including trim, fasteners, sealants and closures, and Koreteck/R-Steel wall panels for the Janosik Building's metal building system.

Butler's Quote Number NE044345 was accepted by Whayland on September 20, 2004. Butler proceeded to engineer and specially fabricate all of the component parts of the Janosik Building's metal building system in conformity with Butler's Quote Number NE044345. Butler commenced to tender delivery of the Janosik Building's metal building system components in March of 2005 and tendered the last of its materials to the site on August 19, 2005.

Because the individual components of the Janosik Building's metal building

system, including the Koreteck/R-Steel wall panels, were specially engineered and fabricated for erection at specific locations within the Janosik Building's metal building system, Butler marked each component with identifying numbers, known as "Piece Mark Numbers," that identified each specific component and the location where that component was to be installed on the Janosik Building's metal building system.

Because the individual metal building system components were specially engineered and fabricated to conform to the Janosik Building's unique specifications and geometric requirements such as length, width, height, as well as factory cut wall openings for the Janosik Building's unique placement and sizing of windows and doors; once the components were engineered and fabricated, they were uniquely suited for the Janosik Building and could not be utilized on other projects without substantial modifications and waste.

Because individual metal building system components are specially engineered and fabricated to conform to an end user's unique geographic location, specifications and geometric requirements such as length, width, height; if a Butler Builder is unable or unwilling to take delivery of the metal building system, the individual components are typically sold for scrap value due to the substantial and prohibitive cost and waste associated with modifying the components.

I conclude that Butler “furnished construction” because the products that it supplied were specifically manufactured by Butler in accordance with the design criteria and specifications for the Janosik Building submitted to Butler by Whayland. These products were, by and large, suitable for the Janosik Building and no other building. As such, this distinguishes the Butler products from the generic construction materials that are suitable for practically any building without being specifically manufactured for those buildings.

Improvement to Real Property

Improvement is defined as including a building except a residential building.¹³ It has been further defined as “a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.”¹⁴ Butler provided the products that Merit Builders used to construct the Janosik Building. There is no doubt that a building is an improvement to real property. LTL argues that section 8127 does not apply because Merit Builders, not Butler, actually constructed the Janosik Building. This argument has been rejected before because of the unique meaning of “furnishing construction.” A

¹³ 10 *Del. C.* §8127(a)(5).

¹⁴ *Standard Chlorine*, 1988 WL 32044 at *2.

number of cases have concluded that section 8127 applies to defendants who did not actually construct the improvements to the real property.¹⁵ In each of these cases, the defendant was found to have “furnished construction” even though its work was done off-site. I conclude that Butler did furnish construction of an improvement to real property.

Equitable Estoppel¹⁶

LTL argues that Butler is estopped from relying on section 8127 because Whayland and Butler, in their efforts to determine why the Janosik Building leaked during heavy rains, caused LTL to delay filing this lawsuit in a timely manner. Estoppel may arise when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.¹⁷ To establish an estoppel, it must appear that the party claiming the estoppel lacked knowledge and the means of knowledge of the truth of the facts in question, that he relied on the conduct of the party against whom the estoppel is claimed, and that he

¹⁵ See *City of Dover*, 514 A.2d 1086 (Del. 1986)(construction of a utility pole), *Standard Chlorine of Delaware, Inc.*, 1988 WL 32044 (Del. Super. March 31, 1988)(construction of a liquid storage tank), *Hiab Cranes and Loaders Inc.*, 1983 WL 875126 (Del.Ch. 1983)(construction of an oil furnace), *Kirkwood Dodge Inc.*, 1989 WL 48639 (Del. Super. May 9, 1989)(construction of a circuit panel box).

¹⁶ LTL also raised fraudulent concealment in its complaint, but did not pursue it in its answer to Butler’s Motion for Summary Judgment. Therefore, I have not considered it.

¹⁷ *Key Properties Group, LLC v. City of Milford*, 995 A.2d 147, 152-153 (Del. 2010).

suffered a prejudicial change of position in consequence thereof.¹⁸ However, there are multiple problems with LTL's argument. One, while Whayland may have been the contact for warranty claims, it was an independent contractor with no authority to speak for Butler. It was not the agent for Butler. Whayland was the construction manager for LTL. Two, there is no evidence in the record that either Whayland or Butler promised to fix the leaks or in some fashion led LTL to believe that one or both of them would fix the leaks. Three, even if Whayland or Butler promised to fix the leaks, such promises do not toll the limitation period.¹⁹ Four, the authority cited by LTL to support its estoppel argument did not deal with section 8127. Indeed, given the manner in which section 8127 has been interpreted and applied by the courts in this regard, it is uncertain what, if anything, would toll it. For example, in *Fountain* the Court stated that the language of section 8127 "expressly provides that once the limitations period has been initiated, nothing covered by the Act shall be construed to lengthen the period beyond the prescribed six years."²⁰ I conclude that

¹⁸ *Id.*

¹⁹ *Fountain v. Colonial Chevrolet Co.*, 1988 WL 40019(Del. Super. April 13, 1988), *Techton American, Inc., v. GP Chemicals, Inc.*, 2004 WL 2419129(Del. Super. Oct. 25, 2004), *Ontario Hydro v. Zallea Systems, Inc.*, 569 F.Supp.1261(D. Del. 1983), *Burrows v. Masten Lumber & Supply Co.*, 1986 WL 13111(Del. Super. Oct. 14, 1986).

²⁰ *Fountain*, 1988 WL 40019, at *5.

LTL's claims against Butler are barred by 10 *Del. C.* §8127.²¹ Therefore, I have granted Butler's Motion for Summary Judgment.

Dryvit

Dryvit provided a 10-year limited material warranty to LTL. Dryvit warranted for a period of 10 years from the date of substantial completion of the Janosik Building that the materials manufactured and sold by Dryvit would (1) be free from defects in the manufacture of such materials, (2) not lose their bond, peel, flake or chip, and (3) be fade and water resistant. The sole responsibility and liability of Dryvit to LTL under the warranty was to provide labor and materials necessary to repair or replace the Dryvit materials shown to be defective during the warranty period. Any other labor or other costs associated with the repairs would be LTL's responsibility and no other charges or expenses would be covered by Dryvit. Dryvit would not have any obligation under the warranty to LTL unless LTL notified Dryvit in writing at a certain address within 30 days of LTL's discovery of the alleged defects.

Dryvit argues that LTL's breach of warranty and contract claims are barred by 6 *Del. C.* §2-725. Section 725(1) provides that an action for breach of contract for

²¹ Butler also raised the four-year statute of limitations set forth in 6 *Del. C.* §2-725. I have not addressed it because it is shorter than the six-year limitation set forth in section 8127 and, even if extended, would not extend beyond the six-year limitation set forth in section 8127.

the sale of goods must be commenced within four years after the cause of action has accrued. A cause of action accrues when the breach occurs, regardless of the party's lack of knowledge of the breach.²² A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.²³

The Dryvit materials were delivered to the site and applied to the exterior of the Janosik Building in late 2005. Thus, LTL's claim accrued in late 2005, or no later than October of 2006, the date of substantial completion. LTL filed its Complaint against Dryvit on July 17, 2013. Thus, LTL's claims against Dryvit are barred by section 725 unless Dryvit's warranty explicitly extends to the future performance of the Dryvit products used in the Janosik Building. LTL argues that the Dryvit warranty explicitly extends to the future performance of the Dryvit products. The Dryvit warranty in this case is what is known as a "repair or replacement warranty." Such warranties have long been held in Delaware to not implicate the "future performance exception." Thus, LTL's claims against Dryvit are barred by section

²² 6 *Del. C.* §2-725(2).

²³ *Id.*

725.²⁴ Moreover, I note, as did Dryvit, that its warranty is limited to the repair and replacement of the materials provided by Dryvit for use in the Janosik Building. LTL does not seek this remedy. It instead seeks monetary damages. These damages are excluded by Dryvit's limited warranty, making LTL's claims for monetary damages against Dryvit inappropriate because Delaware law permits parties to a contract to agree to limit remedies to the repair or replacement of defective goods.²⁵ Therefore, I will grant Dryvit's Motion for Summary Judgment.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal

oc: Prothonotary

cc: Counsel

²⁴ A 10-year "repair or replacement" warranty in a state with a four-year statute of limitations that begins to run on delivery of the products would appear to be of little value for warranty claims arising after the expiration of the statute of limitations.

²⁵ *United States of America v. Angelini*, 2000 WL 1728287 (D. Del. 2000).