

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

Casale Construction, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N13C-03-285 MJB
	)	
The Best Stucco LLC,	)	
a Delaware Limited Liability Company,	)	
	)	
Defendant.	)	

Submitted: December 5, 2013  
Decided: March 28, 2014

*Upon Defendant's Motion to Dismiss Negligent Construction & Breach of Implied Warranty of Good Quality and Workmanship Claims, **DENIED.***

**OPINION AND ORDER**

David L. Baumberger, Esquire, Chrissinger & Baumberger, Wilmington, Delaware, *Attorney for Plaintiff*

Joseph S. Naylor, Esquire, Swartz Campbell LLC, Wilmington, Delaware, *Attorney for Defendants*

**Brady, J.**

## **I. INTRODUCTION**

This case concerns the installation of stucco on the exterior of an addition to a house in Newark, Delaware. Plaintiff, Casale Construction ("Casale") settled a claim with the owners of this house for various construction defects. Casale now seeks indemnification, contribution, indemnity, and/or restitution against the company with which it had sub-contracted to install stucco on the exterior of the house addition, Defendant, The Best Stucco ("Best Stucco").

### **A. Facts<sup>1</sup>**

Casale entered into a contract with the Lopes family in 2008 to construct an addition to the Lopes's residential home in Newark, Delaware. Casale hired Best Stucco to install the stucco on this house, creating a contractor-subcontractor relationship. Best Stucco was to be paid \$16,000 for performance of this contract. In 2012, the Lopes filed suit against Casale, alleging negligent performance in various aspects of the construction of the house addition, including the installed stucco, windows, a French door, and wall framing. Regarding the stucco, the Lopes alleged specifically that Casale "failed to install the stucco with required expansion gaps as well as the required weather-resistant sheathing paper." Casale settled with the Lopes in May 2013, and paid them \$60,000 in compensation.

### **B. Procedural History**

Casale commenced this action on March 27, 2013, against Best Stucco alleging four counts against Best Stucco: (I) Breach of Contract, (II) Negligent Construction, (III) Breach of Implied Warranty of Good Quality and Workmanship, and (IV) Fraudulent Misrepresentation. Casale sought \$76,000 in damages, representing the \$60,000 paid to the Lopes in settlement, and

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<sup>1</sup>Unless otherwise noted, the Facts are taken from the Plaintiff's Amended Complaint. Compl., Transaction ID 53924204 (Aug. 27, 2013).

the \$16,000 Casale had paid Best Stucco for performance of the contract. Casale amended its complaint on August 27, 2013, adding specific details to the Negligent Construction claim.

On November 1, 2013, Best Stucco filed a Motion to Dismiss Counts II-IV of Casale's amended complaint. On November 19, 2013, Casale filed a response opposing this motion. At a hearing on December 5, 2013, the Court dismissed Count IV (Fraudulent Misrepresentation) of Casale's amended complaint, reserving judgment on Counts II and III. This decision addresses these remaining counts.

### **C. Parties' Contentions**

#### ***i. Count II: Negligent Construction***

Best Stucco argues the economic-loss doctrine bars a finding of negligent construction, that is, bars tort claims that are based on duties imposed by contract. Best Stucco contends that a contractual relationship presumes that "the parties to the transaction have allocated the risk of product nonperformance through the bargaining process,"<sup>2</sup> and therefore, Casale's sole method of recovery against Best Stucco is the breach-of-contract claim.

Casale argues Best Stucco is "misguided," citing case law which holds the economic-loss doctrine prohibits recovery in tort only "where a product has damaged only itself (*i.e.*, has not caused personal injury or damage to other property)."<sup>3</sup> Casale contends that the alleged negligent construction by Best Stucco damaged the "entire property"<sup>4</sup> when the lack of expansion gaps and weather-resistant sheathing paper caused water to leak inside the home and damage the interior—"other property" according to Casale.<sup>5</sup>

#### ***ii. Count III: Breach of Implied Warranty of Good Quality and Workmanship***

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<sup>2</sup> *Danforth v. Acorn Structure, Inc.*, 608 A.2d 1194, 1200 (Del. 1992).

<sup>3</sup> Pl. Response to Def. Mot. to Dismiss Nov. 19, 2013 Transaction ID 54583368 (citing *Marcuilli v. Boardwalk Builders*, 1999 WL 1568612, at \*4 (DE. Super. Dec. 22, 1999).).

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* (quoting *Marcuilli*, 1999 WL 1568612, at \*4)

Best Stucco asserts that the Court should dismiss Count III for two reasons. First, on the basis that the implied warranty of good quality and workmanship "has never been applied" between contractors and subcontractors in Delaware, and is limited to "persons in the business of selling homes to consumers."<sup>6</sup> Second, the action, filed five years after Best Stucco completed the work, is barred by the applicable statute of limitations, which is three years when a cause of action arises from an alleged breach of implied warranty of good quality and workmanship claim.

Casale contends that Delaware courts "recognize professionals in the construction industry's warranty of good quality and workmanship."<sup>7</sup> Casale also argues that the statute of limitations is not a bar, because this instant litigation is for indemnity/subrogation from a 2013 settlement. Casale argues that the statute of limitations period does not begin to run until the cause of action for the indemnity arises or the indemnitee suffers damage. Because Casale paid the Lopes settlement in 2013—within the three year limitation—they argue that the statute of limitations argument is without merit.

## II. STANDARD OF REVIEW

In Delaware, a complaint need only give a general notice of a claim asserted to survive a motion to dismiss.<sup>8</sup> Because Delaware is a notice-pleading jurisdiction, "the threshold for the showing a plaintiff must make to survive a motion to dismiss is low."<sup>9</sup> When deciding a motion to dismiss, this Court must "draw all reasonable inference in favor of the non-movant."<sup>10</sup> A complaint will not be dismissed unless it is clearly without merit, meaning that "it appears with

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<sup>6</sup> Def. Mot. to Dismiss Nov. 1, 2013 Transaction ID 54484340, (citing *Wilson v. Pepper*, 1994 WL 713983, at \*2 (Del. Super. Oct. 27, 1994)); *Malinak v. Kramer*, 2012 WL 174958, at \*2 (Del. Com. Pl. Jan. 5, 2012); *Ellixson v. O'Shea*, 2003 WL 22931339, at \*2 (Del. Com. Pl. Nov. 20, 2003).

<sup>7</sup> Pl. Response to Def. Mot. to Dismiss, at 4.

<sup>8</sup> *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

<sup>9</sup> *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

<sup>10</sup> *Ramunno*, 705 A.2d at 1034.

reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief."<sup>11</sup>

### III. DISCUSSION

#### A. Count II: Negligent Construction

Best Stucco's claim that the economic-loss doctrine, a court-developed doctrine that generally prevents tort recovery when a product defect or failure causes damage to the product itself that results in economic loss, but does not cause personal injury or damages to *other* property, is misplaced<sup>12</sup>

In 1996, Delaware enacted the Home Owner's Protection Act ("Act"), and Delaware "no longer precludes negligence actions in cases involving the construction of residential dwellings."<sup>13</sup> Indeed, the Act was passed by the General Assembly to achieve that specific goal.

The synopsis to the Act reads:

This Bill protects home owners by abolishing the economic loss doctrine adopted in *Danforth v. Acorn Structures, Inc.*, Del. Supr., 608 A.2d 1194 (1992) as it applies to actions for negligence in the construction and/or improvement to property used as a residence. The economic loss doctrine prohibits recovery for economic losses caused by the negligent acts of others. Under this Bill, a home owner may recover for such losses. This Bill is intended to apply to any action, regardless of when it occurs, unless otherwise prohibited by law.<sup>14</sup>

In 1999, this Court first applied the Act as between a general contractor and subcontractor.<sup>15</sup> Subsequently, the Court again heard argument that suppliers were not subject to the provisions of the Act. This Court again found that, although the previous decision did not

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<sup>11</sup> *Doe*, 884 A.2d at 458.

<sup>12</sup> See *Marcucilli*, 1999 WL 1568612, at \*4.

<sup>13</sup> *Builders and Managers, Inc. v. Dryvit Systems, Inc.*, 2004 WL 304357, at \*4 (Del. Super. Feb. 13, 2004) (citing *Marcucilli*, 1999 WL 1568612, at \*4).

<sup>14</sup> 138th General Assembly, House Bill No. 519 (Apr. 24, 1996).

<sup>15</sup> *Marcucilli*, 1999 WL 1568612.

explicitly state the Act allowed recovery from suppliers, a motion to dismiss based on the economic loss doctrine should be denied.<sup>16</sup>

The Court in both of those previous cases addressed work performed to assure the integrity of the home's structure from water and weather. That is identical to the nature of the work performed by Best Stucco in the case *sub judice*. Further, the fact that Best Stucco is more than just a materials supplier, and is alleged to have failed to install material properly, does not persuade the Court there is any reason the Act does not apply. The Best Stucco's Motion to Dismiss Count II, alleging negligent construction, is **DENIED**.

### **B. Count III: Breach of Implied Warranty of Good Quality and Workmanship**

Section 8106 of Title 10 of Delaware's Code provides that ". . . no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations . . . shall be brought after the expiration of three years from the accruing of the cause of such action." Delaware courts have determined, for an indemnity claim, this period does not begin until the "time of injury," that is, "the point at which the indemnitee suffers loss or damage through the payment of a claim after judgment or settlement."<sup>17</sup> Casale settled their original claim with the homeowner in May 2013. The statute of limitations regarding an indemnification claim did not begin to run until that date. Best Stucco's claims regarding the statute of limitations are without merit.

Having determined the action is timely, the Court now addresses the substance of the Motion. Best Stucco urges the Court to find that the implied warranty of good quality and workmanship does not apply to them because Best Stucco is "not in the business of selling

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<sup>16</sup> *Builders and Managers*, 2004 WL 304357.

<sup>17</sup> *Marcucilli*, 1999 WL 1568612 at \*8. *See also Di Biase v. A & D, Inc.*, A.2d 865, 867 (Del. Super. 1976).

homes." However, none of the cases on which Best Stucco relies are dispositive regarding this claim.<sup>18</sup>

In *Wilson*, the first case on which Best Stucco relies, the defendant urged the Court to find that he and his wife were not "professional builders," and therefore not bound by the implied warranty of good quality and workmanship.<sup>19</sup> The defendant was a retired man who hired contractors and subcontractors to build homes. In denying summary judgment, the Court did not hold that the implied warranty could never apply to the defendant.<sup>20</sup> Rather, the Court ruled there were insufficient facts before it to "extend the Delaware case law by imposing liability on a person who hires subcontractors to build one or two homes which he then sells."<sup>21</sup>

Best Stucco also cites *Malinak v. Kramer*<sup>22</sup> and *Ellixson v. O'Shea*<sup>23</sup> for its assertion that the implied warranty of good quality and workmanship is limited to persons in the business of selling homes to consumers.<sup>24</sup> Both cases did, in fact, deal with disputes between parties to the sale of a home, and did not address a contract for services on that home. However, in *Malinak*, the Court noted that "there must be a construction contract or builder-customer relationship between the parties onto which such an implied warranty could bind."<sup>25</sup> There is clearly a construction contract between the contractor and subcontractor in the case *sub judice*.

While the cases Best Stucco cites make it clear that the implied warranty of good quality and workmanship unmistakably applies for those in the business of selling homes, none of the cases cited provide any language *limiting* this implied warranty *only* to those in the business of selling homes, such that it would not apply to a party that is contracted to perform work on an

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<sup>18</sup> These cases are: *Wilson*, 1994 WL 713983; *Malinak*, 2012 WL 174958; *Ellixson*, 2003 WL 22931339.

<sup>19</sup> *Wilson*, 1994 WL 713983.

<sup>20</sup> *Id.* at \*3.

<sup>21</sup> *Id.*

<sup>22</sup> 2012 WL 174958 (Del. Com. Pl. Jan. 5, 2012).

<sup>23</sup> 2003 WL 22931339 (Del. Com. Pl. Nov. 20, 2013).

<sup>24</sup> Def. Mot. to Dismiss at 3.

<sup>25</sup> 2012 WL 174958 at \*2.

existing home. Indeed, an early Delaware case, *Bye v. George W. McCaulley & Son Company*,<sup>26</sup> provides guidance.

In *Bye*, this Court was presented with a plaintiff who was “seeking to recover from the defendants . . . for work and labor [the plaintiff performed] constructing a certain porch and steps for the defendant’s home.”<sup>27</sup> According to the parties’ contract, the defendants were to furnish all the materials and the plaintiff was to furnish the necessary labor to complete the work.<sup>28</sup> It was undisputed “that the porch and steps when completed were not satisfactory” and there were certain defects.<sup>29</sup> The plaintiff asserted that the defects were caused by unsuitable material that was furnished by the defendants, whereas the defendants claimed that the defects resulted from the plaintiff’s unskilled workmanship.<sup>30</sup> This Court instructed the jury on the implied warranty, stating:

where a person holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possess the requisite skill to perform such labor in a proper manner, and implies as a part of his contract that the work shall be done in a skillful and workmanlike manner.<sup>31</sup>

In *Council of Unit Owners of Breakwater House Condominium v. Simpler*,<sup>32</sup> decided almost a century after *Bye*, the Delaware Supreme Court was presented with defendants that purchased an existing building, gutted the building, and constructed “condominiums within an existing shell.”<sup>33</sup> The defendants contended that the implied warranty only applied to newly

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<sup>26</sup> 76 A. 621 (1908)

<sup>27</sup> *Id.* at 622.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Bye*, 76 A. at 622.

<sup>32</sup> 603 A.2d 792 (Del. 1992).

<sup>33</sup> *Id.* at 795.



constructed homes and argued the “substantial renovation” they performed was not sufficient.<sup>34</sup> The Delaware Supreme Court explained, “If any implied warranty can attach to a contract for the addition of concrete steps [and porch] to an existing building, as in *Bye*, it can also attach to a contract for the construction of condominiums within an existing shell.”<sup>35</sup> Thus, Delaware recognizes that the implied warranty can attach when contractors, such as Best Stucco, make an addition to an existing structure.<sup>36</sup>

Viewing the facts in the light most favorable to Casale, Best Stucco arguably held themselves out as “competent contractors.”<sup>37</sup> As such, Best Stucco impliedly contracted that their work would be done in a skillful and workmanlike manner. Therefore, Best Stucco’s Motion to Dismiss Count III alleging breach of implied warranty of good quality and workmanship is **DENIED**.

#### IV. CONCLUSION

For the reasons stated above, Best Stucco's Motion to Dismiss Counts II and III of Casale's Complaint is **DENIED**.

**IT IS SO ORDERED.**

/s/

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**M. Jane Brady**  
Superior Court Judge

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<sup>34</sup> *Id.* at 794.

<sup>35</sup> *Id.* at 795 (citing *Bye*, 76 A. 621)

<sup>36</sup> *Id.* At this juncture, the Court is not persuaded by Best Stucco’s contention that “[u]pon information and belief, this implied warranty has never been applied between sophisticated contractors and subcontractors.” Importantly, Casale’s action against Best Stucco arises from indemnification, relating to Casale’s failure to provide the underlying home owners with good quality and workmanship. As the Delaware Supreme Court stated in *Simpler*, “a developer who, under the circumstances of a particular case, would otherwise be subject to an implied warranty of good quality and workmanship cannot escape the warranty merely by arranging for the actual construction to be performed by his contractual agent.” 603 A.2d at 796. Similarly, this Court is not, at this juncture, prepared to rule that the implied warranty did not attach to Best Stucco’s work merely because Best Stucco is being sued by Casale, rather than the underlying property owners, given, as stated above, the case *sub judice* arises from indemnification.

<sup>37</sup> *Bye*, 76 A. at 622.