

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ELOISE W. McKENNA, a/k/a :
E. CHIRSTINE McKENNA, : **C.A. No: 04C-02-022 (RBY)**
Individually and as Sole Trustee :
Under the E. Christine Living Trust, :
 :
Plaintiff, :
 :
v. :
 :
THE TERMINEX INTERNATIONAL: :
COMPANY, ET AL. :
 :
Defendant. :

Issued: March 13, 2006

Scott E. Chambers, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware, Attorney for Plaintiff.

Richard D. Abrams, Esq., Heckler & Frabizzio, Wilmington, Delaware, Attorney for Defendants.

AMENDED O P I N I O N

**UPON DEFENDANTS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

YOUNG, J.

McKenna v. Terminex
March 13, 2006

Defendants, The Terminex International Company, L.P., Terminex International, Inc., and The Servicemaster Company, (“Defendants”) move for partial summary judgment on Counts III and IV of Plaintiff’s Complaint. Plaintiff, Eloise W. McKenna (“Plaintiff”), and Defendants are parties to a service contract for termite inspection and treatment. Plaintiff sued Defendants for the damage caused to her home by termite infestation under contract and negligence theories of recovery. Defendants maintain that Plaintiff’s sole remedy is contract law, and request that Plaintiff’s negligence claims be dismissed. For the following reasons, Defendants’ Motion is **GRANTED**.

STATEMENT OF FACT

Plaintiff, through an undisputed series of transfers, was, as of August 1, 2000, the owner of the involved property, located at 2705 Wrangle Hill Road, Bear, Delaware, and of an effective contract with Defendant.¹

For purposes of this Motion, in August 2000, Plaintiff noticed termites in her stockade fence, and contacted Defendants to inspect the premises.² On that occasion, Defendants treated the area around the fence.³ Defendants also treated Plaintiff’s home for termites on February 3, 2001.⁴ On April 27, 2003, Plaintiff observed a

¹ Am Compl. ¶ 8.

² *Id.* at ¶ 13.

³ *Id.* at ¶ 14.

⁴ *Id.* at ¶ 16.

McKenna v. Terminex
March 13, 2006

swarm of termites in her living room.⁵ Defendants responded to the problem by treating the outside corner of Plaintiff's house.⁶ A few weeks later, Plaintiff observed termites in her dining room. She contacted Defendants, who treated one side of the exterior of Plaintiff's home.⁷ A few days later, termites swarmed throughout Plaintiff's home. Upon call, Defendants responded by treating the entire house.⁸

Plaintiff subsequently hired an entomologist to evaluate her home for termite infestation.⁹ The entomologist's January 20, 2004 report revealed active termite infestation in two locations in Plaintiff's home.¹⁰ Plaintiff notified Defendants of the entomology report, and Defendants again treated Plaintiff's home for termites.¹¹ Plaintiff also hired an engineer to evaluate the structural damage caused to her home by the termite infestation.¹² The engineer found Plaintiff's home to be structurally unsound, and estimated that the structural and cosmetic repairs would cost approximately \$200,000.¹³

⁵ *Id.* at ¶ 17.

⁶ *Id.* at ¶ 19.

⁷ *Id.* at ¶ 20, 21.

⁸ *Id.* at ¶ 22, 23.

⁹ *Id.* at ¶ 29.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 30.

¹² *Id.* at ¶ 24.

¹³ *Id.* at ¶ 27.

McKenna v. Terminex
March 13, 2006

PROCEDURAL POSTURE

Plaintiff filed suit against Defendants on February 18, 2004, alleging breach of contract, negligence, gross negligence, and deceptive trade practices. Plaintiff subsequently amended the Complaint, adding claims for statutory and common law fraud. This Court, on June 17, 2005, granted partial summary judgment to Defendants on Count V of Plaintiff's Complaint, which alleged that Defendants engaged in deceptive trade practices. Count III of Plaintiff's Complaint alleges that Defendants were negligent, because they (1) failed to inspect Plaintiff's residence periodically; (2) knew or should have known of the active termite infestation in Plaintiff's home, but failed to treat the infestation properly; (3) failed to train their employees properly to inspect and identify active termite infestation; and (4) failed to use proper methods to treat the termite infestation. Count IV alleges that Defendants' negligent conduct constituted gross negligence and/or willful and wanton conduct, warranting an award of punitive damages and attorney's fees.

DISCUSSION

Viewed in a light most favorable to the non-moving party, summary judgment may be granted to a party only if there are no genuine issues of material fact.¹⁴ The burden of proof is initially borne by the moving party.¹⁵ However, if a movant can

¹⁴ *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334, 335 (Del. Super. 1973)(citing *Matas v. Green*, 171 A.2d 916 (Del.Super.1961); Super. Ct. Civ. R. 56(c)).

¹⁵ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)(citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962)).

McKenna v. Terminex
March 13, 2006

make such a showing, “the burden shifts to a non-moving party to demonstrate that there are material issues of fact.”¹⁶

Defendants argue that Plaintiff’s negligence and gross negligence claims should be dismissed, because the economic loss doctrine precludes recovery in tort for breach of purely contractual duties. Defendants maintain that Plaintiff’s failure to allege that Defendants breached a duty independent of the contractual obligations bars Plaintiff’s negligence claims.

The economic loss doctrine has been defined as a “judicially created doctrine that prohibits recovery in tort where a product has damaged only itself (i.e., has not caused personal injury or damage to *other* property) and, the only losses suffered are economic in nature.”¹⁷ Although the economic loss doctrine was initially applied in products liability actions, “the courts have expanded the doctrine’s application beyond its original scope to nearly any kind of dispute arising from a commercial transaction where the alleged damages do no harm to a person or to property *other than the bargained for item*.”¹⁸ The first step in determining whether to apply the economic loss doctrine begins with an analysis of the contract and tort claims asserted.

A. The Economic Loss Doctrine is Rooted in the Distinct Purposes Served by Contract and Tort Law

¹⁶ *Id.* at 681 (citing *Hurt v. Goleburn*, 330 A.2d 134 (Del. 1974)).

¹⁷ *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1195 (Del. 1992).

¹⁸ *International Fidelity Ins. Co. v. Mattes Electric, Inc.*, 2002 WL 1400217, at *1 (Del. Super.).

McKenna v. Terminex
March 13, 2006

Generally, in order for contract claims and tort claims to co-exist in an action, the plaintiff must allege that the defendant breached a duty that is independent of the duties imposed by the contract.¹⁹ “[W]here an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort.”²⁰ That principle, however, should not be construed to indicate that contract and tort claims can never co-exist in the same action.²¹ Scenarios exist in which a party may owe a duty that is independent of the contract duties.²²

In *Pinkert v. Olivieri*, the plaintiff homeowners sued defendant builders for breach of contract and fraud for alleged construction deficiencies.²³ Plaintiffs complained that defendants failed to perform the contracted construction services.²⁴ Plaintiffs also argued that the submission of the payment applications for that defective work constituted fraud.²⁵ The Court dismissed the fraud claims, holding

¹⁹ *Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey & Co., Inc.*, 2005 WL 445710, at *3 (Del. Super.)(quoting *Pinkert v. Olivieri*, 2001 WL 641737, at *5 (D. Del. 2001)).

²⁰ *Id.*

²¹ *FleetBoston Financial Corp. v. Advanta Corp.*, 2003 WL 240885, at * 11 (Del. Ch.) (“[I]t does not necessarily follow from the fact that the parties entered into a contractual relationship, that as a result all tort duties are displaced.”)

²² *Id.*

²³ 2001 WL 641737, at *5.

²⁴ *Id.*

²⁵ *Id.*

McKenna v. Terminex
March 13, 2006

that plaintiffs' allegations arose solely from their defendants' contractual duties, and not from any common law duty independent of the construction contract.²⁶ The Court found it significant that defendants' duty to submit periodic payment applications was specifically provided in the contract.²⁷

In Delaware, the economic loss doctrine has not been applied specifically in the context of a termite service contract. That issue, though, has arisen in other jurisdictions. Defendants cite *Clark v. Orkin Exterminating Co., Inc.*²⁸ in support of their argument that the economic loss doctrine bars tort claims for termite service contracts. The Court in *Clark* held that Virginia law required that "duties arising from contracts, and not arising under common-law duties, must be remedied by the law of contracts."²⁹ The facts in *Clark* are similar to the case in issue. Plaintiff homeowners sued defendant termite service provider in contract and tort for the damage caused to their home by termite infestation.³⁰ The Court dismissed plaintiffs' tort claims, holding defendant did not owe plaintiffs a duty "independent of the contractual obligations."³¹ Not only did plaintiffs fail to assert that defendant

²⁶ *Id.*

²⁷ *Id.*

²⁸ 147 F.Supp.2d 458 (W.D. Vir. 2001).

²⁹ *Id.* at 462 (citing *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55 (Va. 1988)).

³⁰ *Id.* at 460.

³¹ *Id.* at 462.

McKenna v. Terminex
March 13, 2006

breached an independent tort duty, but the Court also determined that the parties had no special relationship that would create such a duty.³²

In the present case, Plaintiff's breach of contract claims (Count II) allege that Defendants failed to make periodic inspections and treatments. Plaintiff also claims that Defendants breached the contract by not properly inspecting and treating Plaintiff's home for termites after they learned of the termite infestation. These claims, which, if accurate, are all contractual breaches, are essentially repeated in Plaintiff's negligence claims (Count III) in which Plaintiff complains that Defendants "failed to periodically inspect...failed to properly treat...failed to properly train its employees to inspect...and failed to use proper methods and chemicals to treat" Plaintiff's home.³³ Count IV of the Complaint, likewise, does not assert that Defendants breached a duty independent of the contract obligations, but merely alleges that Defendants' negligence rose to the level of gross negligence. Because Plaintiff has not claimed breach of a duty by Defendants independent of the contractual obligations, the negligence claims must be dismissed.

B. Economic Loss Doctrine Precludes the Recovery in Negligence for Economic Losses.

Plaintiff asserts that, notwithstanding the foregoing, the economic loss doctrine should not preclude her from bringing negligence claims, because the damages she sustained were not only exclusively economic losses, but were also damage to "other

³² *Id.*

³³ Am. Compl. ¶ 35.

McKenna v. Terminex
March 13, 2006

property.” To begin with, the damage alleged by Plaintiff is to the very property (i.e. the 2705 Wrangle Hill Road residence) expressly covered by Plaintiff’s contract with Defendants. Specifically, the claims go to damages to that property, which would be within the purview of contractual damages, as discussed below. The integrity of the house is “the bargained for item.”

C. “Other Property” Losses Are Not Involved

As discussed above, the threshold issue for determining whether the economic loss doctrine applies is whether defendant breached a duty independent of the contract obligations. Only if plaintiff can make such a showing will the Court consider whether the damages sustained were economic losses. Although the issue of damage to “other property” is not dispositive in this case, because the parties have addressed the issue, a discussion of the law on subject is warranted.

The economic loss doctrine precludes a party from bring a negligence claim if the alleged damages are only economic losses.³⁴ Economic loss has been defined as “any monetary loss, costs of repair or replacement, loss of employment, loss of business or employment opportunities, loss of good will, and diminution in value.”³⁵ The economic loss doctrine is limited to those losses sustained to the “bargained for

³⁴ *Danforth*, 608 A.2d at 1195; *International*, 2002 WL 1400217, at *1.

³⁵ *International*, 2002 WL 1400217, at *1; *Danforth*, 608 A.2d at 1195 n.3 (quoting *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 449 (Ill. 1982)(emphasis added)) (“Economic loss has been defined as ‘damages for inadequate value, costs of *repair and replacement of the defective product*, or consequent loss of profits– without any claim of personal injury or damage to *other property*.’”).

McKenna v. Terminex
March 13, 2006

item,” as opposed to losses accompanied by bodily harm or other property damage.³⁶ When distinguishing between economic losses and damage to “other property,” the focus should be on the parties’ bargain. “[E]conomic loss ‘is essentially the failure of the purchaser to receive the benefit of its bargain – traditionally the core concern of contract law.’”³⁷ In *International Fidelity*, the parties contracted for bonds related to electrical work defendant was performing for a construction project. Defendant defaulted, triggering plaintiff’s obligation to pay on the bonds. The Court dismissed plaintiff’s negligence claims based on the economic loss doctrine, holding that plaintiff’s damages were purely economic.³⁸ The Court found that the bargain at issue was for payment on the bonds. Therefore, plaintiff sustained only a monetary loss, not bodily harm or property damage.³⁹

In support of her argument that the termite damage was “other damage,” Plaintiff does not cite a definition, but analogizes cases in which the Courts have made fact-specific determinations of property damage, which would fall outside of the parties’ economic loss. Other jurisdictions, however, have considered exceptions to the “other property” rule in cases “where damage to property” was a foreseeable result of a defect at the time the parties contractually determined their respective

³⁶ *International*, 2002 WL 1400217, at *1.

³⁷ *Council of Unit Owners of Sea Colony East, Phases III, IV, VI and VII Condominium v. Carl M. Freeman Assoc., Inc.*, 1990 WL 177632, at *4 (Del. Super.).

³⁸ *International*, 2002 WL 1400217, at *1.

³⁹ *Id.* at *1-2.

McKenna v. Terminex
March 13, 2006

exposure to risk....”⁴⁰ In *Rich Products*, the parties contracted for the purchase of a mechanical conveyor for use in its food processing business.⁴¹ Plaintiff sued the manufacturer of the conveyor after an alleged defect in the conveyor caused wire strands to fall into the food product and contaminate it.⁴² The Court held that the damage caused to the contaminated food was not damage to “other property.” Accordingly, the economic loss doctrine was held to control the damage claims. The Court determined that the damage to the food product was a foreseeable risk, which was evidenced by Plaintiff’s use of metal detection equipment in the plant.⁴³

In the present case, the parties entered a contract for termite inspection and treatment services for which Plaintiff paid annual premiums. On the surface, the economic loss that Plaintiff sustained as a result Defendants’ alleged breach was the annual premiums she paid Defendants for these services. Plaintiff in any real sense though, was not seeking the spraying of a chemical. Rather, her core concern, when entering the contract with Defendants, was to prevent termite infestation and damage to her home. Prevention of property damage was part of the parties’ bargain, and, therefore, any such damage must be considered an economic loss. Under the reasoning of *Rich Products*, Defendants would be held to foresee that, if they breached the agreement, the result would include termite infestation and damage to

⁴⁰ *Rich Products Corp. v. Kemutec, Inc.*, 66 F.Supp.2d 937, 972 (E.D.Wis. 1999).

⁴¹ *Id.* at 944.

⁴² *Id.* at 946.

⁴³ *Id.* at 972.

McKenna v. Terminex
March 13, 2006

Plaintiff's home. The foreseeable property damage caused by termite infestation was an essential element of the contract. It cannot be considered "other damage."

Plaintiff's negligence claims are dismissed, because damage to her home caused by termite infestation was part of the bargain and a foreseeable risk.

CONCLUSION

For the reasons stated above, Plaintiff's negligence and gross negligence claims are dismissed, as Plaintiff has not established Defendants' breach of a duty independent of the contractual obligations. Accordingly, Defendants' Motion for Partial Summary Judgment on Counts III and IV of Plaintiff's Complaint is **GRANTED.**

/s/ Robert B. Young

Judge

oc: Prothonotary
cc: Counsel
Opinion Distribution
Notebook