IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JAMES V. HEALY and, SYLVIA T. HEALY,	)	
Plaintiffs,	)	
v.	)	C.A. No. 06-03-030
SILVERHILL CONSTRUCTION, INC.	)	
Defendant.	)	

Richard E. Berl, Jr., Esquire, Attorney for Plaintiffs.
Dean A. Campbell, Esquire, Attorney for Defendant.

DECISION AFTER TRIAL

In this action the Court is called upon to determine whether Defendant Contractor is liable to Plaintiffs Homeowners for faulty construction that resulted in mold and water damage. Trial was held on June 25, 2008; the parties submitted post-trial briefs addressing Defendant's motion to dismiss and closing arguments. For the following reasons, the Court finds for the Plaintiffs.

BACKGROUND AND PROCEDURAL HISTORY

On February 14, 2002, Plaintiff Sylvia Healy and Defendant Silverhill Construction entered into a American Institute of Architects Standard Form of Agreement ("Contract"), in which Defendant was to construct a home for Plaintiffs' (Sylvia Healy and James Healy) on Plaintiff Sylvia Healy's building lot located at 37 Mills Ridge Road, Lewes, Delaware.[1] The home was completed in November of 2002.

In November of 2004, Plaintiffs' returned to their home after a short vacation and discovered a large mushroom growing out of the master bedroom wall adjacent to the walk-in shower in the master bathroom. The Plaintiffs hired experts to investigate the

[1] The form contract incorporated by reference "AIA General Conditions A201/CMa 1992."

problems and repair any defects. Mold removal experts found mold growing adjacent to and under the shower. Removal and repairs were undertaken. On November 9, 2005, Plaintiffs filed suit against Defendant in the Justice of the Peace Court alleging defective construction under the contract. The matter was fully litigated and tried below, and judgment was entered in favor of Defendant. Plaintiffs appealed to this Court.

DISCUSSION

I. Defendant's Motion to Dismiss

At the conclusion of Plaintiffs' case-in chief, Defendant moved to dismiss action. Defendant argues that dismissal of Plaintiffs' entire Complaint is appropriate on three grounds: (1) the implied warranty of one year expired on November 14, 2003, and the time of discovery rule is inapplicable; (2) Plaintiffs' negligence claim is improper as a matter of law pursuant to the economic loss doctrine, or, in the alternative: (a) barred by the applicable statute of limitations, 10 *Del. C.* § 8106, which Plaintiffs' have failed to establish should be tolled, (b) subject to dismissal as proximate causation has not been proven, or (c) subject to the defense of waiver; and (3) Plaintiffs' claim for breach of contract is waived pursuant Paragraph 4.7.5 of the General Conditions and barred by the applicable statute of limitations, 10 *Del. C.* § 8106.

Standard of Review

"The standards governing a motion to dismiss for failure to state a claim are well settled: (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'" *In re General Motors (Hughes) Shareholder Litigation*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v.*

FMR Corp., 812 A.2d 894, 896-97 (Del. 2002)). Upon viewing the evidence and drawing all reasonable inferences in favor of Plaintiffs', the Court denies the motion to dismiss.

Contract & Implied Warranty Claims

Actions for breach of contract are governed by a three year statute of limitations. 10 *Del. C.* § 8106(a). A cause of action for breach of contract accrues at the time of the breach. *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. 1969). The "time of discovery" rule applies to breach of contract claims. *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4 (Del. Super. May 16, 2002). It does not apply to breach of implied warranty claims. *Id.*

Delaware law recognizes an implied builder's warranty of good quality and workmanship. *Sachetta v. Bellevue Four, Inc.*, 1999 WL 463712, at *3 (Del. Super. June 9, 1999) (citing *Smith v. Berwin Builders, Inc.*, 287 A.2d 693, 695 (Del. Super. 1972)). This implied warranty arises by operation of law. *Marcucilli*, 2002 WL 1038818, at *4. A cause of action for breach "of this warranty is deemed to occur on the date of settlement and the applicable statute of limitations is 10 *Del. C.* § 8106, which requires suit to be filed within three years of when a cause of action arises." *Id.*; *Estall v. John E. Campanelli & Sons, Inc.*, 1993 WL 189500, at *2 (Del. Super. Apr. 30, 1993); *Di Biase v. A & D, Inc.*, 351 A.2d 865, 867 (Del. Super. 1976).

Defendant here asserts that since the Contract contains a one year express warranty[2], the implied warranty claims had to be filed within a year as well. However, paragraph 12.2.6 provides, in pertinent part, that:

[2] Paragraph 3.5.1 of the General Conditions states, in pertinent part, as follows: "The Contractor warrants to the Owner, Construction Manager and Architect 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 the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents." Paragraph 12.2.2 of the General Conditions states, in pertinent part, that "[i]f, within one year after the date of Substantial Completion of the Work or designated portion thereof, . . . any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it

> "[e]stablishment of the time period of one year … relates only to the specific obligation of the Contractor[3] to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work."

Thus, the Contract specifically limits the one year claim period to the express warranty right to demand that Contractor correct his work.

A cause of action for breach of the implied warranty "is deemed to occur on the date of settlement." *Marcucilli*, 2002 WL 1038818, at *4; *Estall*, 1993 WL 189500, at *2; *Di Biase*, 351 A.2d at 867. Neither party offered evidence of the settlement date. Absent such evidence, the cause of action is deemed to accrue when the construction is substantially complete. *Marcucilli v. Boardwalk Builders, Inc.*, 1999 WL 1568612, at *1 (Del. Super. Dec. 22, 1999). "[T]he general rule is that construction is substantially complete when the builder finishes all the essentials necessary for the full accomplishment of the purpose for which the building has been constructed." *Wilmington Parking Authority v. Becket*, 1993 WL 331072, at *1 (Del. Super. Apr. 26, 1993). The Contract here specifically defines substantial completion as when the work "is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use."[4] Although the parties offered conflicting evidence on the date of substantial completion, the intended use of the construction is as a residence, and it could not be occupied as a residence until the temporary certificate of occupancy was obtained on November 15, 2002. Thus, the Court finds the building was substantially completed on that date, and Plaintiffs'

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promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition."

[3] The Contract identified Defendant as the Contractor.
[4] Paragraph 9.8.1

contract and implied warranty causes of action arose on November 15, 2002. They were timely filed on November 9, 2005. Accordingly, the Court need not address the "time of discovery" issue as to the contract and warranty claims.

Negligence Claim

Although Plaintiffs' claimed losses are solely pecuniary in nature, the economic loss doctrine does not bar negligence claims in residential construction litigation in Delaware. *See* 6 *Del. C.* § 3652.

Title 10, Section 8106 provides a three year limitations for property damage actions arising out of negligence. *Commercial Union Ins. Co. v. S & L Contractors, Inc.*, 2002 WL 31999352, at *1 (Del. Com. Pl. Nov. 8, 2002). A "cause of action in negligence accrues at the time of the injury to the plaintiff." *Plumb v. Cottle*, 492 F. Supp. 1330, 1336-1337 (D.C. Del. 1980). The "time of the injury" occurs, and therefore the limitations period begins to run, when "the plaintiff has reason to know that a wrong has been committed[.]" *Abdi v. NVR, Inc.*, 2007 WL 2363675, at *3 (Del. Super. Aug 17, 2007) (quoting *S & R Associates, L.P. v. Shell Oil Co.*, 725 A.2d 431, 439 (Del. Super. 1998)). The Court finds from the evidence that the Plaintiffs had no reason to know of the alleged negligent construction until, at the earliest, the time that their occupation and use of the building put them in a position to notice the alleged harm from such negligence. Therefore the time of Plaintiffs' injury, at the earliest, was November 15, 2002, less than three years before the filing of this action. Moreover, the defect at issue was latent. I further find from the evidence that Plaintiffs did not know, nor should have known, of any problem with the construction behind the shower walls and floor prior to the appearance of the mushroom in November, 2004.

Defendant further asserts that Plaintiffs' action should be dismissed because Plaintiffs waived all claims upon final payment except to the extent that warranty claims remain. The Court finds that Plaintiffs did not waive claims for this latent defect.

Finally, Defendant's motion to dismiss due to a "failure to prove proximate cause" is denied, since, as set forth below, the Court finds that Plaintiffs' damages were the direct and proximate result of improper installation of the shower membrane around and into the drain.

II. Decision After Trial

Plaintiffs Complaint sets forth three counts, for breach of contract, breach of implied warranty, and negligence. Each of these causes of action is founded upon essentially the same factual allegation; that Defendant improperly constructed the shower, which permitted water to leak into the adjoining wall, which caused the mushroom to grow out of the bedroom wall, alerting Plaintiffs to the problem. Defendant denies any defect in its work, and posits that the water moisture resulting in the mushroom growth came from HVAC condensation leaking into the wall, or, if the shower was the source, it was the result of Plaintiffs improperly maintaining the tile grouting.

Unfortunately, it is clear from the trial testimony that, during the dismantling of the shower to find the cause or extent of the fungus growth and mold problem, and the subsequent rebuilding thereof, no-one ran the shower water while the wall was exposed to attempt to trace the leak to see if it led to the mushroom location on the bathroom wall.

During the punch list phase following construction, Defendant was asked to fix several problems with the home, including a leaking air conditioner condensation pipe. Mr. Healy testified that this HVAC leak caused a leak into the ceiling of the entrance

hall, but Thomas Bonk, Defendant's principal, testified that the leakage was on the second floor within ten feet of the bathroom. Raymond Hopkins, who was unaware that there was an HVAC caused water backup a year before, testified there were no indications of water coming down from the second floor via stains on the ceiling or walls. This testimony was not refuted. The Court finds from the evidence that the HVAC was not the source of moisture resulting in the mushroom growth; rather, it came from the shower on the other side of the shared wall.

George Hanley, Harold Smoker, and Mr. Bonk all testified that tiled showers require grout maintenance, but the Court heard no credible evidence as to whether or not the tile grout was properly maintained. However, on August 26, 2003, during the express warranty period, Plaintiffs sent Bonk a fax indicating that during the month of July "[w]e noticed that two tiles are cracked at the base of the corne[r] of the shower on the bedroom wall side." Defendant's Ex. K. Again, the evidence did not establish whether or not this problem was fixed. If this indeed was the original source of moisture, the court can only infer it wasn't repaired by Defendant as required by the contract. Moreover, the evidence established that, if the shower wall and membrane were properly installed and in working condition, any water leaking through the tile at that location would be collected by the membrane and run back into the drain.

Plaintiffs allege that Defendant failed to: (1) utilize materials for the shower wall which were in accordance with applicable building codes, and (2) properly install the membrane beneath the shower. Delaware law recognizes an implied builder's warranty of good quality and workmanship. *Sachetta*, 1999 WL 463712, at *3 (citing *Smith*, 287 A.2d at 695). This implied warranty arises by operation of law. *Marcucilli*, 2002 WL 1038818, at *4. "Where a person holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possesses 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." *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908). Work is performed in a workmanlike manner if the builder "displayed the degree of skill or knowledge normally possessed by members of [its] profession or trade in good standing in similar communities" in performing the work. *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super. Feb. 5, 1993). A "good faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement, is considered complete if the substantial purpose of the contract is accomplished." *Nelson v. W. Hull & Family Home Improvements*, 2007 WL 1207173, at *3 (Del. Com. Pl. May 9, 2007) (quoting Del. Civ. Pattern Jury Instructions § 19:18 (1998)).

Here, the Defendant building contractor held itself out as possessing the requisite skill to build Plaintiffs' home, so the warranty of good quality and workmanship is an implied term of the contract.

Plaintiffs allege the use of green board was inappropriate for the walk-in shower, and not in accord with local code. "[C]ompliance with applicable laws and regulations is a requirement and condition of building contracts for work to be performed in this State unless the contract expressly provides for a different measure of performance." *Koval v. Peoples*, 431 A.2d 1284, 1286 (Del. Super. 1981). Nothing in this contract expressly provides for some other measure of performance. Thus, Defendant was contractually obligated to comply with the Sussex County Code. *See Bougourd v. Village Garden Homes, Inc.*, 2002 WL 32072790, at *2 (Del. Com. Pl. Dec. 31, 2002).

Harold Smoker, who testified as Plaintiffs' expert, admitted that the Sussex County Code does not forbid the use of green board or require the use of cement board. He also said that other contractors have used green board in stand alone showers.

Raymond Hopkins, who performed the remedial work, testified that he has seen green board used in local shower construction. George Hanley, who performed the shower demolition and tile installation, testified that tile can be attached to green board. The Court finds from the evidence that the green board used to construct the walk-in shower met both industry and code standards, and that Defendant acted reasonably is using it.

Plaintiffs also allege that Defendant improperly installed the rubber membrane beneath the shower. Plaintiffs contend that the rubber membrane had holes and cuts in it and that the membrane was improperly installed around the drain.

As to the cuts in the membrane, Plaintiffs failed to prove by a preponderance of the evidence that the holes or cuts in the membrane were caused by Defendant or its employees or subcontractors. Mr. Hanley testified that there was no sign of water leaking around the nails in the membrane, and that the cuts around the membrane corners would not cause leaking. Both Hopkins and Smoker stated that the membrane is thick and would require a sharp object to cut it. The cuts in the membrane were noticed only after the demolition of the shower tile and green board, which were removed using sharp edged pry bars. Although Hanley testified that he did not cut the membrane while performing the shower demolition, and Hopkins did not think the cuts were made by pry bars, the Court does not find this evidence persuasive. Hopkins did not personally observe the tile being removed. Hanley said no mold was found near the cuts. Thus, either the cut in the membrane was freshly made during the demolition, or the water did not pass through the cut in the membrane, and the shower water leaked from elsewhere. Plaintiffs have failed to establish that the cuts in the membrane were due to the fault of Defendant or Defendant's employees or subcontractors.

Before water can reach the green board or the membrane, it must penetrate the shower wall or floor. Hanley testified that the shower tile was improperly installed

because the wall tile was set before the floor tile.[5] As a result, there was a crack around the perimeter of the shower floor. This crack was filled with grout and an adhesive to adhere the tile to the surface. Below this was one to two inches of a concrete floor and under the concrete laid the membrane. Mr. Hanley testified that because the wall tile was set before the floor tile, once the grout cracked away from the walls, water was going through the crack around the perimeter of the shower floor. Thus, Mr. Hanley concluded that if the membrane was properly installed around the drain, the water would go through the crack in the perimeter, soak the concrete, and eventually get to the drain. Mr. Bonk testified that if water seeps through a crack, the membrane is supposed to catch it.

Plaintiffs allege that Defendant failed to properly install the membrane around the drain. Smoker testified that the membrane should be water tight around the drain and this testimony was not refuted. Hanley testified that the membrane was installed beneath the drain instead of on top of it. As a result, if water got through the tile, the water captured by the membrane would flow around the outside of the pipe rather than *into* the drain pipe. Hanley testified that it would then have no place to travel except under the drain and into the sub-floor.

Mr. Bonk testified that Sherman Plumbing and Heating set the drain and membrane. Under Paragraph 3.3.1 of the General Conditions, Defendant Contractor had a duty to "supervise and direct the Work using the Contractor's best skill and attention." Thus, Defendant, as Contractor, had a duty to supervise Sherman Plumbing and Heating during their installation of the drain and membrane.

In summary, the Court finds from the above that water leaked from the shower either from the cracked tile Defendant was obligated to repair, or as a result of a grout

[5] Mr. Bonk testified that the tile work was performed by Fretz, a general contractor, rather than a tile specialist.

leak caused by the wall tile being improperly installed before the floor tile, or both. The leaking water was not captured by the underlying membrane and diverted down the drain because the membrane was improperly installed and connected to the drain. The escaped moisture caused mold and mushroom growth in the adjoining wall.

Despite Defendant's obligations under the Contract, Defendant asserts that because Plaintiffs served as the Architect[6] and Construction Manager[7] for the job, they had the right to inspect the work, stop work upon findings of non-compliance, and order the Contractor to uncover work that had been covered prior to inspection. As a result, Defendant contends that because Plaintiff Sylvia Healy made inspections of the house when the shower stall was uncovered, Plaintiffs should have noticed the non-conforming construction of the shower stall.

Even if Plaintiff Sylvia Healy visited the house during the construction period, she was not, pursuant to Paragraph 4.6.5, "required to make exhaustive or continuous on-site inspections to check [the] quality or quantity of the Work." Moreover, neither the Architect nor the Construction Manager, according to Paragraph 4.6.6, had "control over or charge of or [were] responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work." Finally, Paragraph 3.3.1 provided that the Contractor is "solely responsible for and ha[s] control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under th[e] Contract . . .." In the end, the Contractor cannot blame the Architect or the Construction Manager for its failure to properly install, or supervise the installation of, the membrane.

[6] The Contract identified Plaintiff Sylvia Healy as the Owner and Architect.

[7] The Contract identified Plaintiff James Healy as Construction Manager.

Plaintiffs' evidence at trial established that they reasonably incurred expenses totaling $5,220.00 in investigating and remedying the damages resulting from the shower leakage.

Plaintiffs' prayer for relief in their Complaint included a request for attorney's fees. However, no evidence thereon or argument therefore was submitted at trial or in Plaintiffs' written closings, and the Court has not been directed to a specific contractual provision creating a right to attorney's fees. The Court deems the fee request abandoned.

CONCLUSION

Defendant was negligent in performing and supervising its contracted work, breaching both express and implied terms of the construction contract. Plaintiffs prevailed on each of their three alternate theories of liability. Judgment is rendered in favor of Plaintiffs and against Defendant in the amount of $5,220.00, plus pre-judgment and post-judgment interest at the legal rate from the original date of filing this action below.

IT IS SO ORDERED, this _____ day of February, 2009.

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Kenneth S. Clark, Jr., Judge