

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

CLERK COMMON
PLEAS COURT
LICKING CO. OHIO

Ohio Fresh Eggs, LLC, *et al.* 2018 FEB - 1 AM 8:46

Plaintiff,

GARY R. WALTERS CASE NO. 2017 CV 00716
CLERK

v.

Hershey Equipment Co., Inc., *et al.*

JUDGMENT ENTRY

Defendants.

This matter is before the Court on defendant TriCar's Motion to Dismiss, plaintiffs' Memorandum Contra, and defendant's Reply. For the reasons set forth below, the motion is granted in part.

To dismiss a claim under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, "it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 326 (2007). "A court must construe all material allegations in the complaint and all inferences that may be reasonably drawn therefrom in favor of the nonmoving party. Thus, a court must presume all factual allegations in the complaint are true for purposes of the motion." (Citations omitted.) *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667 (1995).

Plaintiffs' claims arise from the collapse of a manure storage barn in March 2010. Plaintiffs allege the barn was built pursuant to the plans and designs of defendants. Plaintiffs' complaint alleges the plans and designs were provided in 2003. (Complaint at ¶10, 11).

Plaintiffs' have alleged claims against TriCar for negligence, failure to conform to industry standards, failure to perform in a workmanlike manner, negligence misrepresentation, fraudulent misrepresentation, breach of contract, and implied contract/promissory estoppel.

Judge
Thomas M. Marcelain
740-670-5777

Judge
W. David Branstool
740-670-5770

Courthouse
Newark, OH 43055

Plaintiffs' negligence claim, contract claims, and quasi-contract claim all essentially assert professional negligence in the design of the barn. Defendant submits that the claims are barred by the four-year statute of limitations for professional negligence in R.C. 2305.09(D).

While plaintiffs have asserted contract claims which have a longer statute of limitations, the factual basis of their contract claims is the same as their professional negligence claim. The proper "statute of limitations to be applied is determined from the essential ground or gist of the complaint." *Chateau Estate Homes v. Fifth Third Bank*, 10th Dist. No. C-160703, 2017-Ohio-6985, ¶11. Where the factual allegations supporting a breach of contract claim are the same as the allegations supporting a professional negligence claim, the statute of limitations for professional negligence applies. *Fronczak v. Arthur Andersen, L.L.P.*, 124 Ohio App.3d 240 (10th Dist. 1997).

The statute of limitations for professional negligence begins to run when the act or omission constituting the alleged professional malpractice occurred. *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961; *Lifetime Fitness, Inc. v. Chagrin Valley Eng'g, Ltd.*, N.D. Ohio No. 1:13CV566, 2014 U.S. Dist. LEXIS 168216 (Dec. 4, 2014) (applying *Flagstar* to the negligent design of an engineer). In *Flagstar*, the Ohio Supreme Court rejected both the discovery rule and delayed-damages rule for professional negligence claims. Thus, the statute of limitations in this instance expired in 2007 as plaintiffs alleged the design was provided in 2003.

Plaintiffs have also asserted claims for negligent misrepresentation and fraud. The elements of negligent misrepresentation are, "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject

to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.” (Citations omitted.) *Delman v. City of Cleveland Heights*, 41 Ohio St.3d 1, 4 (1989).

The elements of fraud are, “(1) a representation (or concealment of a fact when there is a duty to disclose) (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance.” *Volbers-Klarich v. Middletown Mgmt.*, 125 Ohio St.3d 494, 501, 2010-Ohio-2057, ¶27.

Plaintiffs have arguably stated a claim for negligent and fraudulent misrepresentation. There are issues of fact that require considerations of evidence outside the pleadings that are properly the subject of a summary judgment motion or trial. These include whether defendant TriCar had any duty to disclose a subcontract, whether any alleged representation that TriCar alone did the work was actually made or that its submission to the Department of Agriculture constituted such a representation, and whether any representation or omission was made with intent to mislead plaintiffs.

Accordingly, defendant’s motion is GRANTED in part. Defendant TriCar is entitled to judgment on all claims except the misrepresentation claims.

It is so ORDERED.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.



Thomas M. Marcelain, Judge

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