

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

Ohio Fresh Eggs, LLC, *et al.*

Plaintiffs,

v.

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

Defendants.

CASE NO. 2017 CV 00716

JUDGMENT ENTRY

2018 OCT 30 AM 11:03  
LICKING COUNTY  
COMMON PLEAS COURT

I. NATURE OF THE PROCEEDINGS

This matter is before the Court on defendant TriCar's Motion for Summary Judgment, plaintiffs' memorandum contra, and defendant's reply. For the reasons set forth below, the motion is granted.

II. STANDARD OF REVIEW

Rule 56(C) of the Ohio Rules of Civil Procedure sets forth the standard this Court applies when construing a Motion of Summary Judgment:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is proper if, after construing the evidence most strongly in favor of the non-moving party, reasonable minds could come to but one conclusion in favor of the moving party. Civ.R. 56; *Horton v. Hardwick Chem. Corp.*, 73 Ohio St.3d 679, 686-687 (1995). The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996).

Once the moving party satisfies its initial burden, the non-moving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by

Judge  
Thomas M. Marcelain  
740-670-5777

Judge  
W. David Branstool  
740-670-5770

Courthouse  
Newark, OH 43055

affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). Doubts must be resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

### III. CONCLUSIONS OF LAW

Defendant TriCar has moved for judgment on plaintiffs’ fifth and sixth claims for negligent misrepresentation and fraudulent misrepresentation.

Plaintiffs contracted with TriCar to review design plans for the manure storage barns at issue in this case and compile the design plans to be submitted to the Department of Agriculture for permit approval. Plaintiffs alleged that the designs were defective. This allegation was the subject of the claims previously ruled upon by the Court. Plaintiffs’ two remaining claims allege defendant TriCar fraudulently or negligently made false representations or concealed facts material to the transaction.

The alleged misrepresentations and omissions appear to be that TriCar, or Mr. Carter acting on behalf of TriCar, placed his engineer stamp on the design plans submitted to the Department of Agriculture representing that he alone prepared the plans and was competent to prepare them; Mr. Carter did not inform plaintiffs that he was not a structural engineer; and Mr. Carter did not inform plaintiffs that he had retained an uninsured engineer, defendant Lauth, to work on the design plans. The Court notes that only one of these allegations—the allegation concerning retaining Mr. Lauth—was pleaded with any particularity. (First Amended Complaint at ¶49, 54).

“A claim of common-law fraud requires proof of the following elements: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is

material to the transaction at hand, (c) 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, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.” *Russ v. TRW, Inc.*, 59 Ohio St.3d 42, 49, (1991).

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).

Plaintiffs alleged TriCar had a duty to disclose the fact it had consulted another engineer, Mr. Lauth, to work on the project. They claim omission of this fact was material to the transaction. Second, plaintiffs allege that Mr. Carter’s failure to disclose that he is not a structural engineer was a material omission. Plaintiffs also argue that because Mr. Carter was not a structural engineer, it was a misrepresentation to stamp the drawings and not disclose Mr. Lauth’s work on the drawings. Plaintiffs allege the project was beyond Mr. Carter’s competence which made the stamp and failure to disclose Mr. Lauth’s participation unethical.

Plaintiffs cite sections of the Ohio Administrative Code, the National Society of Professional Engineers’ Code of Ethics, and the National Council of Examiners for Engineering and Surveying’s Rules of Professional Conduct in support of their allegations that TriCar had these duties and violated ethical standards for engineers. Contrary to

plaintiffs' assertions, however, it is not clear that TriCar violated any of the cited codes. Defendant argues that these issues require expert testimony to establish the standard of care for a design professional. Plaintiffs assert that these issues are within the comprehension of a lay person. Defendant has provided an affidavit from Mr. Carter asserting that it is within the standard of care for an engineer to retain a consulting engineer, that there is no duty to disclose the fact that some work is subcontracted, and that it is within the standard of care for an engineer to sign and seal work prepared under his supervision. (Carter Affidavit at ¶6-8). None of Mr. Carter's assertions are patently false or obviously contradict the ethical codes cited by plaintiffs.

Plaintiffs have come forth with no evidence that Mr. Carter was not competent to work on the design or stamp the drawings. They have come forth with no evidence that Mr. Lauth was not competent to work on the drawings. Further, there is no testimony from an expert or anyone familiar with the practice of the engineering work at issue that TriCar had any duty to disclose these things, that they were material to the transaction, or that TriCar's conduct violated any of the cited ethical standards. Absent any such evidence or testimony—and in light of Mr. Carter's affidavit—plaintiffs have failed to raise any genuine issues of material fact.

Finally, plaintiffs have come forth with no evidence that suggests TriCar made any representations or omitted any material facts with the intent of misleading plaintiffs. Accordingly, TriCar is entitled to judgment on plaintiffs' claims.

#### IV. CONCLUSION

For the reasons set forth above, defendant TriCar's Motion for Summary Judgment is GRANTED.

It is so ORDERED. There is no just cause for delay. This is a final appealable order.

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



Thomas M. Marcelain, Judge

Copies to:

John C. Albert, Esq., Attorney for Plaintiffs  
Crabbe, Brown & James, LLP, 500 S. Front St., Ste. 1200, Columbus, OH 43215

Todd H. Neuman, Esq., Jeffrey R. Corcoran, Esq., Attorneys for Third-Party Defendants Timothy W. Laugh and T. Lauth Consulting  
Allen Kuehnle Stovall & Neuman LLP, 17 S. High St., Ste. 1220, Columbus, OH 43215

Patricia J. Trombetta, Esq., Robb S. Stokar, Esq., Attorneys for Defendant/Third-Party Plaintiff  
Hershey Equipment Co., Inc., 312 Walnut St., Se. 2530, Cincinnati, OH 45202

Thomas F. Glassman, Esq., Attorney for Defendant Hershey Equipment Co., Inc.  
Bonezzi, Switzer, Polito & Hupp Co., LPA, 312 Walnut St., Ste. 2530, Cincinnati, OH 45202

Brian T. Winchester, Esq., Patrick J. Gump, Esq., Attorneys for Defendant Tricar, Ltd.  
McNeal Schick Archibald & Biro Co. LPA, 123 W. Prospect Ave., Ste. 250, Cleveland, OH 44115