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Re: RML Corporation v. Lincoln Window Products, Inc., et. al.
Circuit Court of Norfolk, At Law No.: CL03-1885

Dear Counsel:

In this law action RML Corporation (“RML”) sues fifteen separate business entities. It seeks recompense in the amount of four million dollars (\$4,000,000.00) plus attorneys fees and costs associated with its defense and settlement of claims arising from litigation concerning the Bay Point Condominiums in Norfolk, Virginia.

In the Motion for Judgment, inter alia, RML alleges that it developed and built the Bay Point Condominiums. In 1999 the Board of Directors of Bay Point Condominium Association, Inc., and Bay Point Condominium Association, Inc., sued RML along with other corporations associated with the construction of those condominiums. RML contends that in the previous litigation the plaintiffs made claim for damages suffered as a result of water intrusion into the condominium buildings caused by “the actions or omissions of RML’s subcontractors and material suppliers.” See, Motion for Judgment, paragraphs 1 and 2; and see, Bay Point Condominium Association, Inc., et. al. v. RML Corporation, et. al., Norfolk Circuit Court, At Law No.: CL99-475 (“the previous litigation”). The instant defendants represent a collection of those subcontractors and material suppliers.

RML alleges herein that during the previous litigation it filed third party motions for judgment against all of the named defendants “with whom RML was in privity of contract.” See, Motion for Judgment, paragraph 4. RML also alleges that in the previous litigation it requested “that all of the named defendants defend, indemnify and hold it harmless from the allegations” of that action and “vouched-in those defendants under common law and §8.2-607 of the Code of Virginia.” See, Motion for Judgment, paragraph 5. RML contends that none of the defendants took steps to defend or indemnify it in the previous litigation that RML eventually non-suited the third party

motions for judgment. RML now states that it ultimately settled the previous litigation through a judgment for four million dollars (\$4,000,000.00) that now has been “marked satisfied...in exchange for valuable consideration.” See, Motion for Judgment at paragraphs 6 and 7.

The previous litigation yielded a number of published opinions from this Court. Those opinions pertained primarily to issues respecting water intrusion into Bay Point Condominium buildings allegedly caused by improper use and installation on those buildings of a defective, synthetic exterior cladding material referred to as “Exterior Insulation Finish System (“EIFS”). See, Bay Point Condominium Association, Inc., et. al v. RML Corporation, et. al., 52 Va. Cir. 432 (Norfolk 2000); Bay Point Condominium Association, Inc., et. al. v. RML Corporation, et. al. 54 Va. Cir. 422 (Norfolk 2001); and Bay Point Condominium Association, Inc., et. al. v. RML Corporation, et. al., 57 Va. Cir. 295 (Norfolk 2002).

I

In this litigation RML seeks contribution or indemnity from each of the defendants, jointly and severally, for the value of its settlement with the plaintiffs in the previous litigation and its attorneys fees and costs incurred therein. In a total of fifty-six (56) counts, RML asserts causes of action against one or more of the defendants sounding in negligence, fraud, breach of express warranties, breach of implied warranties, breach of UCC implied warranties, violation of the Virginia Consumer Protection Act, implied contractual indemnity and equitable indemnity. Please note that in this and future opinions the Court will refer to individual counts of the Motion for Judgment by the number RML assigned to them. However, because RML listed two separate counts as “Count XII” (Motion for Judgment, pages 24 and 25), and two separate counts as “Count LVI” (Motion for Judgment, pages 72 and 73), several of RML’s counts are misnumbered. Where necessary to do so in referring to causes of action numbered by RML as “Count XII” and “Count LVI”, the Court will take those measures appropriate to avoid confusion by referring to specifically to the count number, the defendant and the cause of action asserted therein.

In this letter-opinion the Court will confine itself to rulings upon the demurrers to RML’s negligence counts filed by defendants Lincoln Wood Products, Inc. (“Lincoln”), Count II; Eastern Insulation & Supply Corporation (“Eastern”), Counts II and XXXIII; M. W. Patriot Manufacturing, Inc. (“Patriot”), Count VI; Greenwich Supply Corp. (“Greenwich”), Counts VI, XIV and XVIII; Peachtree Doors & Windows, Inc. (“Peachtree”), Count X; Scott Lowery, T/A Lowery Construction (“Lowery”), Count XXI; D. M. Barbini Contracting, Inc. (“Barbini”), Count XXX; East Coast Cedar, Inc. (“East Coast”), Count XXXVI; and Carpet Fashions, Inc, T/A Mill End Carpet Shop (“Mill End”), Count LII. RML also makes negligence claims against the following defendants that were served with the Motion for Judgment yet did not file demurrers: Michael Anderson and Angela Hudson, t/a Custom Homes of Virginia (“Custom Homes”), Count XXIV; McDaniels Roofing Corporation (“McDaniels”), Count XLIII; and Daniel Harvey Gay, Sr., t/a Pro-Glass (“Gay”), Count XLIX. ^{1,2} Future letter-opinions or orders will provide the Court’s decisions on

¹ This letter-opinion will discuss generally these non-demurring defendants and the negligence claims RML makes against them. The Court ultimately will decide the negligence counts against each of them in accordance with the decisional principles announced herein.

other pending demurrers, motions and pleas filed by one or more of the defendants. All demurrers, motions and pleas awaiting the Court's decisions were argued by counsel on September 7, 2004. The Court received, reviewed and has considered briefs filed by RML and several of the defendants on those pending matters.

RML alleges that it "contracted with" Lowery, Custom Homes, Barbini, Greenwich, Eastern, McDaniels, Gay, East Coast and Mill End in one or another capacity. *See*, Motion for Judgment, paragraphs 9, 10, 12, 13, 14, and 15; *see also* paragraphs 129, 136, 144, 152, 159, 167, 175, 205, 213, 221, 228, 236, 244, 251, 259, 267, 297, 305, 313, 343, 351, 359, 366, 374, 382, 395. In the negligence counts regarding the following defendants, RML alleges a direct contractual relationship respecting the product or service at issue: Count XVIII (Greenwich-installation of doors and sliding glass doors), Count XXI (Lowery-installation of windows and decking materials), Count XXIV (Custom Homes-installation of windows and decking materials), Count XXX (Barbini-installation of windows and decking materials), Count XXXIII (Eastern-installation of doors and sliding glass doors), Count XXXVI (East Coast-installation of decking systems), Count XLIII (McDaniels-installation of roofs, roofing systems and flashing), Count XLIX (Gay-furnishing materials for and installing decking systems), and Count LII (Mill End-furnishing materials for and installing decking systems). However, in the negligence counts regarding the following defendants RML does not allege a direct contractual relationship respecting the product or service at issue: Count II (Lincoln and Eastern -manufacture and distribution of windows and sliding glass doors), Count VI (Patriot-manufacture of windows and sliding glass doors, and, Greenwich-distribution of windows and sliding glass doors), Count X (Peachtree-manufacture and distribution of doors), and Count XIV (Greenwich-manufacture and distribution of doors).³ Thus, with respect to some of the defendants for some of their products or services, RML alleges to be in privity of contract, and, as to others, it

2 RML categorizes the named defendants as follows: Lincoln as in the business of manufacturing, distributing, selling and marketing windows and sliding glass doors; Patriot as in the business of manufacturing, distributing, selling and marketing windows and sliding glass doors; Greenwich as in the business of supplying Patriot windows, as an installer of Patriot and/or Lincoln sliding glass doors, as in the business of manufacturing, distributing, selling and marketing doors, and as an installer of doors; Eastern as in the business of supplying Lincoln windows, as an installer of Patriot and/or Lincoln sliding glass doors, and as an installer of doors; Lowery as an installer of Patriot and/or Lincoln windows and as providing labor for the installation of decking; Custom Homes as an installer of Patriot and/or Lincoln windows and as providing labor for the installation of decking; Barbini as an installer of Patriot and/or Lincoln windows and as providing labor for the installation of decking; Peachtree as in the business of manufacturing, distributing, selling and marketing of doors; McDaniels as an installer of roofing materials; Gay as providing materials and labor for the installation of decking materials; East Coast as providing materials and labor for the installation of decking materials; and Mill End as providing materials and labor for the installation of decking materials. *See*, Motion for Judgment at paragraphs 8-15.

3 Blacks Law Dictionary, Revised 4th Edition (1976) defines privity of contract as "that connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect of the matter sued on." *See also*, Metro Panel Systems, Inc. v. Sordoni Skanska Construction Company, 56 Va. Cir. 399, 401 (Norfolk 2001). RML offers a much more expansive definition of that legal concept, arguing that it is in privity of contract with each of the defendants even absent "a direct contractual relationship" with them. In support of its position RML cites Padgett v. Bon Air Realty Company, 150 Va. 841, 847, 143 S.E.2d 291, 293 (1928). However, Padgett did not purport to change or expand the definition of privity of contract in Virginia. To the contrary, in relevant part, the decision explored whether a non-contracting party litigant could sue upon a real estate sales contract as a third party beneficiary. *Id.* This Court declines RML's invitation to expand the above-noted longstanding definition of privity of contract.

does not.

II

In undertaking to decide the several demurrers the Court must accept as true those factual allegations properly pleaded in the Motion for Judgment and such other facts as may be fairly inferred from those allegations. See, Glazebrook v. Board of Supervisors, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003); Van Deusen v. Snead, 247 Va. 324, 326, 441 S.E.2d 207, 208 (1994). A demurrer tests the legal sufficiency of a pleading and does not entail a court's evaluation of the merits of a claim. A demurrer "does not admit the correctness of the pleader's conclusions of law." Moore v. Maroney, 258 Va. 21, 23, 516 S.E.2d 9, 10 (1999); see also, Welding, Inc. v. Bland County Service Authority, 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001); Ward's Equipment, Inc. v. New Holland of North America, Inc., 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997).

Thus, this Court's consideration of the pending demurrers respecting RML's negligence claims requires a determination whether RML properly pleads a valid cause of action against each demurring defendant. W.S. Carnes, Inc. v. Board of Supervisors, 252 Va. 377, 384, 478 S.E.2d 295, 300 (1996).

III

The Court sustains the demurrers to Count II (Lincoln and Eastern), Count VI (Patriot and Greenwich), Count X (Peachtree) and Count XIV (Greenwich) without leave to amend the Motion for Judgment as to those counts.

In Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 374 S.E.2d 55 (1988) the Court definitively ruled that absent privity of contract no cause of action exists in tort for recovery of economic losses allegedly incurred as a result of another's negligence. Id. at 422-424, 374 S.E.2d at 57, 58. The Court continues to hold fast to the Sensenbrenner determination that no such cause of action exists in Virginia. See, Rotonda Condominium Unit Owner's Association v. The Rotonda Associates, 238 Va. 85, 380 S.E.2d 876 (1989); Copenhaver v. Rogers, 238 Va. 361, 384 S.E.2d 593 (1989); Ward v. Ernst & Young, 246 Va. 317, 435 S.E.2d 628 (1993); Filak v. George, 267 Va. 612, 594 S.E.2d 610 (2004).

In this case RML seeks contribution or indemnity for the value of its settlement with the plaintiffs in the previous litigation and thus, by definition, seeks from the defendants compensation for purely economic losses. See, Blake Construction Co., Inc. v. Alley, 233 Va. 31, 353 S.E.2d 724 (1987); and see, Metro Panel Systems, Inc. v. Sordoni Skanska Construction Co., 56 Va. Cir. 399, 404 (Norfolk 2001). Moreover, even the original loss for which RML herein seeks contribution or indemnity, i.e., diminution in value of and costs to repair the Bay Point Condominiums due to water intrusion, constituted an economic loss rather than an "injury to property." See, Sensenbrenner, 236 Va. at 423, 424, 374 S.E.2d 57, 58; Rotonda, 238 Va. at 90, 380 S.E.2d at 879. This holding conforms squarely with the decisions of this circuit in the previous litigation and other circuits in similar litigation. Bay Point Condominium Association, Inc. v. RML Corporation, 52 Va. Cir. 432, 434-436 (Norfolk 2000); and see, Murray v. Dryvit Systems, Inc., 2002 Va. Cir. Lexis 420 (Franklin County); Board of Directors Lesner Pointe Condominium v. Harbour Point Building Corp., 2002 Va.

Cir. Lexis 422 (Virginia Beach).

Therefore, because no cause of action exists sounding in tort for negligence as to those defendants with which RML did not allege a direct contractual relationship, the demurrers respecting the above-referenced counts must be sustained without leave to amend.

IV

As to those counts wherein RML alleges a direct contractual relationship with the named defendant respecting the product or service at issue, the demurrers are sustained with leave to amend. See, Count XVIII (Greenwich), Count XXI (Lowery), Count XXX (Barbini), Count XXXIII (Eastern), Count XXXVI (East Coast), and Count LII (Mill End).

In Ward v. Ernst & Young, 246 Va. at 324-326, 435 S.E.2d at 631-32, the Court discussed its previous holdings in Blake, Sensenbrenner, Rotonda and Copenhaver and, on the issue of recovery of economic losses under a negligence theory, stated that “when privity exists, economic losses may be recovered under a negligence theory.” Id. 246 Va. at 326, n. 3, 435 S.E.2d at 632, n. 3. Prior to that footnote, the Court approvingly quoted the following language from its Rotonda opinion:

[T]he Association sought only to recover damages for the economic losses associated with the costs of repairing the defects in the common elements. Such economic losses are not recoverable in tort; they are purely the result of disappointed economic expectations. The law of contracts provides the sole redress for such claims.[n2]

n2 These observations cannot fairly be interpreted to mean that economic losses are never recoverable in tort. The language employed here has its predicate in the tort alleged in the Association’s negligence count; it does not purport to foreclose a right to recover an economic loss in other tort actions such as those for fraud, conspiracy to injure another in a trade, business or profession, or tortious interference with contract.

Ward, 246 Va. at 325, 435 S.E.2d at 632, quoting Rotonda, 238 Va. at 90, 380 S.E.2d at 879.

In this case RML asserts that Ward’s footnote 3 language entitles it to maintain a cause of action for negligence against those defendants with which it maintained a direct contractual relationship. However, mere invocation of that footnote’s language does not end the inquiry required to decide these demurrers. The Court necessarily must determine whether RML’s entitlement to proceed on a negligence theory arises ex contractu or ex delicto.⁴

⁴ In Glenn v. National Housing Building Corp., 50 Va. Cir. 71, 88-89 (Virginia Beach 1999), the Court referenced Ward’s footnote 3 and the apparent conflict between that passage’s language and the holdings in both Rotonda and Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc., 256 Va. 553, 507 S.E.2d 344 (1998). The Court noted that in the aftermath of Rotonda, at least two judicial circuits had concluded that “even where a party asserts

In Kamlar Corp. v. Haley, 224 Va. 699, 299 S.E.2d 514 (1983), the Court discussed the difference between damages recoverable in tort and contract breach actions, and its determination to continue adherence to the distinctions between the two:

Damages are awarded in tort actions to compensate the plaintiff for all losses suffered by reason of the defendant's breach of some duty imposed by law to protect the broad interests of social policy...damages for breach of contract, on the other hand, are subject to the overriding principal of compensation. They are within the contemplation and control of the parties in framing their agreement. They are limited to those losses which are reasonably foreseeable when the contract is made. These limitations have lead to "more or less inevitable efforts of lawyers to turn every breach of contract into a tort." [Footnote omitted]. W. Prosser, Handbook of the Law of Torts, section 92 (4th Ed. 1971) at p. 614.

The overwhelming weight of authority continues to resist this tendency.

Kamlar, 224 Va. at 706, 299 S.E.2d at 517. See also, Blake, 233 Va. at 34-35, 353 S.E.2d at 726-27; Sesenbrenner, 236 Va. at 423-24, 374 S.E.2d at 57; Rotonda, 238 Va. at 90, 380 S.E.2d at 876, 879; Ward, 246 Va. at 324-25, 135 S.E.2d at 631-32.

In Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc., 256 Va. 553, 507 S.E.2d 344 (1998), within the context of a construction contract dispute wherein the plaintiff ("RMA") alleged fraud and constructive fraud, the Court explored the distinction between tort and contract breach actions:

privity of contract, the sole redress for economic damages is the law of contracts." Id. at 89. The Court went on to label Ward's footnote 3 as dicta and to openly question "how one might tend to reconcile the footnote in Ward" with the Court's prior determination that economic losses are not recoverable in tort, and it then concluded its discussion as follows:

Virginia law generally forbids a claimant from attempting to transform a cause of action ex contractu into a tort claim where the duties between parties arise solely by virtue of contract. See McDevitt, 256 Va. at 558. The rule is apparently different in cases involving economic damages where there is privity of contract; though the Supreme Court has not explained why this should be so.

Id., at 88-89.

Thus, the Court in Glenn effectively ruled that Ward's footnote 3 creates an ex delicto cause of action for negligence when privity of contract exists and permits the recovery of economic losses in such an action. This court is not so convinced.

In determining whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained. In Oleyar v. Kerr, Trustee, 217 Va. 88, 90, 225 S.E.2d 398, 399-400 (1976) (quoting Burke's Pleading and Practice, Section 234 at 406 (4th Ed. 1952)), we distinguished between actions for tort and contract:

If the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of the contract, to take due care, and the defendants are negligent, then the actions is one of tort.

RMA, 256 Va. at 558, 507 S.E.2d at 347. The McDevitt court went on to conclude that, "a tort action cannot be based solely on a negligent breach of contract." 256 Va. at 559, 507 S.E.2d at 347.

In light of the Virginia Supreme Court's repeated recognition of legal principles distinguishing those duties owed between individuals in tort and contract and the distinct causes of action arising therefrom, this Court cannot conclude that Ward's footnote 3 signaled a departure from that longstanding jurisprudence. See, Filak v. George, 267 Va. at 618-19, 594 S.E.2d at 613-14 (2004). Therefore, while economic losses lawfully may be recovered when privity of contract exists, their availability to RML in this case for the defendant's alleged negligent breach of contractual duties turns on the specific language of the parties' contracts governing their relationships in construction of the Bay Point Condominiums. With respect to RML's negligence claims, the defendants owed RML no duty outside the scope of those contractual relationships.

RML does not contend in the Motion for Judgment that its contract with any demurring defendants contains language providing for the recovery of the economic losses sued for in this case. Therefore, the Court must sustain the demurrers regarding Motion for Judgment Counts XVIII, XXI, XXX, XXXIII, XXXVI and LII with leave to amend. RML may file an Amended Motion for Judgment respecting those counts within ten (10) business days of the Order incorporating the Court's decisions as announced in this letter-opinion.

The Court will proceed to enter an Order incorporating the decisions of this letter-opinion, noting RML's objections thereto and, as to the Court's decision to grant RML leave to amend certain counts of the Motion for Judgment, noting the objections of Greenwich, Lowery, Barbini, Eastern, East Coast and Mill End. The Court will dispense with counsel signatures pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia.

Very truly yours,

Norman A. Thomas
Judge, Fourth Judicial Circuit