

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

[Filed: March 14, 2016]

MAUREEN CAIN,
Plaintiff,

V.

AQUIDNECK CONSULTING
ENGINEERS, LLC *Alias* ABC LLC,
Defendant.

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C.A. No. NC-2014-0228

DECISION

STONE, J. Before the Court is Defendant Aquidneck Consulting Engineers, LLC Alias ABC LLC's (ACE or Defendant) Motion for Summary Judgment in this breach of contract, negligence, breach of warranty, and malpractice action. On March 7, 2016, the Court held a hearing on the motion and heard arguments from both parties. Jurisdiction in this Court is pursuant to G.L. 1956 § 8-2-14 and Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure. For the reasons set forth herein, the Defendant's Motion for Summary Judgment is granted.

I

Facts and Travel

Maureen Cain (Plaintiff) is a resident of the Town of Portsmouth, Rhode Island. Sometime in 2008 or 2009, she decided to build a new house located at 29 Beach Street, Portsmouth, Rhode Island. In 2009, to assist her on that project, she hired ACE to design the foundation of the home. ACE is a structural engineering firm that is located in Newport, Rhode Island. Pursuant to their contract, ACE's only responsibility was to design the foundational plan

in exchange for \$1500. The contract further provided that ACE would incur no responsibility for construction supervision or administration.

The foundational plan prepared by ACE included a deck. To provide structural support for the deck, ACE's plan called for the contractor to use Wolmanized Parallel Strand Lumber (PSL) beams.¹ The manufacturing process for PSL provides it with superior structural strength as compared to ordinary wood. One manufacturer of PSL developed a technique to treat PSL in order to protect it from the outdoor elements. This Wolmanized PSL is known as Parallam Plus PSL² As one might expect, Wolmanized PSL is more expensive than un-Wolmanized PSL.

Once ACE prepared the foundational designs, Ms. Cain began to seek contractors to build the house. Ms. Cain engaged in a bidding process, with four contractors competing for the job. On February 8, 2010, one of the bidders questioned ACE whether non-Wolmanized beams could be used for the deck's foundation. ACE, through Douglas G. Hancher, P.E., responded to all of the bidding contractors that "everyone should bid on using the 16"-deep Wolmanized Service Level 2 PSLs" and that "[c]ladding details for non-Wolmanized PSLs is out of our depth; if you (or others) want to offer a clad plain (non-Wolmanized) PSL alternative (and take responsibility for the waterproofing detailing), that's okay structurally."

Additionally, on May 6, 2010, Plaintiff questioned ACE regarding the placement of "frost walls" in the foundation. Apparently, she believed that the plans provided by ACE would create an issue whereby water could collect in the foundation. Despite ACE telling her, and her

¹ PSL is produced by placing small wooden strands laid in parallel alignment which are then bonded with adhesive. One could think of it as wrapping a number of toothpicks together to form a single beam.

² The term "Wolmanized," as it relates to lumber, is a registered trademark belonging to Arch Wood Protection, Inc. (Arch). Weyerhaeuser produces the Parallam Plus PSL, in conjunction with Arch.

contractor, that its plan would provide a runoff and prevent creating a catch basin, she insisted that the contractor take a different course of action. The implementation of those new plans resulted in an additional charge from the contractor.

That was the last contact that ACE had with anyone concerning Ms. Cain's project. Subsequently, Ms. Cain hired Island Design Homes, Inc. (Island) to build the house. Apparently, Island used non-Wolmanized beams on the project that were not treated. Those beams have since deteriorated due to the outdoor conditions. Plaintiff entered into arbitration with Island over the issue of the beams and indicated that "ACE would not provide the design for [non-Wolmanized] cladding" and that ACE informed the contractors that the beams had to be "completely protected from exposure to the atmosphere."

Following arbitration, on June 2, 2014, Plaintiff filed a complaint in Newport County Superior Court against Defendant alleging four counts: 1) breach of contract, 2) negligence, 3) breach of warranty, and 4) malpractice. On December 14, 2015, Defendant filed a Motion for Summary Judgment, to which Plaintiff timely objected. In its motion, Defendant forwards numerous arguments that it contends are fatal to Plaintiff's case. The Court heard oral arguments from the parties on March 7, 2016 and indicated it would issue a written decision.

II

Standard of Review

Pursuant to Rule 56(c), "[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001). In deciding if the parties dispute any issues of material fact, the Court must neither "pass[] on the

weight and credibility of the evidence” nor “determine issues of fact.” Palazzo v. Big G Supermarkets, Inc., 110 R.I. 242, 245, 292 A.2d 235, 237 (1972). Rather, the Court’s role in ruling on a motion for summary judgment is “only [to] determine whether there are any issues of fact to be resolved” and “whether as a matter of law one party is entitled to a judgment.” Id. (quoting Warren Educ. Ass’n v. Lapan, 103 R.I. 163, 168, 235 A.2d 866, 870 (1967)).

Once a summary judgment motion is made, “[t]he burden rests with the nonmoving party ‘to prove the existence of a disputed issue of material fact by competent evidence; it cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.’” Mut. Dev. Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319, 323 (R.I. 2012) (quoting Hill v. Nat’l Grid, 11 A.3d 110, 113 (R.I. 2011)). Thus, “by affidavits or otherwise [opposing parties] have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact.” Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). “[A] litigant cannot avoid summary judgment by merely posing factual possibilities without submitting admissible evidence thereof.” Nichols v. R.R. Beaufort & Assocs., Inc., 727 A.2d 174, 177 (R.I. 1999). Accordingly, in order to survive a summary judgment motion as to a particular claim, the plaintiff must “produce evidence that would establish a prima facie case for [that] claim.” DiBattista v. State, 808 A.2d 1081, 1089 (R.I. 2002). Conversely, summary judgment is proper if the plaintiff cannot set forth a prima facie case. Kelley v. Cowesett Hills Assocs., 768 A.2d 425, 430 (R.I. 2001).

III

Analysis

The Plaintiff’s complaint sets forth four separate theories of liability. Defendant submits that each of those theories fails for its own reasons. Contrarily, Plaintiff insists that genuine

issues of material fact still remain. Having carefully reviewed each party's arguments, the Court will address each theory in turn.

A

Breach of Contract

As it relates to the breach of contract claim, the Defendant insists that in analyzing the Plaintiff's claims, "[t]he court must look to the 'gist of the action.'" Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 823, 489 N.E.2d 172, 175 (1986) (quoting Hendrickson v. Sears, 365 Mass. 83, 85, 310 N.E.2d 131 (1974)). In support, it notes that "the act of unintentionally failing to conform with contract specifications is not different from negligenc[ce]." Kingston Hous. Auth. v. Sandonato & Bogue, Inc., 273, 577 N.E.2d 1, 3 (Mass. App. Ct. 1991). Therefore, ACE asks the Court to analyze the Plaintiff's breach of contract claim in the same light as her negligence and malpractice claims. While that may be true, the Court is nonetheless mindful that if—in a breach of contract case—the issue of whether a material breach has occurred "admits of only one reasonable answer, then the court should intervene and resolve the matter as a question of law." Women's Development Corp. v. City of Central Falls, 764 A.2d 151, 158 (R.I. 2001).³

In the present case, the Court finds there is no question that ACE fully performed its contractual duties owed to the Plaintiff. It is uncontested that it prepared the foundational designs it was hired to, but Plaintiff decided to allow different materials to be used— as it relates to the beams—and a different design to be used—regarding the frost walls. Those choices on her part did not constitute a breach on ACE's behalf. The contract clearly stated that ACE would

³ Further, by addressing this issue separately, the Court ensures that both the contract and negligence counts are fully addressed by the Court.

incur no responsibility for construction supervision or administration. Accordingly, the question of whether or not ACE breached the parties' contract "admits of only one reasonable answer." Id. That answer is that ACE did not breach the contract. Therefore, the Court finds that ACE is entitled to summary judgment on the Plaintiff's claim for breach of contract.

B

Breach of Warranty

ACE submits to the Court that generally the work of a design professional—such as an engineer—is not subject to implied warranties. Instead, ACE offers that it must be judged under a negligence standard, testing whether ACE acted in accord with the skill that one would reasonably expect from a similarly situated engineer. Plaintiff offered no counterargument to ACE's position.

"[I]n the absence of a special agreement [a design professional] does not imply or guarantee a perfect plan or satisfactory result." Klein v. Catalano, 437 N.E.2d 514, 525 (Mass. 1982) (first alteration in original) (internal citations omitted) (quoting Mississippi Meadows, Inc. v. Hodson, 299 N.E.2d 359 (Ill. App. Ct. 1973)). Indeed, "[a]n engineer, or any other so-called professional, does not 'warrant' his service or the tangible evidence of his skill to be 'merchantable' or 'fit for an intended use.' . . . Rather, . . . the engineer or architect 'warrants' that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect." Bd. of Managers of Park Point at Wheeling Condo. Ass'n v. Park Point at Wheeling, LLC, --- N.E.3d ---, 2015 IL App (1st) 123452, ¶ 18 (Ill. App. Ct. 2015) (quoting Kemper Architects, P.C. v. McFall, Konkel & Kimball Consulting Engineers, Inc., 843 P.2d 1178, 1186 (Wyo. 1992)).

The Court is aware of no case that exposes a design professional to an implied warranty on his work. Rather, courts hold the work of engineers to a negligence standard. There was no express warranty contained in the language of ACE's contract with Ms. Cain. As a result, the Court must grant ACE's motion for summary judgment as it relates to the breach of warranty count.

C

Negligence and Malpractice

To succeed on a negligence claim, “a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage.” Wyso v. Full Moon Tide, LLC, 78 A.3d 747, 750 (R.I. 2013) (quoting Willis v. Omar, 954 A.2d 126, 129 (R.I. 2008)). Where there is “no evidence presented to the motion justice[] that would [] establish[] an applicable standard of care against which [the] defendant’s conduct could be measured, [and] the plaintiff offered no evidence to substantiate whether any deviations from those standards occurred” summary judgment is appropriate. Boccasile v. Cajun Music Ltd., 694 A.2d 686, 691 (R.I. 1997). A malpractice claim and a negligence claim share the same elements and burden of proof. See Perry v. Alessi, 890 A.2d 463, 467 (R.I. 2006).

Here, the Plaintiff has neither offered evidence as to the standard of care that ACE owed to Ms. Cain nor any evidence of how the actions of the Defendant were negligent by falling below that standard. As it pertained to the applicable standard of care, the Plaintiff’s deposition testimony—which Defendant relied on in its opposition—included statements like “okay, so I don’t know—should I even be answering this? I’m not an expert in this.” (Cain Dep. Tr. (Cain

Tr.) 28:20–23).⁴ Despite these statements, Plaintiff never retained an expert who could offer an adequate opinion on the standard of care or Defendant’s alleged deviation therefrom. Additionally, Plaintiff attempted to rely on product literature stating that Parallam Plus PSL was the only Wolmanized PSL available. However, this argument is unavailing as it merely recognizes that two proprietary techniques were combined to create Parallam Plus PSL. Weyerhaeuser uses a patented process to produce its Parallam PSL and “Wolmanized” is a registered trademark of Arch. To say that Parallam Plus PSL is unique is in the same vein as saying that any collaboration between two companies is unique. One quite literally cannot create the same product without violating those companies’ rights. However, as is evident through the generic drug market, this does not mean that one cannot create a comparable product. Thus, it cannot be said that by telling the contractors they could use non-Wolmanized beams if they could sufficiently protect them from the elements that ACE was negligent, as a matter of law. See Wyso, 78 A.3d at 750 (stating that a plaintiff must establish the duty and breach thereof); see also Boccasile, 694 A.2d at 691 (noting that with no evidence of the applicable standard of care a claim must fail).

Rather, it would appear to the Court that ACE acted reasonably by providing a direct answer to the question asked by the contractors while also qualifying its answer by stating that it could not offer an opinion on how to waterproof the beams, beyond suggesting the product it had already recommended. That a third party—over whom ACE had no control—chose to undertake a course of action wholly different from that which ACE had suggested does not create liability for ACE.

⁴ When asked what was wrong with the subject beams Ms. Cain stated, “I’m not an expert in that.” (Cain Tr. 52:18), and when asked what ACE did wrong she responded “I don’t know. I’m not an expert here.” Id. at 22:15.

Regarding the frost wall, Plaintiff did not abide by the plans provided by ACE, and therefore, Defendant cannot be said to be the proximate cause of Plaintiff's injury.⁵ See Carpenter v. Murphy, 4 A.D.3d 318, 320 (N.Y. App. Div. 2004) (holding that where one deviates from the design professional's plan, that professional is not liable for negligence). "[I]f a 'plaintiff fails to present evidence identifying defendant[']s negligence as the proximate cause of his [or her] injury or from which a reasonable inference of proximate cause may be drawn,' then summary judgment becomes proper." Splendorio v. Bilray Demolition Co., 682 A.2d 461, 467 (R.I. 1996). While this Court is cognizant of the fact that proximate cause is rarely decided at the summary judgment stage, this is one of the infrequent situations where, as a matter of law, it can be determined. The mere fact that Plaintiff believed the plan provided by ACE may create an issue with the foundation is insufficient proof that the plan was faulty and that she needed to implement an alternative plan. Indeed, the only damages she claims are the cost for the alteration that she ordered. Choosing to implement a different plan is in no way traceable to the actions of ACE. Where a plaintiff cannot establish its prima facie case, it is appropriate for the Court to enter summary judgment. Kelley, 768 A.2d at 430. Based on the foregoing, Plaintiff's claims for breach of contract and malpractice against ACE fail as a matter of law.

⁵ The Court's reasoning as to the Plaintiff's failure to establish a standard of care, or corresponding breach, applies equally to the claims regarding the frost walls and the beams.

IV

Conclusion

After reviewing the materials and arguments submitted by both parties in the light most favorable to the Plaintiff, this Court grants Defendant's Motion for Summary Judgment on the ground that there are no genuine issues of material fact remaining because, as a matter of law, Plaintiff is unable to establish her prima facie case against Defendant. As a result, Defendant is entitled to judgment as a matter of law. Counsel shall confer and prepare an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Maureen Cain v. Aquidneck Consulting Engineers, LLC Alias ABC LLC

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COURT: Newport County Superior Court

DATE DECISION FILED: March 14, 2016

JUSTICE/MAGISTRATE: Stone, J.

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