

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000862-MR

H&R MECHANICAL CONTRACTORS, INC.

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 02-CI-00024

CODELL CONSTRUCTION COMPANY AND
TAYLOR & WHITNEY ARCHITECTS, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND McANULTY, JUDGES; POTTER, SENIOR JUDGE.¹

TAYLOR, JUDGE: H&R Mechanical Contractors, Inc. (H&R) brings this appeal from an April 17, 2002, Order of the Knox Circuit Court dismissing its complaint against Codell Construction Company (Codell) and Taylor & Whitney Architects, Inc. (Taylor & Whitney). We affirm.

¹ Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

H&R is a plumbing contractor who is located in Georgetown, Kentucky. Codell is a construction management company doing business in Winchester, Kentucky. Taylor & Whitney are architects from Lexington, Kentucky. In 1999, the Knox County Hospital, located in Barbourville, entered into separate contracts with H&R, Codell, and Taylor & Whitney for the construction of a new hospital.

On January 17, 2002, H&R filed a complaint against, *inter alios*, Codell and Taylor & Whitney for the negligent performance of their duties in the construction of the new hospital, which allegedly caused damage to H&R. Taylor & Whitney filed an answer on February 20, 2002, and Codell filed a motion to dismiss for failure to state a claim upon which relief could be granted on March 4, 2002. Thereafter, Taylor & Whitney also filed a motion to dismiss or a motion for judgment on the pleadings. On April 17, 2002, the circuit court entered an order dismissing the complaint against Codell and Taylor & Whitney. Therein, the court concluded:

The Plaintiff, Codell, and Taylor & Whitney each entered into contracts with Knox County Hospital to perform certain duties towards the construction of a new hospital. Each of the parties signed a separate contract with Knox County Hospital. It is undisputed that the Plaintiff did not contract with Codell and that the Plaintiff did not contract with Taylor & Whitney. There is then no contractual relationship between the Plaintiff and Codell or Taylor &

Whitney. The Plaintiff contends that as a result of delays in the construction project caused by Codell and Taylor & Whitney, the Plaintiff suffered substantial damages.

Kentucky has adopted the economic loss doctrine which prevents the recovery of tort damages because of a relationship that was created by contract. Real Estate Market, Inc. v. Franz, 885 S.W.2d 921 (Ky. 1994). The duty of Codell was to Knox County Hospital by virtue of its contract with Knox County Hospital. The duty of Taylor & Whitney was to Knox County Hospital by virtue of its contract with Knox County Hospital. Neither Codell or Taylor & Whitney has a duty to the Plaintiff and the Plaintiff is not a third party beneficiary to the contracts of Codell or Taylor & Whitney with the hospital. The duties of Codell and Taylor & Whitney were created by contract and cannot be converted to tort claims based on negligence. Guarantee Electric Co. v. Big River Electric Corp., 669 F. Supp. 1371 (W.D.Ky. 1987).

The Plaintiff points out that it is very early in this litigation and that dismissal is an extreme remedy. Nevertheless, the basis of the Plaintiff's claim is clear. The Plaintiff's claim is that delays by Codell and Taylor & Whitney caused the Plaintiff damages. The Plaintiff's claim is based on contractual duties, yet there is no contract between the Plaintiff and either Codell or Taylor & Whitney. Based on the authorities cited above, such claims are not well taken.

This appeal follows.

H&R contends the circuit court committed error by dismissing its complaint against Codell and Taylor & Whitney. Specifically, H&R contends the complaint states a cause of

action based upon the tort of negligent misrepresentation as set forth in Restatement (Second) of Torts § 552 (1997) and recently adopted by the Kentucky Supreme Court in Presnell Construction Managers, Inc. v. EH Construction, LLC, 134 S.W.3d 575 (Ky. 2004).² Conversely, Codell and Taylor & Whitney argue that the complaint does not state a claim for negligent misrepresentation and the circuit court properly dismissed the complaint.

A motion to dismiss for failure to state a claim should only be granted when it appears the pleading party would not be entitled to relief upon any set of facts that could be proved in support of the claim. Ewell v. Central City, 340 S.W.2d 479 (Ky. 1960). When construing a complaint, it is well-established that the substance of the complaint should control. First National Bank of Mayfield v. Gardner, 376 S.W.2d 311 (Ky. 1964).

In relevant part, H&R's complaint stated as follows:

13. That through actions or inaction of the Defendants significant delays occurred during the building of the new hospital facility.

14. That the Defendants owed a duty to H&R when performing their respective functions during the completion of the new hospital to perform them in a skillful, careful and diligent manner.

² We observe that this appeal was held in abeyance pending final resolution of Presnell Construction Managers, Inc. v. EH Construction, LLC, 134 S.W.3d 575 (Ky. 2004).

15. That from the time the Agreement was executed the Defendants failed to properly perform their duties, resulting in delays in the construction project, all of which were the approximate cause of damages suffered by H&R.

16. That the delays negligently caused through actions or inaction of the Defendants resulted in \$358,090.00 in project delay costs to H&R, as of November 5, 2001.

17. That H&R is entitled to and now demands a judgment in the amount of \$242,647.90 against Knox County Hospital in payment for completed work.

18. That H&R is entitled to and now demands a judgment, jointly and severally, against the Defendants for damages proximately resulting from the negligent performance of their duties during the construction of the new Knox County Hospital facility.

The elements of the tort of negligent misrepresentation are as follow:

(1) 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.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the

information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552 (1997).

Juxtaposing H&R's complaint and the elements of the tort of negligent misrepresentation, it is evident that the complaint does not set forth a claim for negligent misrepresentation. To set forth a claim for negligent misrepresentation, it is imperative to allege, in some form, that false information was supplied or relied upon by a party. The complaint broadly speaks in terms of duties and inactions on the part of the "defendants." In fact, the complaint looks to alleged negligent performance of duties, not negligent misrepresentation. The circuit court viewed the complaint as merely setting forth a breach of contractual duties for which no contract existed. Upon the whole, we do not believe the complaint can reasonably be construed as setting forth a claim for negligent misrepresentation. Accordingly, we conclude the circuit court properly dismissed H&R's complaint for failure to state a claim upon which relief could be granted.

For the foregoing reasons, the Order of the Knox Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

POTTER, SENIOR JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

POTTER, SENIOR JUDGE, DISSENTING. I respectfully
dissent.

For this judge, part of the difficulty in resolving
this appeal stems from the failure of the Court in Presnell,
supra, to specify in detail the facts upon which the alleged
misrepresentation and negligent supervision claims were based.
The Court merely outlined the operative facts as follows:

[The Contractor], claiming exclusively
economic losses from [the Construction
Manager's] **failure to perform properly its
contractual duty to coordinate the Project**,
filed a suit against [The Construction
Manager] in which it brought claims premised
upon [its] alleged negligent
misrepresentation and negligent supervision
of the Project.

Id. at 576, emphasis added.

When considering the Presnell case, the Court of
Appeals described the facts upon which the claims were based as
follows:

Work on the project proceeded with great
difficulty. There were numerous disputes
relating to the timing and quality of the
work and to the payment of outstanding
invoices. EH Construction, LLC v. Delor
Design Group, Inc., Appeal No. 1998-CA-
001476-MR (Ky.App. March 31, 2000).

Given these descriptions of the facts which existed in Presnell,
it is difficult to imagine how that case differs from the

present case in any material way. The absence of concrete facts supporting the alleged negligent misrepresentation and negligent supervision claims in Presnell makes it difficult to readily envision factual examples of the type of conduct in the typical construction contract which would easily fall within the purview of the Restatement Section 552. Be that as it may, it is not this court's task to provide such scenarios; neither is our function to determine whether H&R has actually sustained a loss covered by the Restatement or whether it can presently articulate such a claim.

Because the court below dismissed the complaint based upon the pleadings, the issue is whether H&R's pleadings were sufficient to survive the motion to dismiss for failure to state a claim. As made clear by the opinion of the former Court of Appeals in Spencer v. Woods, 282 S.W.2d 851, 852 (Ky. 1955):

A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that the claimant is entitled to no relief under any state of the facts which could be proved in support of the claim.

Civil Rule 8.01 requires that a complaint contain only a "short and plain statement of the claim showing that the pleader is entitled to relief" and a demand for judgment. The purpose of that rule was further clarified by the Court in Universal C.I.T

Credit Corp v. Bell High Coal Corp., 454 S.W.2d 706, 708 (Ky. 1970):

'The true objective of a pleading stating a claim is to give the opposing party fair notice of the claimant's right, the adverse party's wrong, and the type of relief to which the claimant deems himself entitled.'
Clay, Kentucky Practice, CR 8.01, Comment 3.

The complaint filed by H&R includes the following allegations:

8. That Codell was retained by Hospital to serve in the capacity of Construction Manager.
9. That Taylor and Whitney was retained by Hospital to serve in the capacity of Architects.

* * *

13. That through actions or inactions of the Defendants significant delays occurred during the building of the new hospital facility.
14. That the Defendants owed a duty to H&R when performing their respective functions during the completion of the new hospital to perform them in a skillful, careful and diligent manner.
15. That from the time that Agreement was executed the Defendants failed to properly perform their duties....

As previously noted, this description of H&R's claims appears to be virtually identical to the facts described as supporting the claims in Presnell.

Furthermore, I find no basis for concluding that the trial court was misled by the pleading. I cannot concur in the

majority's statement that the trial court viewed the complaint as merely setting forth a breach of contract claim. When the Circuit Court dismissed the complaint, it did so in part because "Kentucky has adopted the economic loss doctrine **which prevents the recovery of tort damages** because of a relationship that was created by contract.... [The Defendants' duties] were created by contract **and cannot be converted to tort claims** based on negligence." [Emphasis added.] These statements make clear that the circuit court viewed the complaint as asserting a negligence claim in addition to the one based on contract. It also appears clear to this judge that the Circuit Court would have ruled differently had Presnell been the law at the time the complaint was dismissed.

Surely, one of the Defendants' duties under the contract was to supply correct information. Therefore if they negligently supplied incorrect information, they violated not only their contractual duties, but the tort duties imposed by Restatement Section 552, which is now the law of Kentucky.

Because I am convinced that the pleadings potentially state a claim under the rationale of Presnell, I would reverse.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
APPELLEE CODELL CONSTRUCTION
COMPANY:

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BRIEF AND ORAL ARGUMENT FOR
APPELLEE TAYLOR & WHITNEY
ARCHITECTS, INC.:

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