

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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November 18, 2009

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Re: *Palma, Inc. v. Claymont Fire Company, No. 1, et al.*
C.A. No. 09L-06-121-JRS
Upon ABHA Architects, Inc.'s Motion to Dismiss. GRANTED.

Dear Counsel:

Defendant, ABHA Architects, Inc. ("ABHA"), has moved to dismiss the tort-based claims alleged against it by Plaintiff, Palma, Inc. ("Palma"), in a case involving

alleged construction and design defects brought against several defendants. For the reasons stated below, ABHA's motion is **GRANTED**.

This case arises from the installation of an epoxy floor in Claymont Fire Company, No. 1's ("Claymont") firehouse. The portion of the complaint at issue is Count VI, which alleges a claim of negligent misrepresentation against ABHA.¹ More specifically, Palma, the general contractor on the project, alleges that ABHA, an architectural firm, provided "drawings, plans, specifications, and other architectural, engineering and technical information" that were "false, contained numerous errors, omissions, discrepancies, and ambiguities, and were not otherwise in compliance with building and design requirements."² At oral argument, counsel for Palma suggested that its claim extended to ABHA's negligent misrepresentations to Claymont regarding the quality of the work performed on the project by other firms (including Palma), even though this allegation does not appear in Palma's complaint.

ABHA has moved to dismiss the complaint on the ground that the complaint does not allege a viable cause of action against ABHA as a matter of law. When considering a motion to dismiss, the Court must read the complaint generously,

¹ See generally Compl. ¶¶ 40-52.

² Compl. ¶ 45.

accept all of the well-plead allegations contained therein as true, and construe them in a light most favorable to the plaintiff.³ A complaint is “well-plead” if it puts the opposing party on notice of the claim being brought against it.⁴ “Allegations that are merely conclusory and lacking factual basis, however, will not survive a motion to dismiss.”⁵

After reviewing the briefing and hearing oral argument, the Court finds that this case falls squarely within the so-called “economic loss doctrine,” as applied in *Delaware Art Museum v. Ann Beha Architects, Inc.*⁶ At its essence, the economic loss doctrine prevents recovery for negligent misrepresentation (and other tort claims) where only economic damages are alleged.⁷ As contemplated by the economic loss doctrine, “economic loss” includes “damages for inadequate value, costs of repair and

³ See *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993) (finding that the reviewing court must accept the allegations of the complaint as true); *Browne v. Robb*, 583 A.2d 949, 950 (Del. 1990) (“The complaint sufficiently states a cause of action when a plaintiff can recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”) (citation omitted); *Johnson v. Gullen*, 925 F. Supp. 244, 247 (D. Del. 1996) (same).

⁴ *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995).

⁵ See *Criden v. Steinberg*, 2000 WL 354390, at *2 (Del. Ch. Mar. 23, 2000) (citation omitted).

⁶ 2007 WL 2601472, at *2 (D. Del. Sept. 11, 2007) (discussing the economic loss doctrine and exceptions thereto and ultimately holding that the claims against the defendant consultant and project engineer were barred by the economic loss doctrine).

⁷ *Id.* at *2.

replacement of the defective product.”⁸ Under the economic loss doctrine, a claim of negligent misrepresentation is only appropriate where the complaint alleges non-economic losses such as personal injury or damage to property that is not the subject of the underlying claim. Suffice it to say, the doctrine is alive and well in Delaware.⁹

In this case, the complaint alleges that ABHA’s negligent misrepresentation resulted in damage only to the epoxy floor itself, and the costs to repair that damage.¹⁰ Consequently, the claim is barred by the economic loss doctrine.

Section 552 of the Restatement (Second) of Torts establishes an exception to the economic loss doctrine that has been recognized in Delaware.¹¹ For the § 552 exception to apply, “the plaintiff must show that the defendant supplied the information to the plaintiff for use in business transactions with third parties.”¹²

⁸ *Danforth v. Acorn*, 608 A.2d 1194, 1196 n.3 (Del. 1992).

⁹ See, e.g., *Danforth*, 608 A.2d at 1198 (applying the economic loss doctrine); *J.W. Walker & Sons, Inc. v. Constr. Mgmt. Serv., Inc.*, 2008 WL 1891385, at *1 (Del. Super. Feb. 28, 2008) (same); *Brasby v. Morris*, 2007 WL 949485, at *7 (Del. Super. Mar. 29, 2007) (same); *Noramco (Delaware), Inc. v. Carew Assoc., Inc.*, 1990 WL 251572, at *3 (Del. Super. Nov. 29, 1990) (same).

¹⁰ Compl. ¶ 52.

¹¹ See *Restatement (Second) of Torts* § 552 (1977) (“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.”). See also *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (Del. Super. 1990) (applying the § 552 exception).

¹² *Danforth v. Acorn*, 1991 WL 269956, at *2 (Del. Super. Nov. 22, 1991).

Additionally, the plaintiff must “show that the defendant is in the business of supplying information.”¹³ Whether *vel non* the exception applies is a case-specific inquiry.¹⁴

In this case, the complaint fails to plead any facts that would implicate the § 552 exception. The allegedly false information provided by ABHA was not provided to Palma. Rather, to the extent the complaint alleges that ABHA supplied any “information,” at most the complaint hints that such information was provided directly to Claymont, not to Palma.¹⁵ Therefore, Palma has not plead facts that would allow it to avail itself of the “information supplier” exception to the economic loss doctrine. Because the first element of the exception is not satisfied, the Court need not reach the second element and determine whether ABHA is “in the business of supplying information.”

As discussed above, Palma’s complaint reveals that its negligent misrepresentation claim against ABHA is barred by the economic loss doctrine and that it is not entitled on the current pleadings to assert the § 552 exception. That

¹³ *Id.* at *3.

¹⁴ *RLI Ins. Co. v. Indian River Sch. Dist.*, 556 F. Supp. 2d 356, 361 (D. Del. 2008).

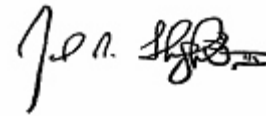
¹⁵ *See* Compl. ¶ 41 (noting that ABHA was hired by Claymont, not Palma). The Court notes that the Complaint is silent regarding ABHA’s alleged misrepresentation regarding the quality of work performed by others on the project, as alluded to by Palma’s counsel at oral argument.

being said, in view of Palma's counsel's representations at oral argument that Palma can, in good faith, allege facts that might implicate the § 552 exception, Palma is granted leave to seek to amend its complaint accordingly.

For the aforementioned reasons, ABHA's Motion to Dismiss is hereby **GRANTED**, with leave to seek to amend its complaint by appropriate motion.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink, appearing to read "J.R. Slights, III". The signature is written in a cursive style with a horizontal line at the end.

Joseph R. Slights, III

JRS, III/sb

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