IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

THEODORE J. MARCUCILLI and JUDY G. MARCUCILLI,	:	C.A. No. 99C-02-007
PLAINTIFFS,	:	
v.	:	
BOARDWALK BUILDERS, INC.,	:	
DEFENDANT and THIRD-PARTY PLAINTIFF,	:	
v.	:	
COMPLETE RESTORATION CONTRACTORS, INC., DRYVIT SYSTEMS, INC., and JAMES HRICKO,	:	
THIRD-PARTY DEFENDANTS.	:	

MEMORANDUM OPINION

DATE SUBMITTED: February 26, 2002

DATE DECIDED: May 16, 2002

John A. Sergovic, Esquire, P.O. Box 875, Georgetown, DE 19947, attorney for plaintiffs

Jonathan L. Parshall, Esquire, P.O. Box 8989, Wilmington, DE 19899-8989, attorney for defendant/third-party plaintiff Boardwalk Builders, Inc.

William E. Moore, Esquire, 43 Baltimore Avenue, Rehoboth Beach, DE 19971, attorney for third-party defendant Complete Restoration Contractors, Inc.

Daniel F. Wolcott, Jr., Esquire, P.O. Box 951, Wilmington, DE 19899, attorney for third-party defendant Dryvit, Systems, Inc.

Robert G. Gibbs, Esquire, P.O. Box 690, Georgetown, DE 19947, attorney for third-party defendant James Hricko

Pending before the Court is a motion for summary judgment which defendant Boardwalk Builders, Inc. ("Boardwalk") has filed. This is my decision on the motion.

FACTS[1] AND PROCEDURAL HISTORY

On December 14, 1991, Theodore J. Marcucilli and Judy G. Marcucilli ("plaintiffs") contracted with Boardwalk for the construction of a home. The contract incorporated plans, specifications and requirements which James Hricko, AIA ("Hricko") prepared. The contract required a Dryvit Systems, Inc. ("Dryvit") Exterior Insulation and Finish Surface ("EIFS") system to be installed. On July 9, 1992, Boardwalk contracted with Complete Restoration Contractors, Inc. ("CRC") to install the Dryvit system on the home. After installation, plaintiffs received a warranty from the manufacturer covering the Dryvit System installed on their home.

Michael A. Donaldson, President of EIFS, Inc., a distributor for Dryvit, was, at the time of the construction of plaintiffs' house, the sales representative of Manning Company, which was assigned Sussex County as part of its exclusive territory by Dryvit. He noticed the home's construction because Dryvit-type material was being applied to the house, but Manning Company had not sold it to them. He visited the job site on more than one

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[1]Unfortunately, the parties failed to provide a statement of the facts in their submissions on this motion. That has made this Court's job much more difficult than it need to have been.

occasion during construction to inquire as to the source of the Dryvit material and "was basically `booted off' the job site by a person who purported to be in control, whose name ... [he] was not given, nor can ... [he] recall how that individual identified himself." March 29, 2001, Affidavit of Michael A. Donaldson at 2.

On January 13, 1993, Boardwalk delivered a structure to plaintiffs that was substantially complete.

Boardwalk also delivered a one year limited warranty to plaintiffs. The warranty provides the following regarding caulking:

> 4. EXCLUSIONS FROM COVERAGE
> WE DO NOT ASSUME RESPONSIBILITY FOR ANY OF THE FOLLOWING, ALL OF WHICH ARE EXCLUDED FROM THE COVERAGE OF THIS LIMITED WARRANTY:
>
> ***
>
> d) Defects that are the results of characteristics common to the materials used, such as (but not limited to): ... drying, shrinking and cracking of caulking ....

After taking possession of the home, plaintiffs learned the structure was not watertight. The roof was repaired several times in an effort to stop the leakage problem. In February, 1997, another leak was discovered. The roofer determined it was not the roof which was leaking. The leak was attributed to open caulking joints in the EIFS system around window and door openings.

In a letter to Boardwalk dated March 24, 1997, Mr. Marcucilli addressed problems plaintiffs were having with the home. He pointed out the following regarding the caulking:

> Exterior caulking. While Amendment #1 to the contract specifically specifies the more expensive GE Silicone caulking that is warranted for 25 years, Boardwalk used

> a conventional caulking for the entire exterior. It has been a problem from the onset. I've already had to recaulk several areas. There's little question but that I will have to have the exterior of the house completely recaulked within the next year or so.

Mr. Marcucilli demanded $2,535 and a release from all liens to resolve the outstanding disputes.

The President of Boardwalk and Mr. Marcucilli entered into the following agreement on October 15, 1997:

> In consideration for the amount of $1,955 ($2,545 less $500 already held in retainage) credited to the homeowner by the builder, the homeowner agrees that the builder has discharged its responsibilities in accordance with warranty provisions of the contract for all items identified by the homeowner, including but not limited to those which the homeowner has identified, but for which he has specifically waived additional consideration. The homeowner does not however waive any rights and remedies otherwise provided by the contract or laws of the state of Delaware.
>
> The builder hereby releases the homeowner from any and all liens, including those of any person employed by or utilized by the builder, any subcontractor contracted by the builder or any of the builder's vendors or suppliers utilized in performance of the contract between builder and homeowner.

Mr. Donaldson inspected the property in February or March 1998. At some point before this inspection, he told Mr. Marcucilli that he had observed that the materials being applied to the exterior of plaintiffs' house were not 100 percent Dryvit Systems' materials and that Mr. Donaldson had been ordered off the job site by someone who appeared to be in control of the property. After his inspection, he confirmed the materials were not 100 percent Dryvit materials and found the installation was defective in two particulars: the caulking was improperly applied and there were

improper spacings between the panels to allow proper expansion and contraction.

The caulking failure caused water damage. In addition, however, plaintiffs have shown, for summary judgment purposes only, the following other deficiencies caused or contributed to the water damage: Boardwalk failed to use the materials specified by the contract to be used in the construction, it failed to use a component and necessary part of the weatherproofing materials to seal joints around the window casings, it failed to use proper workmanship to install the materials that it did use, and it added a house-wrap product (Typar) to the plywood substrate not in accordance with Dryvit and contract installation specifications that the Dryvit board be attached to the plywood substrate.

On February 4, 1999, plaintiffs filed the complaint in this matter against Boardwalk. In that complaint, they alleged the following. Boardwalk delivered an EIFS Dryvit Systems, Inc. warranty. Boardwalk falsely assured plaintiffs that the EIFS System was installed in accordance with the manufacturer's warranty, falsely stated that the applicator had been appropriately trained to install such system, and falsely led plaintiffs to believe the EIFS System was a Dryvit system. The false representations constitute material misrepresentations of fact and Boardwalk is liable for damages therefor under 6 Del. C. § 2511. The installation was defective and contrary to contractual

specifications. The defects were latent. Boardwalk concealed the latent defects.

Plaintiffs stated claims for breach of contract, negligent performance of the contract, breach of the implied warranty of good quality and workmanship, breach of express warranty and violations of the Consumer Fraud Act.

Boardwalk filed a third-party complaint naming as third-party defendants CRC, Dryvit, Hricko, Goslee Roofing Company, Inc. and Weather Shield Manufacturing, Inc. Only Boardwalk, Dryvit and Hricko remain as active litigants. CRC and Boardwalk entered into a stipulation to the entry of default judgment against CRC on Boardwalk's claim against CRC for indemnity, and the Court granted summary judgment in favor of Goslee Roofing Company, Inc. and Weather Shield Manufacturing, Inc.

Boardwalk has filed a motion for summary judgment, arguing entitlement to judgment on three grounds.

DISCUSSION

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact. Id. at 681. Where the moving party produces an affidavit or other evidence

sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991), cert. den., 112 S. Ct. 1946 (1992); Celotex Corp. v. Catrett, supra. If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. 1962).

1) Release

Boardwalk argues that it is entitled to summary judgment because the problems regarding the caulking were the sole cause of the water damage and plaintiffs released it from all claims regarding caulking problems.

The Court must more thoroughly inquire into the facts regarding the release. See id. It is not clear that plaintiffs were aware, when they entered the release, that defective caulking had resulted in water problems and it is not clear from the language of the release that plaintiffs released Boardwalk from damage from defective caulking. Furthermore, for summary judgment purposes, plaintiffs have shown that something other than caulking

defects caused damage to the home.

In light of the foregoing, I deny summary judgment on this ground.

2) Statute of Limitations Regarding "Contract Claims"

Before I address this argument, I note that plaintiffs have not argued fraudulent concealment existed which would have tolled the applicable statutes of limitations nor have they set forth facts which would be sufficient to conclude that fraudulent concealment had been established beyond dispute.

The parties have not addressed, clearly, the statute of limitations and the "contract" claims.[2] The issue is whether the "time of discovery" rule applies to claims for breach of contract, warranty, and implied warranty of good quality and workmanship. I note that the holdings regarding the time of discovery rule are limited to the rule's applicability to these three claims as a matter of law. Because there are factual issues as to what plaintiffs might have discovered and when, the question of whether plaintiffs are entitled to application of the time of discovery rule in this specific case is one for the fact finder. See Queen Anne Pier Condominium Council v. Raley, Del. Super., C.A. No. 85C-JA10, Lee, J. (January 26, 1988); Harting v. Magness Construction Co., Del. Super., C.A. No. 84C-DE-56, Stiftel, P.J. (January 16,

[2]There is no attack on the negligence and statutory fraud claims, apparently because of the holding in Pack & Process, Inc. v. The Celotex Corporation, 503 A.2d 646, 650-51 (Del. Super. 1985).

1986).

Plaintiffs have stated a claim for breach of contract. The time of discovery rule applies to breach of contract claims. Butzke v. Schaefer, Del. Super., C.A. No. 94C-07-004, Graves, J. (April 25, 1995), aff'd, Del. Supr., Nos. 314, 1995, 291, 1995, Hartnett, J. (May 6, 1996); Queen Anne Pier Condominium Council v. Raley, supra; Riley v. Williams, Del. CCP, C.A. No. 2000-05-004, Smalls, J. (January 16, 2001).

The time of discovery rule applies to a claim for breach of an express warranty which is not covered by the UCC. Council of the Dorset v. Stoltz, Del. Super., C.A. No. 90C-10-269, Del Pesco, J. (June 19, 1996).[3] In this case, the express warranty, by its terms, was limited to one year. However, there are not sufficient facts before the Court to allow it to rule as a matter of law that the one year limitation period passed before suit was filed.

The time of discovery rule does not apply to the claim for breach of implied warranty of good quality and workmanship. This implied warranty arises by operation of law. Council of Unit Owners v. Simpler, Del. Super., C.A. No. 89C-09-007, Graves, J. (February 18, 1993) at 8, rearg. den., Del. Super., C.A. No. 89C-09-007, Graves, J. (May 12, 1993). It "covers only latent defects or those

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[3]The time of discovery rule does not apply to warranties covered by the UCC; a cause of action accrues at a time other than at delivery only if a warranty explicitly extends to future performance of the goods. Pack & Process, Inc. v. Celotex, 503 A.2d at 652; Burrows v. Masten Lumber and Supply Company, Del. Super., C.A. No. 84C-MY-12, Ridgely, J. (October 14, 1986).

defects of which a buyer had no actual knowledge." Id. at 8-9. "Latent defects are those which are not obvious or not discoverable by a reasonable inspection." Id. at 9. Any breach of this warranty is deemed to occur on the date of settlement and the applicable statute of limitations is 10 Del. C. § 8106, which requires suit to be filed within three years of when a cause of action arises. Di Biase v. A & D, Inc., Del. Super., 351 A.2d 865, 867 (1976); Estall v. John E. Campanelli & Sons, Inc., Del. Super., C.A. No. 91C-03-256, Del Pesco, J. (April 30, 1993). It would not make sense to rule that the time of discovery rule, which applies to latent defects, applies to this implied warranty, which also applies to latent defects. I rule that the time of discovery rule does not apply to a claim for breach of the implied warranty of good quality and workmanship. Since the applicable statute of limitations ran as of January 13, 1996, plaintiffs' claim for breach of good quality and workmanship is time-barred.

Based on the foregoing, I grant summary judgment in Boardwalk's favor only on the claim of breach of implied warranty of good quality and workmanship.

3) Damages on Consumer Fraud Claim

Boardwalk argues that plaintiffs have not offered evidence that the use of non-Dryvit mesh, base coat and insulation board contributed to the water leakage problems. As noted earlier, the Court rejects that argument, finding that for summary judgment purposes only, plaintiffs have shown that the use of non-Dryvit

mesh, base coat and insulation board contributed to the water leakage problems. Since this premise fails, Boardwalk's argument regarding damages, which is based on this premise, also fails. At this stage, the Court will not foreclose plaintiffs from seeking either the benefit of the bargain or the out of pocket measure of damages. See Stephenson v. Capano Development, Inc., 462 A.2d 1069, 1076-77 (Del. 1983). This issue is not appropriate for a summary judgment ruling at this point.

CONCLUSION

In light of the foregoing, I deny summary judgment except to the extent that I rule plaintiffs' claim for breach of the implied warranty of good quality and workmanship is time-barred.

IT IS SO ORDERED.