IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

THE RYLAND GROUP, INC.,	:	
	:	
	:	
Plaintiff,	:	
	:	C.A. No.: 00C-09-056 SCD
v.	:	
	:	
SANTOS CARPENTRY COMPANY, INC., A&J BUILDERS APCO, FORMED WALLS FOUNDATIONS BY SCHULTE AND ROSSI, INC., DAVID T. SCHULTE MASONRY, INC., HUHN CARPENTRY, OMNIWAY SERVICE CO. d/b/a KAPPLER CONSTRUCTION, SAY SERVICE, INC., STATE WIDE PLUMBING, MK BUILDERS, RABSPAN, INC., and UNITED HVAC, INC.	:	
	:	
Defendants.	:	

O R D E R

For the reasons set forth in the Opinion attached hereto, Defendant Santos Carpentry Company's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 26th day of March, 2004.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Counsel of Record

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	:	
Defendants.	:	

Submitted: March 2, 2004
Decided: March 26, 2004

Upon consideration of Defendant Santos' Motion for Summary Judgment– GRANTED

O P I N I O N

Armand J. Della Porta, Esquire, of Kelley, Jasons, McGuire & Spinelli, Wilmington, Delaware, and Judith Anne Gleason, Esquire, and David E. Schroeder, Esquire, of Gleason & Schroeder, LLC, Chicago, Illinois, for Plaintiff The Ryland Group, Inc.;

William L. Doerler, Esquire, of White and Williams, LLP, Wilmington, Delaware, and Robert K. Pearce, Esquire, of Ferry, Joseph & Pearce, P.A., Wilmington, Delaware, for Defendant Santos Carpentry Company;

Robert J. Leoni, Esquire, of Morgan, Shelsby & Leoni, Newark, Delaware, for Defendant Rabspan, Inc.;

Kenneth M. Doss, Esquire, of Casarino, Christman & Shalk, Wilmington, Delaware, for Defendant Statewide Plumbing;

David Malatesta, Esquire, of Kent & McBride, P.C., Wilmington, Delaware, and Donald J. Detweiler, Esquire, of Saul Ewing LLP, Wilmington, Delaware, for Defendant Formed Walls Foundation;

Kevin J. Connors, Esquire, of Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, for Defendant Kappler Construction;

Richard D. Abrams, Esquire, of Heckler & Frabizzio, Wilmington, Delaware, for Defendant Say Service, Inc.;

Joseph Scott Shannon, Esquire, of Tighe, Cottrell & Logan, P.A., Wilmington, Delaware, for Defendant Huhn Carpentry;

Joseph Gabay, Esquire, of Swartz Campbell LLC, Wilmington, Delaware, for Defendant MK Builders.

Del Pesco, J.

The plaintiff, the Ryland Group, Inc. ("Ryland") was the owner and general contractor for a housing development in Delaware called Weldin Ridge. Defendant is a subcontractor hired by Ryland to do framing on some of the houses in the development. Defendant seeks summary judgment as to all claims based on the statute of limitations. The motion is granted as over three years elapsed between the accrual of claims and commencement of the action.

Santos Carpentry -- Framing subcontractor

On August 5, 1994, Santos Carpentry Company, Inc. ("Santos") signed a subcontract agreement with Ryland. The agreement was applicable to projects undertaken by Ryland in the mid-Atlantic area. In approximately September 1995, Ryland asked Santos to perform the framing work at Weldin Ridge. On or about September 25, 1995, Santos signed an Addendum to Subcontractor Agreement, Occupational Safety and Health Standards. Santos was one of six framing subcontractors hired to construct approximately 60 executive-style homes.

Santos completed its framing work at Weldin Ridge by June 28, 1996. In early 1997, Ryland began receiving complaints from a few of the Weldin Ridge homeowners about structural problems. In February 1997, Ryland notified all of its subcontractors about the complaints involving the homes and asked them to attend a meeting to discuss the damage that was appearing in a number of the homes. Some of the subcontractors attended the meeting, Santos did not. On March 12, 1997, Santos informed Ryland that it would not make any repairs at Weldin Ridge.

Ryland hired an expert in 1996, Weintraub Engineering, to resolve problems related to a few homes. Weintraub was rehired in 1997 to examine the whole

development. Weintraub prepared reports in 1997 and into 1998 detailing various structural problems.

This lawsuit was commenced on September 11, 2000.

Legal Standard for Summary Judgment

A motion for summary judgment requires the Court to examine the record to determine whether there are any genuine issues of material fact or whether the evidence is so one-sided that one party should prevail as a matter of law.[1] If, after viewing the record in light most favorable to the nonmoving party, the Court finds no genuine issue of material fact, summary judgment is appropriate.[2]

Conflicts of Law

Santos argues that the Delaware statute of limitations applies under conflict of law principles. Ryland provides no facts to assist in the analysis of choice of law, arguing only that Santos' motion "does not set forth the necessary facts to determine whether New Jersey or Delaware law should apply to plaintiff's contract based claims."[3]

Delaware has adopted the most significant relationship test to resolve conflict issues arising out of both contract and tort claims.[4] I surmise that the initial contract between Ryland and Santos was not executed in Delaware. Santos informs that neither Ryland nor Santos are Delaware corporations, Santos being a New Jersey corporation and Ryland being either a New Jersey or a Maryland corporation.[5] The facts provided to the

[1] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[2] *Hammond v. Colt Industries Operating Corp*., 565 A.2d 558, 560 (Del. 1989).
[3] Plaintiff The Ryland Group's Response Brief to Defendant Santos Carpentry Company's, "Revised" Motion for Summary Judgment, at p. 8.
[4] *See Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc*., 394 A.2d 1160, 1161 (Del. 1978); *Travelers Indemnity Co. v. Lake*, 594 A.2d 38, 48 (Del. 1991).
[5] The defendants filed summary judgment motions previously. They were withdrawn to permit further discovery. The first trial date was deferred, and the case is now within a few weeks of a second trial date. The opportunity for thorough discovery has been provided.

Court are that this dispute arises out of construction which occurred in Delaware, and that the claims for which Ryland is seeking payment are liquidated claims brought by homeowners in Delaware who purchased the Ryland homes and a limited number of direct claims for Ryland-owned properties. Under the conflict of laws analysis, Delaware has the greatest contact with the case. Delaware law will be applied.[6]

The Contract Claims

Title 10, Section 8106 of the Delaware Code provides the statute of limitations applicable to contract cases. Under that provision, a three-year statute of limitations applies unless the action is a "debt not evidence by a record or by an instrument under seal . . . ."[7] The common law limitations period of 20 years applies to debts under seal.

It is clear from the cases construing §8106 that documents of debt, such as mortgages or promissory notes, escape the three year limitation if they contain the most minimal reference to a seal.[8] But actions arising from other types of contracts must show a clearer intent to enter into a contract under seal. In *American Telephone & Telegraph Co. v. Harris Corp*.,[9] Vice Chancellor, now Justice, Jacobs, quoting from *the Aronow Roofing Co. v. Gilbane Building Co.*,[10] stated:

> In Delaware, for an instrument other than a mortgage to be under seal[:] . . . it must contain language in the body of the contract, a recital affixing the seal, and extrinsic evidence showing the parties' intent to

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[6] Santos argues for the application of 10 *Del. C.* §8121, the Delaware borrowing statute. Section 8181 has no application here because the conduct which gives rise to this claim happened in Delaware. This is not a cause of action arising outside Delaware.
[7] DEL. CODE ANN. tit. 10, §8106 (1999).
[8] *See Milford Fertilizer Co. v. Hopkins*, 807 A.2d 580 (Del. Super. 2002); *Greater New York Savings Bank v. Sky-Drummond Assocs., L.P.*, C.A. No. 90L-10-3-1MT, 1991 WL 53375 (Del. Super. Mar. 15, 1991); *River Bank America v. Tally-Ho Assocs., L.P.*, C.A. No. 90L-JN-21, 1991 WL 35719 (Del. Super. Feb. 22, 1991); *Monroe Park v. Metropolitan Life Ins. Co*., 457 A.2d 734 (Del. 1982); *cf. Peninsula Methodist Homes and Hospitals Inc. v. Architect's Studio, Inc*., et al., C.A. No. 83C-AU-118, 1985 WL 634831 (Del. Super. Aug. 28, 1985).
[9] C.A. No. 92C-01-27, 1993 WL 401864 (Del. Super. Sept. 9, 1993).
[10] 902 F.2d 1127 (3rd Cir. 1990).

> conclude a sealed contract. The mere existence of the corporate seal and the use of the word "seal" in a contract do not make the document a specialty . . . There is simply no manifested intent to create a contract under seal; no language in the body of the contract to suggest that the contract is under seal; and no recital appears before the corporate seal to evidence any intent to create a specialty.[11]

Neither the subcontractor agreement nor the addendum demonstrates the requisite intent to create a contract under seal. The testimonium clause in the subcontractor agreement contains the only reference to a seal. It says: "IN WITNESS WHEREOF, the parties have executed and sealed this Agreement on the date below written[.]"[12] The only reference to a seal in the addendum is the word "(Seal)" located to the right of the signature lines. This is not a debt action. This is a contract action between an owner/general contractor and a subcontractor. The references to a seal are insufficient to demonstrate an intent to create a contract under seal. This claim is governed by a three-year statute of limitations period.[13] Since Santos clearly stated its intention not to take any further action at Weldin Ridge in March 1997, the statute of limitations ran no later than March 2000.[14] This action was commenced in September 2000, and is therefore barred by the three-year statute unless an exception applies.

Ryland seeks to invoke the time of discovery rule. It argues that the defects in the framing work performed by Santos or its subcontractors were not discovered until the analysis by Weintraub Engineering was completed in 1998.

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[11] *American Telephone & Telegraph*, C.A. No. 92C-01-27, 1993 WL 401864 at *7.
[12] Ryland Homes Subcontractor Agreement, with Santos Carpentry Co. Inc., Aug. 1994.
[13] *Juran v Bron*, No. Civ.A. 16464, 2000 WL 1521478 at *11 (Del. Ch. Oct. 6, 2000).
[14] Santos argues that since it completed its work no later than June 28, 1996, the statute of limitations runs from that time. Since it is of no consequence to this motion, I will view the facts in a light most favorable to Ryland.

The time of discovery exception to the application of the statute of limitations arose initially in the context of medical malpractice cases where the wrong was inherently unknowable to the injured party.[15] The rule has been applied in other contexts as well.[16] However, the discovery rule has no application here. As the general contractor at Weldin Ridge, Ryland had complete access to the worksite. Ryland could inspect the work of the subcontractors at will, and was in a position to discover defects in the construction--failures to adhere to its own plans-- if it had chosen to do so. The fact, if it is a fact, that Ryland allowed Santos to cut corners or otherwise defectively perform its work, does not relieve Ryland of its responsibility as the general contractor. If Ryland was ignorant of the defects, it was not blamelessly ignorant.

Ryland's reliance on *Butzke v. Schaefer*[17] is misplaced. The plaintiffs in *Butzke* were the homeowners, the defendant was the builder. The plaintiffs occupied the property in August 1990. In May 1993, the plaintiff attempted to sell the house. In the course of that effort, a structural inspection was conducted which revealed structural defects. The Court denied summary judgment on the breach of contract action on the grounds that there remained a fact issue as to whether the time of discovery commenced

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[15] *See Layton v. Allen*, 246 A.2d 794 (Del. 1968) (both plaintiff patient and defendant doctor were unaware that a foreign substance had been left in the plaintiff's body). *See also Cole v. Delaware League for Planned Parenthood*, 530 A.2d 1119 (Del. 1987) (plaintiff patient alleged an injury of sterility as a result of a performed abortion).

[16] The time of discovery exception, in cases other than those of medical malpractice, is narrowly confined in Delaware to injuries which are both (a) "inherently unknowable" and (b) sustained by a "blamelessly ignorant" plaintiff. *Began v. Dixon*, 547 A.2d 620 (Del. Super. 1988) (legal malpractice action where statute of limitations began to run when client consulted with independent counsel); *Hodges v. Smith*, 517 A.2d 299 (Del. Super. 1986) (negligence action against surveyor was unknowable by property owner until another survey was performed since error not in plain view); *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646 (Del. Super. 1985) (fraud and negligence action against roofer where statute of limitations tolled because defect concealed); *Rudginski v. Pullella*, 378 A.2d 646 (Del. Super. 1977) (negligence, contract and fraud action against plumbers who installed underground septic system, statute of limitations began to run when plaintiffs had notice of the problem, or could have discovered it by the exercise of reasonable diligence and care).

at the time of the breach, or at the time the non-breaching party discovered, or should have discovered, the breach. Here, it is the contractor--not the homeowner--who is alleging ignorance. A contractor cannot claim to be blamelessly ignorant when it had a duty and an opportunity to inspect and simply failed to do so. The fact that the consulting expert did not provide a report for a year beyond the time that a problem was evident is of no consequence. "If all parties were allowed to toll the statute of limitations until they learned of the legal theory of a proposed action or so pursued an action, there would be no purpose to the statute of limitations."[18]

Summary Judgment as to all breach of contract claims--including express or implied warranty claims--is GRANTED.

Indemnification claims

Santos has also moved for summary judgment on Ryland's claim for indemnification.

The contract between Ryland and Santos is a form agreement with blank areas which are filled in so that the agreement can be adapted to various subcontractors. The title of the agreement is "SUBCONTRACTOR AGREEMENT." It begins (with handwritten portions italicized here):

> For the consideration herein set forth, *Santos Carpentry Co. Inc.* ("Subcontractor") and the *Delaware Valley East* Division of THE RYLAND GROUP, INC., ("Ryland") agree as follows:
>
> 1. Subcontractor has represented that it is skillful, proficient and experienced in the craft or trade of *Framing.*
>
> * * * * *

[17] C.A. No. 94C-07-04, 1995 WL 339058 (Del. Super.); *aff'd in part*, *rev'd in part*, *subnom*, *Schafer v. Butzke*, 692 A.2d 415 (Del. 1996).
[18] *Began*, 547 A.2d at 623-24.

> 7. Subcontractor warrants and represents that it is familiar with and in compliance with all laws, . . . all applicable laws relating to Workman's Compensation, minimum wages and overtime, and discrimination in employment. Subcontractor will maintain all records . . . will indemnify and save Ryland harmless, to the extent permitted by law from any damage, fine or penalty which may be assessed against them or either of them by reason of Subcontractor's breach of any laws, regulations or rulings.
>
> 8. Subcontractor shall maintain at its expense [recites obligation to have certain levels of workers compensation and liability insurance, and requirements regarding proof of insurance]. The **contractor** shall indemnify and hold Ryland harmless from and against any and all liability, damage and expense in connection with claims arising out of or resulting from the performance of the contractor's work provided that such claim is caused in whole or partly by any negligent act or omission of the contractor, its agents or employees." (emphasis supplied)[19]

Santos argues that the indemnity provision is ambiguous because in the contract Santos is identified as the subcontractor, while the indemnity provision speaks of the **contractor**'s work. I note that the indemnity language in paragraph 7 refers to subcontractor's indemnity obligation, but curiously, the language in paragraph 8 does not.

Contracts of indemnification are strictly construed.[20] Ambiguous contractual terms are construed against the drafter.[21] Under the circumstances here presented, I find that the contract is ambiguous as to the indemnity obligations in paragraph 8 since there is no contractor defined in the contract. The word "contractor," is a general term, and is variously defined. For example, the Delaware Code defines a contractor as an architect, engineer, real estate broker, subcontractor or anyone who provides labor.[22] Use of the

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[19] Ryland Homes Subcontractor Agreement, with Santos Carpentry Co. Inc., Aug. 1994.
[20] *Waller v. J.E. Brenneman Co*., 307 A.2d 550, 551 (Del. Super. 1973).
[21] *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. 1996).
[22] "Contractor" includes every person engaged in the business of:

> a. Furnishing labor or both labor and materials in connection with all or any part of construction, alteration, repairing, dismantling or demolition of buildings, roads, bridges, viaducts, sewers, water and gas mains and every other type of structure as an improvement, alteration or development of real property; a person is a contractor regardless of whether the person is a general contractor or a subcontractor, or whether the person is a resident or a nonresident; in addition "contractor" shall include "construction

word contractor creates an ambiguity in the Ryland agreement. The ambiguity is thus construed against Ryland as the drafter. The indemnification provision in paragraph 8 is not enforceable as to Santos.

Ryland also makes a claim of implied indemnification. Where a contract addresses the issue of indemnification, the court will not enlarge the right of indemnification by implication.[23] Ryland cannot recover on an implied right of indemnification.

The Tort Claims

The claim here arises from defects in the construction of houses. Santos finished framing at Weldin Ridge by June 28, 1996. The record is unclear as to whether repairs were made after that date. The record demonstrates that no later than March 12, 1997, Santos indicated that it would not do any further repairs. Delaware has a three year statute of limitations for tort actions.[24] The statute of limitations ran no later than June 28, 1999. For the reasons discussed above, there is no exception based on time of

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transportation contractors" which shall include persons engaged in the business of contracting for transporting tangible property of other persons in connection with all or any part of the construction, alteration, repairing, dismantling or demolition of buildings, roads, bridges, viaducts, sewers, water and gas mains and every other type of structure as an improvement, alteration or development of real property but shall not include draypersons as defined in § 2301(a) of this title; or
b. Real estate development.

DEL. CODE ANN. tit. 30, §2501 (2002);

"Contractor" includes, but is not limited to, an architect, engineer, real estate broker or agent, subcontractor or other person, who enters into any contract with another person to furnish labor and/or materials in connection with the erection, construction, completion, alteration or repair of any building or for additions to a building, by such contractor, or for the sale to such other person of any lands and premises, whether owned by such contractor or another, upon which such contractor undertakes to erect, construct, complete, alter or repair any building or addition to a building.

DEL. CODE ANN. tit. 6, §3501 (2002).

[23] *Waller*, 307 A.2d at 552.

[24] DEL. CODE ANN. tit. 10, §8106 (1999).

discovery which tolls the running of the three year period. All tort actions by Ryland are barred by the statute of limitations.

Contribution

To the extent that Ryland seeks to recover from Santos based on a theory of contribution, the three year statute of limitations may not bar the claim because contribution claims arise when one joint tortfeasor has paid more than it's *pro rata* share of a common liability.[25]

Santos argues that Ryland cannot pursue a contribution claim because contribution requires joint liability to another, in this case, the homeowners, and there is no legal basis for such a claim. Ryland responds that its contribution claim is based on the allegation that Ryland and Santos were both potentially liable in tort to the homeowners, thereby justifying its tort action. It cites in support of its contention the case of *ICI America Inc. v. Martin-Marietta Corp*.[26]

Ryland's reliance on *ICI* is misplaced. *ICI* involved an owner who contracted with Healey ("contractor") to build a facility. Martin-Marietta ("material supplier") provided a product which was used for flooring. When the flooring failed, ICI brought a claim against the material supplier based on the warranties associated with the product. The material supplier filed a third-party action against the contractor for contribution alleging that the contractor had failed to use the product properly.[27] The court found that allegations in the third-party complaint were sufficient to survive a motion to dismiss for

[25] DEL. CODE ANN. tit. 10, §6302 (1999); *Fehlhaber v. Indian Trails, Inc*., 45 F.R.D. 285 (D. Del 1968), *aff'd* 425 F.2d 715 (3rd Cir. 1970); *Distefano v. Lamborn*, 81 A.2d 675, 680 (Del. 1951).
[26] 368 F.Supp. 1148 (D. Del. 1974).
[27] *Id*. at 1149.

failure to state a claim because there was a possibility that the material supplier and the contractor could be jointly liable.[28]

This summary judgment motion is considered with trial imminent. Discovery is complete, the factual record has been developed. This is not a time to consider possibilities. This claim is readily distinguishable from *ICI* because the homeowners whose claims against Ryland give rise to this case had no legal basis for a claim against Santos. The homeowners had no contract with Santos. Santos' duties, and thus its obligations, arose entirely from the contract it had with Ryland. The facts do not indicate any independent basis for recovery such as a violation of law. Where an action is based entirely on a breach of the terms of a contract between the parties, and not a violation of some duty imposed by law, a tort action will not lie, and the plaintiff must sue, if at all, in contract.[29]

Santos' motion for summary as to all tort-based actions, including contribution, is GRANTED.

Other Claims

The Court acknowledges the other arguments raised by Santos in its motion. It is not necessary for the Court to reach those arguments due to the conclusions reached in the discussion above.

[28] *Id*. at 1151.
[29] *Garber v. Whittaker*, 174 A. 34, 36 (Del. Super. 1934); *see also Heronemus v. Ulrick*, C.A. No. 97C-03-168, 1997 WL 524127 (Del. Super. July 9, 1997); *Ulmer v. Whitfield*, C.A. No. 80C-NO-16, 1985 LEXIS 1279 (Del. Super. Sept. 10. 1885).