2024 IL App (1st) 230162-U

No. 1-23-0162

Second Division
August 30, 2024

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DELACOURTE CONDOMINIUM ASSOCIATION, an Illinois Not-for-Profit Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff,	)	No. 20 L 5077
v.	)	
FOCUS DEVELOPMENT, INC.; FOCUS CONSTRUCTION, INC.; and WEIDNER ROAD RESIDENCES, L.P.,	)	Honorable Mary Colleen Roberts Judge, Presiding.
Defendants and Third-Party Plaintiffs-Appellants	)	
v.	)	
P.B.S. PLASTERING, INC. and ALCA, INC.,	)	
Third-Party Defendants-Appellees.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Howse and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal of a third-party complaint is affirmed where its claims relied on the viability of a tort claim barred by the economic loss doctrine.

¶ 2 This appeal arises from a construction defects complaint filed by plaintiff Delacourte Condominium Association (Delacourte) against defendants/third-party plaintiffs Focus Development, Inc. (Focus Development), Focus Construction, Inc. (Focus Construction), and Weidner Road Residences, L.P. (Weidner). After being served with Delacourte's complaint, third-party plaintiffs filed a third-party complaint seeking contribution and indemnification from their subcontractors, third-party defendants Alca, Inc. (Alca) and P.B.S. Plastering, Inc. (PBS). Third-party plaintiffs now appeal a series of orders culminating in the dismissal of their third-party complaint. For the following reasons, we affirm, albeit for different reasons than relied on by the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Delacourte is an Illinois not-for-profit corporation created as the condominium association for the condominium units located at 800-860 Weidner Road in Buffalo Grove, Illinois (the Premises). Weidner and Focus Development developed the Premises in early 2000 with Focus Construction serving as general contractor. In August 2006, several residents at the Premises began complaining of water infiltration and water damage on the balconies and sliding glass door areas of their units. Third-party plaintiffs acknowledged the defective conditions at that time, and Focus Construction subcontracted with Alca and PBS to repair them. This repair work was completed in June 2007.

¶ 5 According to Delacourte, problems with the repair work began to manifest themselves in the fall of 2016, more than nine years after work's completion. Delacourte hired the forensic engineering firm Wiss, Janney, Elstner Associates, Inc. (WJE) to investigate the matter. In September 2016, WJE prepared a report concluding that the repair work was defective in that it failed to properly seal the balconies and sliding glass doors, thereby causing water infiltration and damage to the surrounding areas.

¶ 6 Delacourte filed its original complaint in this matter on May 7, 2020, naming Focus Development and Weidner as defendants. Delacourte then filed an amended complaint in November 2020, again naming Focus Development and Weidner as defendants. The amended complaint raised claims for breach of express warranty, breach of contract, and breach of the implied warranty of habitability against Focus Development and Weidner in relation to the repair work.

¶ 7 Focus Development and Weidner moved to dismiss, arguing, among other things, that Delacourte's claims were barred by the 4-year statute of limitations and the 10-year statute of repose applicable to construction claims (735 ILCS 5/13-214(a-b) (West 2020)). On March 19, 2021, the circuit court entered an order finding that Delacourte's claims were timely because (1) the alleged defects in the repair work became apparent within 10 years of the completion of the work and (2) the complaint was filed within 4 years of the time the defects were discovered.

¶ 8 Delacourte filed a second amended complaint on May 14, 2021, which is the operative complaint for purposes of this appeal. In addition to Weidner and Focus Development, the second amended complaint now named Focus Construction as an additional defendant. Count I of the second amended complaint alleged that all defendants were negligent in performing the repair work, thereby causing "property damage to the interior of homes on the Premises including, but

not limited to damage to other property, including carpeting, floors, and draperies within the homes." Count II alleged breach of contract against Focus Development and Weidner based on agreements to construct the Premises in substantial compliance with the plans and specifications, and to complete the repair work in a "good and workmanlike manner." Finally, count III alleged that Focus Development and Weidner breached the implied warranty of habitability as a result of the defective conditions.

¶ 9 On June 11, 2021, third-party plaintiffs filed their third-party complaint against Alca and PBS. In Counts I and III, third-party plaintiffs sought contribution under the Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 *et seq.* (West 2020)) in the event that "any one or more of [third-party plaintiffs] is found liable for any damages sustained by [Delacourte]." Counts II and IV alleged that Alca and PBS breached their respective subcontracts by refusing to indemnify Focus Construction. Attached to the third-party complaint were unsigned versions of the subcontracts, which included the provision:

> "**Waiver of Contribution and Indemnification.** To the fullest extent permitted by law, Subcontractor waives any right of contribution and shall defend, indemnify and hold harmless Contractor and Owner and their successors and assigns, from and against all claims, damages, losses, and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from or in connection with the performance of the Subcontract Work; provided, that any such claim, damage or loss, or expenses is caused in whole or in part by any negligent act or omission of Subcontractor or by anyone directly or indirectly employed by Subcontractor or for whose acts Subcontractor may be liable."

¶ 10 Alca and PBS filed motions to dismiss the third-party complaint, arguing that the contribution claims were barred by the economic loss doctrine. Third-party defendants also argued

that the indemnity provisions in their subcontracts were void under the Construction Contract Indemnification for Negligence Act (740 ILCS 35/1 (West 2020)) (Anti-Indemnity Act) because Focus Construction sought indemnity for its own negligence. PBS additionally maintained that the indemnification claims were barred by the construction statute of repose because the third-party complaint was filed more than 10 years after the repair work was completed.

¶ 11 On December 13, 2021, the circuit court entered an order on the motions to dismiss. The court first found that third-party plaintiffs' claims did not violate the Contribution Act because they sought contribution only to the extent damages were attributable to Alca and PBS' negligence. The court also ruled that the contribution claims were not barred by the economic loss doctrine because the third-party complaint "sufficiently alleged damage to other property and that the damage was caused by sudden water infiltration." However, the court further found that the third-party claims were barred by the construction statute of repose because the claims were filed more than 10 years after the repair work was completed in 2007. Thus, the court dismissed the third-party complaint with prejudice.

¶ 12 Third-party plaintiffs filed a motion to reconsider, contending that the court erred in applying the construction statute of repose to their indemnification claims. Third-party plaintiffs asserted that the court should have instead applied the statute of repose applicable to written contracts (735 ILCS 5/13-206) (West 2020)) because their claims were based on the refusal to indemnify rather than the performance of a "construction-related activity." Because the third-party complaint was filed within 10 years of Alca and PBS' refusals to indemnify, third-party plaintiffs reasoned that the complaint was timely. Third-party plaintiffs also argued that their contribution claims were timely because they were filed within 2 years of Delacourte's original complaint.

¶ 13 Alca and PBS also filed a joint motion to "Reconsider a Limited Portion of the December 13, 2021 Order and for Clarification." In particular, they argued that neither Delacourte nor third-party plaintiffs alleged damage from a "sudden and dangerous occurrence" sufficient to constitute an exception to the economic loss doctrine. Alca and PBS further sought "clarification" as to whether third-party plaintiffs' indemnification claims violated the Anti-Indemnity Act, maintaining that Focus Construction was improperly attempting to indemnify itself for its own negligence.

¶ 14 On April 13, 2022, the court entered an order finding that it had previously erred in ruling that Delacourte's claims were not barred by the construction statute of repose. Now, the court explained that Delacourte's claims were untimely because its original complaint was filed in 2020, more than 10 years after the repair work was completed in 2007. Thus, the court dismissed both Delacourte's second amended complaint and, by extension, the third-party complaint. Even so, the court further ruled that the third-party indemnification claims would not be barred by the Anti-Indemnity Act because third-party plaintiffs sought indemnity only to the extent of Alca and PBS' negligence. Finally, the court reiterated its previous ruling that the third-party contribution claims were not barred by the economic loss doctrine because Delacourte had "sufficiently alleged the existence of a sudden and dangerous occurrence sufficient to survive a motion to dismiss."

¶ 15 Delacourte filed a motion to reconsider, arguing that its claims were timely because it discovered the defects within 10 years of the repair work and filed its original complaint within 4 years after that.

¶ 16 Third-party plaintiffs also filed a "Motion to Reconsider the Court's April 13, 2022 Order" in which they contended that, in the event the court were to grant Delacourte's motion to

reconsider, the court should also address the timeliness arguments raised in support of their motion to reconsider the December 13, 2021 order.

¶ 17 On June 23, 2022, the court reversed course again, now finding that Delacourte's complaint was timely. The court adopted the same reasoning it used in denying third-party plaintiffs' motion to dismiss Delacourte's complaint, *i.e.*, that the complaint satisfied the construction statute of repose because Delacourte discovered the defective repair work within 10 years after the work was completed and that the complaint satisfied the construction statute of limitations because Delacourte filed its original complaint within 4 years of discovering that the work was defective. Accordingly, the court granted Delacourte's motion to reconsider and reinstated both Delcourte's second amended complaint and the third-party complaint.

¶ 18 Alca and PBS subsequently filed a joint motion to vacate the June 23, 2022 order, arguing that (1) Delacourte's motion to reconsider was untimely because it was filed more than 30 days after the court's December 13, 2021 order, and (2) the court lacked authority to rule on the motion to reconsider because it was an impermissible successive postjudgment motion.

¶ 19 On October 12, 2022, the court entered an order finding that it did not have the authority to enter the June 23, 2022 order. The court stated that the December 13, 2021 dismissal of the third-party complaint was a final judgment, which it reconsidered for the first time in its April 13, 2022 order. Thus, the motions to reconsider the April 13 order were not only untimely, but also unauthorized successive postjudgment motions. The court also rejected third-party plaintiffs' argument that it retained jurisdiction to enter the June 23 order because their successive motion to reconsider raised a "new matter." Accordingly, the court vacated its June 23, 2022 order and reinstated the dismissal of the third-party complaint.

¶ 20 On January 3, 2023, upon third-party plaintiffs' motion, the circuit court entered an order finding that the October 12, 2022 order was "final and appealable pursuant to Illinois Supreme Court Rule 304(a)." Third-party plaintiffs filed a timely notice of appeal on January 24, 2023.

II. ANALYSIS

¶ 21 This appeal requires us to consider whether the circuit court erred in dismissing third-party plaintiffs' complaint pursuant to section 2-619 of the Code of Civil Procedure. Section 2-619 allows for an involuntary dismissal where "the claim asserted against [the] defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2020). This court reviews a dismissal under section 2-619 *de novo*, meaning that we perform the same analysis that a circuit court would perform. *In re Miller*, 2023 IL App (1st) 210774, ¶ 22. Under the *de novo* standard, we owe no deference to the circuit court's findings. *Id.* We may also affirm the circuit court's ruling on any basis found in the record, regardless of whether the circuit court relied on that basis or whether the court's reasoning was correct. *Omega Demolition Corp. v. Illinois State Toll Highway Authority*, 2022 IL App (1st) 210158, ¶ 36.

¶ 22 In this case, third-party plaintiffs devote their opening brief on appeal to arguing that the circuit court erred in determining that their claims were untimely. Specially, third-party plaintiffs maintain that the circuit court erroneously analyzed the timeliness of their indemnification claims under the construction statute of repose when it should have applied the statute of repose applicable to written contracts instead. Third-party plaintiffs further contend that their contribution claims were timely under section 13-204 of the Code of Civil Procedure (735 ILCS 5/13-204 (West 2020)), which preempts application of the construction statue of repose in certain circumstances.

¶ 23 Alca and PBS make some timeliness arguments, but primarily raise several "alternative bases" on which they say we should affirm the circuit court's judgment. For example, Alca and

PBS contend that Delacourte's underlying negligence claim against Focus Construction, upon which the third-party claims are based, is invalid under the economic loss doctrine. Because Focus Construction's third-party claims depend on the viability of Delacourte's negligence claim, Alca and PBS conclude that the third-party complaint was properly dismissed.

¶ 24 The economic loss doctrine, also called the *Moorman* doctrine, holds that a party cannot recover in tort for purely economic losses. *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 88 (1982). An "economic loss" is defined in this context as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." (Internal quotation marks omitted.) *Id.* at 82. The doctrine is premised on the notion that contract law, rather than tort law, offers the appropriate remedy where economic losses are not paired with personal injury or property damage. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 200 (1997). This is so because parties to a contract "may allocate risks by agreement and do not need the special protections of tort law to recover damages caused by a breach of contract." *Mars, Inc. v. Heritage Builders of Effingham, Inc.*, 327 Ill. App. 3d 346, 351 (2002). The doctrine also avoids the "open-ended tort liability" and "virtually uninsurable risks" that defendants might otherwise face if they could be held liable in tort for every economic effect of their negligence. *In re Chicago Flood Litigation*, 176 Ill 2d at 198. The economic loss doctrine denies a plaintiff a remedy in tort regardless of the plaintiff's ability to recover under a contract action. *Id.*

¶ 25 Illinois courts have recognized just three exceptions to the economic loss doctrine: (1) where the plaintiff sustained personal injury or property damage resulting from a sudden or dangerous occurrence, (2) where the plaintiff was harmed by a defendant's intentionally false representation, and (3) where the plaintiff's damages were caused by a negligent misrepresentation

from a defendant in the business of supplying information for the guidance of others in their business transactions. *Hecktman v. Pacific Indemnity Co.*, 2016 IL App (1st) 151459, ¶ 15.

¶ 26 Third-party plaintiffs argue that the first exception applies in this case because Delacourte's second amended complaint alleges damage to property other than the condominium building itself. In particular, third-party plaintiffs note that Delacourte alleges that the water infiltration from the balconies "caused property damage to the interior of homes on the Premises including, but not limited to damage to carpeting, floors, and draperies within the homes." According to third-party plaintiffs, this alleged damage "takes the contribution claim[s] beyond the reach of the economic loss doctrine."

¶ 27 We disagree. To fall within the exception to the economic loss doctrine, a plaintiff must establish both that they sustained damage to other property and that the damage was caused by a "sudden, dangerous or calamitous occurence." *Id.* ¶ 17. Courts have defined a sudden, dangerous, or calamitous occurrence as a "sudden event, consistent with a tortious act," or an event that is "highly dangerous and presents the likelihood of personal injury or injury to other property." (Emphasis omitted.) *Mars, Inc. v. Heritage Builders of Effingham, Inc.*, 327 Ill. App. 3d 346, 353 (2002).

¶ 28 Here, neither Delacourte nor third-party plaintiffs have alleged damage caused by a sudden or dangerous event. Rather, the complaints allege that the damage resulted from gradual water infiltration, presumably caused by normal precipitation over time. Indeed, the water infiltration was so gradual that much of the damage was not even discovered until the fall of 2016, over nine years after the repair work was completed. The infiltration of water over an extended period of time will generally not constitute a sudden or dangerous occurrence within the meaning of the economic loss doctrine. *Hecktman*, 2016 IL App (1st) 151459 ¶ 18 (water infiltration from

defective windows was not a "sudden, dangerous or calamitous event"); *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.*, 404 Ill. App. 3d 611, 619 (2010) (water damage caused by leaky roof not due to a sudden or dangerous occurrence). This is also not a case where water leakage over time resulted in a definable calamitous event. See *Electronics Group, Inc. v. Central Roofing Co., Inc.*, 164 Ill. App. 3d 915, 919 (1987) (negligently installed roof allowed "a substantial amount of water" to leak through roof in a single day); *United Air Lines, Inc., v. CEI Industries of Illinois, Inc.*, 148 Ill. App. 3d 2d 322, 340 (1986) (gradual water leaks caused the "sudden and violent collapse" of a ceiling). Thus, the water infiltration in this case was in no sense a sudden or dangerous occurrence.

¶ 29 Additionally, the economic loss doctrine bars tort recovery for damages that are merely incidental to the alleged defects. *Hecktman*, 2016 IL App (1st) 151459, ¶ 22 (water damage to hardwood floors caused by negligently installed windows not actionable in tort); *Chicago Heights Venture v. Dynamit Nobel of America, Inc.*, 782 F. 2d 723, 729 (7th Cir. 1986) (water damage to ceilings and walls caused by leaking roof not recoverable in tort under Illinois law).

¶ 30 This court's decision in *Washington Courte Condominimum Ass'n-Four v. Washington-Golf Corp.*, 150 Ill. App. 3d 681 (1986) is instructive. There, a condominium association sued a general contractor and several subcontractors, alleging that the improper installation of windows and sliding glass doors led to water infiltration that damaged the insulation, walls, ceilings, floors, and electrical outlets in certain condominium units. We held that the damage was "incidental to the defective windows and doors" and therefore not recoverable in tort. *Id.* at 686-87. We explained that "the gravamen of [the] plaintiffs' complaint in the case at bar is that the windows and sliding doors did not work, which constitutes an allegation of economic loss." *Id.* at 687.

¶ 31 Here, as in *Washington Courte*, the gravamen of Delacourte's complaint is that the balconies and sliding glass did not work to keep water out. Although third-party plaintiffs rely on Delacourte's allegations of damage to carpeting, floors, and draperies around the sliding glass doors, this damage is merely incidental to the defective conditions. Thus, those allegations do not save the third-party complaint from the economic loss doctrine.

¶ 32 Consequently, we conclude that Delacourte's negligence claim against third-party plaintiffs is barred by the economic loss doctrine. Because the third-party claims depends entirely on the viability of Delcaourte's negligence claim, the circuit court did not err in dismissing the third-party complaint.

¶ 33 As we have determined that the third-party complaint was properly dismissed, we need not address the parties' other arguments related to the circuit court's orders.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the circuit court.

¶ 36 Affirmed.