

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

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COURT OF CLAIMS
OF OHIO

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GRAND VALLEY LOCAL SCHOOL DISTRICT)
BOARD OF EDUCATION, et al.,)

Plaintiffs,)

vs.)

BUEHRER GROUP ARCHITECTURE &)
ENGINEERING, INC. et al.)

Defendants,)

Case No. 2014-00469-PR

Judge Patrick M. McGrath

**MEMORANDUM IN OPPOSITION OF PLAINTIFF/COUNTERCLAIM
DEFENDANT OHIO SCHOOL FACILITIES COMMISSION TO THE MOTION
FOR JUDGMENT ON THE PLEADINGS OF DEFENDANT BUEHRER GROUP
ARCHITECTURE & ENGINEERING, INC.**

Now comes the Plaintiff/Counterclaim Defendant the Ohio School Facilities Commission (“OSFC”), and Plaintiff/Counterclaim Defendant Grand Valley Local School District Board of Education (“Grand Valley” or “School District”) (collectively “Plaintiffs” or “Co-owners”), by and through counsel, and file this Memorandum in Opposition to the Motion for Judgment on the Pleadings (“Motion”) of Defendant Buehrer Group Architecture & Engineering, Inc. (“Buehrer”).

The sole argument made in the Motion is that the statute of limitations has expired for an action based upon professional negligence. This argument wholly misrepresents the law as a limitations period is inapplicable to the State of Ohio. Additionally, even if the statute of limitations were applicable, this action was filed within four years of discovery of the negligence of Defendant Buehrer. Finally, even if no action for negligence exists, Plaintiffs would still possess an action under contract, contrary to Defendant Buehrer’s assertions.

ON COMPUTER

I. INTRODUCTION AND SUMMARY

This action, as against Buehrer, stems from a contract for professional design services entered into on or about April 22, 2002, for the design *and* construction administration of a new Pre-Kindergarten through Grade 12 school facility (“Project”) being funded and built jointly by Plaintiffs. Complaint at ¶s 5,6, 9 and 12. Defendant Buehrer had responsibility not only for the design of the new PK-12 facility, but also for supervising the actual construction of the Project. *Id.* at 9. The Project was completed and occupied in late 2005. *See* Exhibit 1, Affidavit of Eric Moser. After a period of time, the Co-owners began experiencing roof issues which were handled under the roof warranty. *Id.* The issues included water infiltration and buckling of shingles throughout the roof. *Id.*

The Co-owners retained a roofing consultant, Construction Resources Inc. (“CRI”), to examine and evaluate the roofing system. *Id.* On July 19, 2011, the roofing consultant issued a Report that pointed out numerous construction defects, and also recommended that an engineer evaluate the design. Exhibit 2. Based on CRI’s recommendation, the Co-owners hired I A Lewin PE & Associates (“Lewin”), an engineering firm, to examine the design of Defendant Buehrer. Exhibit 1 at ¶ 9. On October 17, 2011, Lewin issued its report which questioned aspects of Buehrer’s design based upon what it had examined. Exhibit 3. The report found four specific design elements missing from the design of the roof and masonry for the Project and recommended the steps necessary to correct the design errors. *Id.* at 4.

As set forth above, it was not until October 17, 2011, when the Lewin Report informed the Co-owners of the errors and omission in the original design that the Co-owners were first on notice of the design errors in the work of Defendant Buehrer. Exhibit 3.

Subsequent to occupation of the Project, the pavement in the parking lots began to fail. Exhibit 1 at ¶ 7. The Co-owners then, through the construction manager, engaged a consultant, EDP Geosciences (“EDP”) to examine the basis for the pavement failure in the parking lots. EDP issued a report on June 13, 2011, Exhibit 4, which found that one of the causes of the pavement problems in the parking lots was the failure by Buehrer to include underdrains in their design. *Id.*

The Co-owners are currently in the process of remediating the roof and masonry at the Project. The parking lot remediation will follow in the future.

II. STATUTE OF LIMITATIONS ARE INAPPLICABLE TO THE STATE

Defendant Buehrer has mischaracterized and misrepresented the law on this issue. Buehrer alleges that Plaintiffs are foreclosed from continuing this lawsuit due to the expiration of the four year statute of limitations as set forth R.C. 2305.09(D). However, it is well settled that the statute of limitations is not applicable to the State absent an express provision that it applies to actions brought by the State. *State, Dept. of Transp. v. Sullivan*, 338 Ohio St. 3d 137, 527 N.E. 2d 798 (1988). The syllabus of the *Sullivan* case ruled:

The state, absent express statutory provisions to the contrary, is exempt from the operation of a generally worded statute of limitations. This rule serves the public policy of preserving public rights, revenues, and property from injury and loss. (*Block v. North Dakota, ex rel. Bd. Of University & School Lands* (1983), 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840, followed.)

Sullivan has been followed and continues to be the controlling law of this State. There is no express provision providing that the limitation period contained within R.C. 2305.09(D) can be

applied to the State. Therefore, there is no limitation period against the State. For this reason, Defendant Buehrer's argument, as against the State, is without merit and should be denied.

III. THE APPROPRIATE LIMITATION PERIOD FOR A WRITTEN CONTRACT IS 15 YEARS PER R.C. 2305.06 AS IN EFFECT IN 2005

It is somewhat disingenuous for Buehrer to assert that none of the provisions of a 30 page contract contain requirements over and above simple design work. On its face, the Contract, Exhibit 1 to the Complaint, contains numerous provisions unrelated to professional design work. Much of this lawsuit is based directly on Defendant Buehrer's failure to perform and breach of contractually required duties. Defendant Buehrer not only possessed the design responsibility, but also possessed construction administration and quality control responsibilities for the Project. As set forth in Buehrer's Contract. Section 2.7.4 provides:

2.7.4 Site Visits and Inspections. The Architect and appropriate Consultants shall visit the Project at appropriate intervals and, at such intervals as the Architect and the School District Board agree, to review the Work of each Contractor for Defective Work, to become familiar with the progress and quality of the Work on the Project and to determine if the Work is proceeding in conformity with the Contract Documents. Such visits shall specifically include, without limitation, the observation of large excavations, observation of footings during placement of concrete and ***observation of masonry work***, structural steel erection, ***roofing work***, and interior finishes. In all events, the Architect or its representative and appropriate Consultants shall be on the site of the Project for such purposes not less than 32 hours per week whenever any Work is in preparation or progress, unless otherwise expressly provided in writing by the School District Board. The School District reserves the right to require the Architect or his representative to be at the Project Site 32 hours per week as part of the Architect's Basic Fee. ***If the Architect shall become aware, either through such visits or otherwise of any Defective Work on the Project, the Architect shall provide a written report of all Defective Work to the School District Board and the Construction Manager, together with recommendation for the correction thereof.*** (Complaint at Exhibit A, page 10, emphasis added.)

Buehrer was, in effect, the watchdog charged with protecting the Co-owners from Defective Work. The damages incurred by Plaintiffs are currently in excess of \$6 million.

Complaint at ¶ 19. Much of those damages are attributable to defective work installed by Defendants Gibson and McMillan for their failure to “to construct the Project in compliance with the Construction Documents.” *Id.* at ¶s 25, 29. However, per the above *contractual* language contained in 2.7.4 of the design contract, Defendant Buehrer possessed a contractual duty to protect the Co-owners from the Defective Work of Gibson and McMillan—the situation which occurred here, and to report the Defective Work and the proposed solution for the Defective Work to the Co-owners. Obviously Buehrer failed to carry out this duty. Had Buehrer carried out its duty to protect the Co-owners from Defective Work, much of the damage incurred by the Co-owners would have been avoided.

This contractual duty is over and above the negligent design of the Project which Buehrer refers to in its Motion and these duties are purely based on contract. The construction defects set forth in the Report of CRI, Exhibit 2, are pervasive and systemic and should have been observed by Buehrer in its construction administration duties; and Buehrer was required to give notice to the School District of the Defective Work with recommendations on correcting the Defective Work. Buehrer’s failure to perform its construction administration duties is a cause of much of the damage incurred by the Project.

Buehrer’s Motion argues that any contractual provisions become “subsumed” into the tort claim for professional negligence. That argument does not take into account the extra contractual requirements for construction administration assumed by Buehrer when they willingly executed the Contract. Additionally, that argument also does not take into account the enhanced standard of care set forth in the Contract. That standard of care in the Contract augments the standard of care normally utilized to judge malpractice of an architect with a timeliness and efficiency clause and also requires that Defendant Buehrer act in the best interests

of the Co-owners, i.e. the Contract gave Buehrer a fiduciary duty. Additionally, it provides that the standard of care was what would be expected of an architect *with experience in designing similar school buildings*, as opposed to an architect only exercising care in accordance with generally accepted practices. The language at 1.1.3 of the Contract provides:

Timeliness; Standard of Care. The Architect shall perform services hereunder in an efficient and timely manner in accordance with professional standards of skill, care and due and reasonable diligence in a timely manner expected of architects with experience in designing school buildings similar in design and function to the Project in accordance with the Project Schedule and so that the Project shall be completed as expeditiously and economically as possible within the Construction Budget and as consistent with professional skill, due care and in the best interests of the Commission and the School District Board. (Complaint at Exhibit A, page 3.)

Buehrer, in its Motion, quotes a truncated version of the above language, and argues that this language “requires only that Buehrer provide professional design services ‘customarily furnished in accordance with generally accepted architectural and engineering practices...’” Motion at 11-12. This quote by Buehrer, from 1.1.1 of the Contract, is a mischaracterization of the requirements of the Contract. The Motion fails to then point out the additional duties set forth in 1.1.3 of the Contract.

Defendant Buehrer relies on the case of *B&B Contrs. & Developers v. Olsavsky Jaminet Architects Inc.*, 7th Dist App. No. 12MA-5 984 N. E. 2d 419, 2012-Ohio-5981 in support of its argument. However, Buehrer fails to fully disclose what occurred in that case. The appellant in that case, after oral arguments, withdrew its assignment of error on the contract claim. *Id.* at ¶ 42. In other words, the Court was not truly faced with a justiciable issue on this at that point. The Court stated that:

[I]f we were to rule in favor of B&B on this issue, we would end up reversing and remanding for a new trial on the entire case. As can be seen from the above analysis, the tort and contract claims are extremely intertwined, and thus, we

would not be comfortable remanding for a new trial on only the contract claim. (Footnote omitted) When advised of this at oral argument, B&B effectively withdrew this assignment of error from our consideration as they did not wish to risk losing the tort judgment they already possess. As such, we proceed no further on this matter and leave intact the trial court's judgment precluding the breach of contract claims.

In reality the *B&B* case supports the arguments of Plaintiffs. The Court did say that in this type of situation "a separate claim for a contract can only proceed where the alleged conduct to support that claim is distinct from the conduct underlying the malpractice claim". *Id* at ¶ 39. Here the conduct is distinct from a mere malpractice claim. First, a claim for professional design negligence does not include the duties, as provided for in the Contract, such as construction administration set forth in 2.7.4 of the Contract. Nor would an ordinary malpractice claim utilize a standard of care such as the one set forth in 1.1.3 of the Contract.

As is apparent from the above, Defendant Buehrer possessed specific duties outside the normal standard of care for design professionals, which were set forth in its Contract. The breach of those specific duties is part and parcel of this suit for which the statute of limitations is 15 years. For that reason this matter is subject to a 15 year statute of limitation in effect at the time.

IV. THIS ACTION WAS FILED WITHIN 4 YEARS OF DISCOVERY OF BUEHRER'S NEGLIGENT DESIGN

Even if the statute of limitations were applicable in this case, the limitations period has not run due to the fact that the cause of action was not discovered until 2011. The discovery rule provides that an applicable cause of action accrues "at the time when the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury." *Investors REIT One v. Jacobs* (1989), 72 Ohio St. 3d 176, 179; 546 N.E. 2d 206. *See also, Harris v. Listo* (1999), 86 Ohio St. 3d. 203, 205; 714 N.E. 2d 377. The discovery rule is applicable in cases

where the injury, such as this case, was latent. *NCR Corp. v. U.S. Mineral Products* (1995), 72 Ohio St. 3d 269, 649 N.E. 2d 175. As the Supreme Court stated in *NCR, supra*, in regard to latent property defects:

[T]he discovery rule is appropriate for the accrual of such a cause of action. Again, we agree. While this court has applied the discovery rule most often in medical malpractice cases (see, e.g., *Melnyk v. Cleveland Clinic*[1972], 32 Ohio St.2d 198, 61 O.O.2d 430, 290 N.E.2d 916), the underlying rationale also fits with latent property-damage actions. The discovery rule is invoked in situations where the injury complained of may not manifest itself immediately and, therefore, fairness necessitates allowing the assertion of a claim when discovery of the injury occurs beyond the statute of limitations. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727. The discovery rule has not previously been applied to property-damage cases decided by this court. However, other jurisdictions have found the discovery rule useful and appropriate in resolving the limitations-of-actions issues in asbestos-removal-litigation cases. See, e.g., *MDU Resources Group v. W.R. Grace & Co.* (C.A.8, 1994), 14 F.3d 1274; *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.* (C.A.8, 1994), 29 F.3d 1283; *Farm Credit Bank of Louisville v. U.S. Mineral Products Co.* (W.D.Ky.1994), 864 F.Supp. 643; *Hebron Pub. School Dist. No. 13 of Morton Cty. v. U.S. Gypsum Co.* (N.D.1991), 475 N.W.2d 120. These courts concluded that statutes of limitations should not bar claimants before they have a reasonable basis for believing they have a claim. *Id.* at 271.

Here the negligence of Buehrer was not reasonably discoverable until a roofing consultant of the Co-owners, CRI, issued a report in July of 2012, pointing out numerous latent construction defects, and also recommending that the Co-owners engage an engineer to evaluate the design. Ex. 2. When the report of I A Lewin Associates was issued in October of 2012, it listed a number of errors attributable to Buehrer in the design of the Project. Ex. 3. Only then did the Plaintiffs realize the potential for a cause of action for negligent design. *Id.* The design errors did not become evident until that point, and the Co-owners had no reasonable basis to believe they had a cause of action until the CRI Report and the Lewin Report. Based on those

reports, the Plaintiffs would have until sometime in 2015 to file suit on this matter. With respect to the pavement issues, the four year period would also take the time period into 2015.¹

Additionally, the discovery of the negligent design was directly impeded by the actions of Defendant Buehrer. Pursuant to 1.1.3 of the Contract, *supra*, Buehrer was required to “act in the best interests of the Commission and the School District Board.” The contractual requirement “to act in the best interests” of the Co-owners created a higher standard to which Defendant Buehrer was required to meet. However, in the time period between 2005 and 2011, Defendant Buehrer, while aware of the problems being experienced at the Project, did nothing to give any indication to the Co-owners that some of the problems may be due to Buehrer’s own errors and omissions. In essence, Buehrer disregarded its fiduciary responsibility to the Co-owners and hid its actions from the Co-owners. After concealing the truth from the Co-owners to whom Buehrer owed a fiduciary duty, Defendant Buehrer now raises a defense of the statute of limitations. In short, it is unconscionable that Defendant Buehrer is asking the Court to reward it for its concealment of the truth from the Co-owners.²

For the above stated reasons, this action was filed within four years of the discovery by the Co-owners noticing that they may reasonably possess a cause of action against Defendant Buehrer for its negligence.

V. CONCLUSION

Plaintiffs OSFC and Grand Valley Local School District Board respectfully request that the Court deny Defendant Buehrer’s Motion for Judgment on the Pleadings. The statute of

¹ Plaintiffs also intend on filing, within the next few days, a Motion for Leave to Amend the Complaint to incorporate allegations setting forth the facts as in Exhibits 1-4.

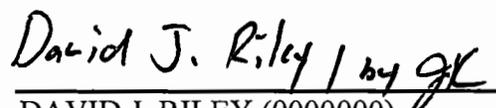
² Buehrer’s actions in covering up its errors may support additional claims against Buehrer. Further discovery will determine whether a Motion to Amend the Complaint is appropriate.

limitations is inapplicable to the State. Additionally, Plaintiff's claims include breaches of specific contractual provisions unrelated to any professional design standard of care. Finally, Plaintiffs filed this action within four years of when they should have reasonably known they possessed a cause of action against Buehrer.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing Memo in Opposition to Motion for Judgment on the Pleadings was sent via regular U.S. Mail and email, to the following counsel this 12th day of June 2014:

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