



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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June 8, 2020

K. Stewart Evans, Jr.
10201 Fairfax Blvd., Suite 525
Fairfax, VA 22030

Michael J. Holleran
1925 Issac Newton Sq., Suite 250
Reston, VA 20190

Re: EvansStarrett PLC v. Goode & Preferred General Contracting Co., Inc.,
CL 2019-14621

Dear Mr. Evans and Mr. Hollern:

This matter is before the court on Plaintiff's motion for leave to file an amended complaint. Plaintiff, a law firm, seeks to make two amendments to its claim for attorney fees: 1) to correct the ad damnum and 2) to add an actual fraud count. Defendants do not object to the first proposed amendment, but do object to the second proposed amendment. For the reasons discussed below, the motion will be granted in part (the ad damnum may be amended) and denied in part (the actual fraud count may not be added).

The Proposed Fraud Count May Not Be Added

Plaintiff proposes adding an actual fraud count based upon the following facts.1

On February 21, 2019, Donn Milton and Rebecca Bowerman ("Milton/Bowerman"), the parties against whom Plaintiff had previously represented Defendants in a dispute over construction invoices, offered to resolve all disputes between Milton/Bowerman and Defendants by wiring the total of the arbitration award for damages and attorney fees (\$246,985.58) to Plaintiff's trust account no later than February 28, 2019; at that time, Defendants knew that they owed Plaintiff \$228,098.17. That same day (February 21, 2019), Defendant Goode, with the

1 For purposes of Plaintiff's motion, the court accepts these facts as true.

intent to mislead, knowingly and falsely represented to Plaintiff that, if Plaintiff would agree to having the payment of \$246,985.58 wired to Defendant Preferred's bank account instead of Plaintiff's trust account, Defendant Preferred would wire the money it owed Plaintiff to Plaintiff upon receipt of the funds, even though Defendant Goode intended, when he made the representation, to pay Plaintiff only \$145,000 (the amount of legal fees awarded by the arbitrator).

Defendants argue that this amendment may not be made because it would be futile as it is barred by the source-of-duty rule. The court agrees that, if the amendment is futile, the amendment should not be permitted. See e.g., *AGCS Marine Ins. v. Arlington County*, 293 Va. 469, 487 (2017) ("court should grant a motion for leave to amend except when, for example, the proffered amendments are legally futile"). Thus, the sole issue before the court is whether the actual fraud claim is barred by the source-of-duty rule and thus would be futile.

The source-of-duty rule requires courts to determine whether a duty arises in contract or tort so that the court can, in turn, determine whether "a cause of action sounds in contract or tort . . . ." *Richmond Met. Auth. v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558 (1998). In *Richmond Met. Auth.*, as in the case at bar, there was a claim for "actual fraud . . . ." 256 Va. at 559. The Court found that "each particular misrepresentation by McDevitt related to a duty or an obligation that was specifically required by the Design-Build Contract." *Id.* Thus, the Court concluded that the "source of any duty breached in this case is solely from the Design-Build Contract between the parties." *Id.* As a result, the actual fraud claim was barred by the source-of-duty rule.

A more recent case, *Dunn Construction Co. v. Cloney*, 278 Va. 260 (2009), also involved an allegation of actual fraud based upon an "unquestionably deliberate and false" representation by the defendant, i.e., that he made "repairs to bring the wall in compliance with the applicable building code . . . ." 278 Va. at 268. The Court found that the false representation was "related to a duty that arose under the contract" and that the fact that "the representation was made in order to obtain payment from [the plaintiff] does not take the fraud outside of the contract relationship, because the payment obtained was also due under the original terms of the contract." *Id.*

Most recently, in *Tingler v. Graystone Homes, Inc.*, 298 Va. 63 (2019), the Court revisited the source-of-duty rule. In a footnote, the Court stated the following regarding the source-of-duty rule and fraud:

Claims of actual and constructive fraud arising solely out of a contractual relationship may be barred by the source-of-duty rule when the damages arise solely out of the underlying contractual relationship. See, e.g., *Richmond Metro. Auth.*, 256 Va. at 560 (stating so while emphasizing that this scenario "is not one of fraud in the inducement").

298 Va. at 82, n.11.

*Tingler* also cited *Dunn Construction Co.* for the proposition that the "putative tort claims . . . caused by conditions created during the construction process 'are all entwined with a breach of the contract' and do not reasonably fall 'outside of the contract relationship,'" *Dunn Constr. Co.*, 278 Va. at 268

. . . ." 298 Va. at 92.

The appellate case primarily relied upon by Plaintiff is *City of Richmond, Va. v. Madison Mgmt. Group*, 918 F.2d 438 (4th Cir. 1990). *City of Richmond, Va.*, however, involved a fraud-in-the-inducement claim: the plaintiff "alleges that Interpace knew, at the time it promised to supply conforming pipe, that it would not supply conforming pipe." 918 F.2d at 447. Tingler explained that fraud-in-the-inducement claims differ materially from fraud claims made in the context of an existing contractual relationship:

Claims for fraudulent inducement, however, logically preexist before the contract allegedly induced and thus stand as a viable tort claim. See *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 363-64 (2010) (holding that when the alleged fraud occurred "before a contract between the two parties came into existence, . . . it cannot logically follow that the duty . . . allegedly breached was one that finds its source in the [c]ontracts"). . . . But we have never held, despite the presence of an existing contractual relationship, that a claim for actual fraudulent inducement, which involves a new contract induced with a third party, is barred by the source-of-duty rule. . . . See generally *City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 446-50 (4th Cir. 1990) (finding that plaintiff's actual fraud claim was not barred "even where the parties have agreed to a contract" and that plaintiff had presented sufficient evidence of actual fraud by showing that it *relied upon the representation of a third-party supplier* when deciding whether to award a contract to a construction contractor).

298 Va. at 82, n.11 (emphasis added).

*City of Richmond, Va.* thus provides no support for Plaintiff's claim.

Plaintiff also relies upon two United States district court opinions, *Tidewater Beverage Services, Inc. v. Coca Cola Co., Inc.*, 907 F. Supp. 943 (E.D. Va. 1995) and *Virginia Transformer Corp. v. P.D. George Co.*, 932 F. Supp. 156 (W.D. Va. 1996).

In *Tidewater Beverage Services, Inc.*, the court followed the nFourth Circuit's lead in *City of Richmond, Va. v. Madison Mgmt. Group*:

Like the defendant in *Madison, Coca-Cola*, in this case, is alleged to have breached both its contractual duties to Tidewater and its duty under the law to not commit fraud. Therefore, as in *Madison*, Defendant is not entitled to the protection of the economic loss rule.

907 F. Supp. at 948.

Because *Tidewater Beverage Services, Inc.* involved, like *City of Richmond, Va. v. Madison Mgmt. Group*, a fraud-in-the-inducement claim, it has no bearing on the case at bar.

In *Virginia Transformer Corp.*, the court stated that "the fraud exception to the economic loss rule is solely for actual fraud, a distinction correctly made in the decisions cited *supra*, and one adhered to here." 932 F. Supp. at

163. As the issue in the case was whether a *constructive fraud claim* was barred by the economic loss rule, this statement is *dictum*.<sup>2</sup> Moreover, *Virginia Transformer Corp.* predates *Richmond Met. Auth.*, *supra*, and *Dunn Construction Co.*, *supra*, and is thus of no precedential value in explicating Virginia law.


Finally, Plaintiff cites to *Evanston Ins. Co. v. Sivam, Inc.*, 2013 U.S. Dist. LEXIS 197680 (E.D. Va. 2013), in which the plaintiff made a claim of constructive fraud. In what can only be considered *dictum* because the claim was constructive fraud, the court stated that claims "for actual fraud, as opposed to constructive fraud, are tort claims and are exempt from the economic loss rule" (At \*8), citing *Virginia Transformer Corp.*, *supra*. As noted above, *Virginia Transformer Corp.*'s statement was *dictum* and predated *Richmond Met. Auth.*, *supra*, and *Dunn Construction Co.*, *supra*, and is thus of no precedential value in explicating Virginia law. Accordingly, *Evanston Ins. Co.* is also of no precedential value. Indeed, despite being decided in 2013, the court did not mention, let alone apply, *Richmond Met. Auth.*, *supra*, or *Dunn Construction Co.*, *supra*, the most recent enunciation of Virginia law. *Evanston Ins. Co.* thus has no bearing on the case at bar.

Turning to the case at bar, the actual fraud alleged is that Defendant Goode falsely represented to Plaintiff that Defendant Preferred "would the (sic) wire the money it owed [Plaintiff] for legal fees and expenses to [Plaintiff] upon receipt" of the funds from Milton/Bowerman. Plaintiff's *Motion For Leave To File Amended Complaint and Memorandum in Support* at 4. But whatever monies Defendant owed Plaintiff for legal fees and costs arose wholly from their contractual relationship. The fact that there was dispute about the amount owed is a contractual dispute, nothing more. Moreover, the fact that the representation by Defendant Preferred was knowingly false is of no moment under *Richmond Met. Auth.*, *supra*, and *Dunn Construction Co.*, *supra*, since, in both cases, there was a deliberate and false representation by the defendant, yet the Court held that the fraud action was barred. To repeat the language of *Dunn Construction Co.*: the false representation was "related to a duty that arose under the contract" and the fact that "the representation was made in order to obtain payment from [the plaintiff] does not take the fraud outside of the contract relationship, because the payment obtained was also due under the original terms of the contract." 278 Va. at 268.

Because the false representation made by Defendant Preferred was related to a duty that arose under the contract, the proposed amendment sounds in contract, not tort. It is thus barred by the source-of-duty rule. As a result, Plaintiff's motion to amend the complaint to add an actual fraud count is DENIED.

An appropriate order will enter.

Sincerely yours,

  
Richard E. Gardiner  
Judge

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<sup>2</sup> It also may be that the court was referring to fraud-in-the-inducement since it cited, *inter alia*, the Fourth Circuit's opinion in *City of Richmond, Va.*

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

EVANSSTARRETT PLC	)	
	)	
Plaintiff	)	
	)	
v.	)	CL 2019-14621
	)	
MARVIN E. GOODE & PREFERRED GENERAL	)	
CONTRACTING CO., INC.	)	
	)	
Defendants	)	

ORDER

THIS MATTER came before the court on May 28, 2020 on Plaintiff's motion for leave to file an amended complaint for attorney fees by: 1) correcting the *ad damnum* and 2) adding an actual fraud count.

IT APPEARING to the court, for the reasons stated in the court's letter of June 8, 2020, that the motion should be denied in part and granted in part, it is hereby

ORDERED that the motion is GRANTED in part (the *ad damnum* may be amended from \$89,104.14 to \$79,642.66) and DENIED in part (the actual fraud count may not be added).

ENTERED this 8<sup>th</sup> day of June, 2020.



Richard E. Gardiner  
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:  
  
K. Stewart Evans, Jr.  
Counsel for Plaintiff  
  
Michael J. Holleran  
Counsel for Defendant