



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWS
ROBERT J. SMITH
JAN L. BRODIE
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD

COUNTY OF FAIRFAX

CITY OF FAIRFAX

THOMAS A. FORTKORT
JACK B. STEVENS
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL

RETIRED JUDGES

JUDGES.

October 23, 2017

LETTER OPINION

Mr. Daniel M. Rathbun
Mr. David E. Bateman
Rathburn Law Firm, P.C.
10427 North Street, Suite 200
Fairfax, VA 22030

Counsel for Defendant Cole Roofing Systems, Inc.

Mr. Richard D. Kelley
Mr. Stephen D. Caruso
BEAN, KINNEY & KORMAN, P.C.
2300 Wilson Boulevard, 7th Floor
Arlington, VA 22201

Counsel for Plaintiffs

RE: William Johnston, et al. v. Dietrich A. Stephan. et al.
Case No. CL-2017-5006

Dear Counsel:

This cause comes before the Court on Defendant Cole Roofing System, Inc.'s ("Defendant") demurrer to Plaintiffs' Complaint respecting causes of action for Breach of Warranty and violation of the Virginia Consumer Protection Act (VCPA). The Court finds that as pled, the Plaintiffs have not properly set forth a case that a roofing construction subcontractor involved in a commercial transaction with a general contractor is liable to a

OPINION LETTER

remote purchaser of the home in question, for breach of express warranty or under the VCPA. Consequently, the Court sustains Defendant's objection to the Breach of Warranty and VCPA claim with leave to amend. The Court overrules the statute of limitations objection finding that by Code it must be raised by Plea in Bar or as an affirmative defense at trial.

FACTS

The central issue in this demurrer is whether the subsequent purchasers of a home can recover damages from a subcontractor who worked under a general contractor employed by a former owner. Deitrich A. Stephan and Elizabeth A. Stephan ("Stephans") owned real property located at 708 East Clear Spring Road, Great Falls, Virginia 22066. The Stephans hired a general contractor, The Construction Zone, Ltd. (the "General Contractor"), to construct a home on the Property. On February 15, 2010, the General Contractor and Cole ("Defendant") entered into a standard contract agreement ("Subcontract") pursuant to which Cole agreed to install, and did install, a roof on the home.

Three years later, the Johnstons ("Plaintiffs") purchased the home from the Stephans. On January 23, 2014, the Johnstons allegedly demanded that Cole perform further work on the roof. Cole allegedly declined. On April 5, 2017, the Johnstons filed this action against Cole, alleging that Cole's refusal to work on the roof violated consumer protection law and breached an alleged contractual warranty. In response to the Complaint, Cole craved oyer for the alleged warranty. The Johnstons responded by attaching the Subcontract between Cole and the General Contractor to the Complaint.

ARGUMENTS OF THE PARTIES

Defendant's Argument

Defendant's demurrer focuses on counts VII (breach of a contractual warranty), and VIII (violation of Virginia Consumer Protection Act).

First, Defendant argues Count VII fails to state a claim for breach of a contractual warranty. Specifically, it fails because there is no privity of contract between Plaintiffs and Defendant Cole. Plaintiffs rely on the Subcontract, but that contract is between Defendant and the General Contractor. Plaintiffs are not parties to the Subcontract and do not have a right to enforce its terms. Defendant argues the Subcontract does not permit the transfer of any warranty to third parties.

Second, Defendant contends Count VII fails because the Subcontract does not contain any warranties. Under the Subcontract, Defendant was to provide a warranty to the General Contractor. The Subcontract required that Defendant install the roof in a manner that would not void a third party's warranty on the roof. For example, a manufacturer's warranty. The Subcontract merely required Defendant to provide or include a warranty on the roof upon completion of the work. It did not, however, require Defendant to warrant the roof.

Third, Defendant avers Count VIII is barred by the statute of limitations. The Virginia Consumer Protection Act requires any private action arising under the Act to be brought within two years after accrual of the action. Va. Code Ann. § 59.1-204.1. Plaintiffs were required to file their claim no later than January 23, 2016. They did not file this action until April 5, 2017.

Lastly, Defendant claims Plaintiffs failed to state a claim for violation of the Virginia Consumer Protection Act. The Act is limited to consumer transactions, which is the sale of services “to be used primarily for personal, family or household purposes.” Va. Code Ann. § 59.1-198. Under this definition, the Act does not apply in this case. The Complaint alleges Defendant provided services under the Subcontract, and only the Subcontract. This contract was between two separate businesses, and the services provided were for business purposes. Moreover, Defendant argues even if the Act applies, Plaintiffs’ claim should be dismissed. Plaintiffs did not allege the proper elements to support a cause of action for violation of the Act. They did not allege “a false representation, of material fact, made intentionally and knowingly, with intent to mislead, reliance by the party misled, and resulting in damage.” *Weiss v. Cassidy Development Corp.*, 63 Va. Cir. 76, 78 (2003). “Unlike fraud victims, the alleged representation here did not induce the Johnstons to enter into any transaction at all, (such as executing a contract or making a purchase).” (Def.’s Dem. 5). Additionally, they did not suffer damages caused by the alleged representation.

Plaintiffs’ Response

Plaintiffs have three arguments: 1) Plaintiffs stated a claim for breach of warranty; 2) the statute of limitations is procedurally improper; and 3) Plaintiffs stated a claim for breach of the Virginia Consumer Protection Act.

First, Plaintiffs contend all they have to prove is the required terms of the warranty. Specifically, what is warranted and for how long. Furthermore, a third party may enforce a warranty if the contracting parties intended the third party to benefit from the warranty.

Plaintiffs aver Defendant provided an express warranty to the Stephans and that warranty transferred to Plaintiffs. The warranty does not expressly prohibit or restrict its transferability.

Next, Plaintiffs argue that the defense of the statute of limitation may not be raised by demurrer. The Demurrer on this basis should therefore be overruled.

Lastly, Plaintiffs argue the Act does not limit its protection to transactions that occur between a supplier and a consumer. Furthermore, a roof is used for personal, family and household purposes. Additionally, the representations that Defendant made pertaining to the roof were of a material fact and they were false. This is proven by the fact that Defendant later admitted to Plaintiffs that the warranty was enforceable and the roof was installed incorrectly. Plaintiffs state they relied on Defendant's misrepresentations.

ANALYSIS

A demurrer tests a pleading's legal sufficiency. The Court may sustain a demurrer if the pleading either fails to state a cause of action or fails to state facts upon which the demanded relief can be granted. Va. Code. § 8.01-273. The Court must "consider as true all the material facts alleged in the complaint, all facts impliedly alleged, and all reasonable inferences that may be drawn from such facts." *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013). "Additionally, on demurrer, the court may consider the substantive allegations of the pleading in addition to any accompanying exhibit mentioned in the pleading." *Bagwell v. City of Norfolk*, 59 Va. Cir. 205, 206 (Norfolk 2002) (citing *Flippo v. F & L Land Co.*, 241 Va. 15, 16 (1991)).

A demurrer determines “whether the complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim.” *Id.* at 143. Although the facts alleged in the pleadings are to be considered in the light most favorable to the plaintiff, “a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.” *Kitchen v. City of Newport News*, 275 Va. 378, 385, 657 S.E.2d 132, 136 (2008) (quoting *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122-23, 624 S.E.2d 1, 4 (2006)).

I. Whether Plaintiffs state a claim for breach of contractual warranty

“The parties involved in a construction project resort to contracts and contract law to protect their economic expectations. Their respective rights and duties are defined by the various contracts they enter. Protection against economic losses caused by another's failure properly to perform is but one provision the contractor may require in striking his bargain.” *Blake Constr. Co. v. Alley*, 233 Va. 31, 35, 353 S.E.2d 724, 727 (1987).

In *Sensenbrenner v. Rust*, a case which Defendant cites, the Supreme Court of Virginia considered the following question:

Does Virginia law permit recovery by a home purchaser against the pool installer and the architect for damages to the indoor swimming pool and to the foundation of the house caused by a leaking pool, where the pool installer and the architect were not in privity of contract with the home purchaser, on the basis that the damages were injuries to property and not economic losses?

Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 421, 374 S.E.2d 55, 56 (1988). The Court answered in the negative.

In *Sensenbrenner*, the homeowners entered into a contract with O'Hara and Company. O'Hara was to construct a new home for the plaintiffs. The plaintiffs only contracted with O'Hara, and O'Hara contracted with the architect and subcontracted the construction of the pool. The subcontractor built the pool on fill rather than natural soil, causing water pipes to break and cause damage. The Court held:

The plaintiffs here allege nothing more than disappointed economic expectations. They contracted with a builder for the purchase of a package. The package included land, design services, and construction of a dwelling. The package also included a foundation for the dwelling, a pool, and a pool enclosure. The package is alleged to have been defective -- one or more of its component parts was sufficiently substandard as to cause damage to other parts. The effect of the failure of the substandard parts to meet the bargained-for level of quality was to cause a diminution in the value of the whole, measured by the cost of repair. This is a purely economic loss, for which the law of contracts provides the sole remedy.

Recovery in tort is available only when there is a breach of a duty "to take care for the *safety* of the person or property of another." The architect and the pool contractor assumed no such duty to the plaintiffs by contract, and the plaintiffs' complaint alleges no facts showing a breach of any such duty imposed by law.

Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988).

In this case, Plaintiffs rely entirely on two contracts. The first contract is the contract Plaintiffs entered into with the Stephans. The contract provides "[w]arranties on roof (10 years) and all appliances." Pl.'s Ex. B at 3. The second contract is the subcontract The Construction Zone, Ltd. and Cole Roofing, Inc. executed. The contract provides:

The scope of the work to be performed for Subcontractor, as generally described on the cover page of the Subcontract specifically includes but is not limited to the following items . . .

- Cole Roofing, Inc must inspect & approve material substrate prior to roofing installation to ensure warranty will apply . . .
- 5 year workmanship guarantee on all work performed
- 10 year limited warranty

Def.'s Ex. A at 2.

Although this case varies slightly from *Sensenbrenner* because Plaintiffs did not bring a tort action, the Court's reasoning is still applicable. Plaintiffs are requesting no less than \$200,000 in actual damages based on a warranty provided for in a contract to which they are not in privity. In the Complaint, Plaintiffs do not allege that there is privity of contract or that they are an intended third party beneficiary of the contract. Furthermore, they solely allege the warranty is transferrable, but they do not provide facts to support this allegation.¹ The language in both contracts is unclear as to the transferability and scope of the warranty.

Consequently, the Court sustains the objection of Defendant with leave to amend.

II. Whether Plaintiffs state a claim under the Virginia Consumer Protection Act (VCPA)

The General Assembly enacted the Virginia Consumer Protection Act with the intent to "promote fair and ethical standards of dealings between suppliers and the consuming public." Va. Code Ann. § 59.1-197. In considering Defendant's objections, the Court addresses whether there is a consumer transaction, whether Plaintiffs have alleged all

¹ Plaintiffs allege additional facts in their supplemental brief maintaining Defendant made parol admissions that the warranty was transferable but the Court confines its analysis to the claim as currently pled.

the elements required, and whether the applicable statute of limitations is addressable by demurrer.

A. Whether the transaction at issue falls within the definition of “consumer transaction”

Under the VCPA, "consumer transaction" means:

1. The advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes;
2. Transactions involving the advertisement, offer or sale to an individual of a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged;
3. Transactions involving the advertisement, offer or sale to an individual of goods or services relating to the individual's finding or obtaining employment;
4. A layaway agreement, whereby part or all of the price of goods is payable in one or more payments subsequent to the making of the layaway agreement and the supplier retains possession of the goods and bears the risk of their loss or damage until the goods are paid in full according to the layaway agreement; and
5. Transactions involving the advertisement, sale, lease, or license, or the offering for sale, lease or license, of goods or services to a church or other religious body.

Va. Code Ann. § 59.1-198. While the Supreme Court has not addressed this definition, a few trial courts have discussed the implications of the definition.

First, contractors who purchase materials for a construction project on a house do not fall under the definition because they are “a *commercial entity* [purchasing] goods from another commercial entity for commercial purposes; *i.e.*, the construction of a home to be *sold* by [the contractor] (not *lived in* by [the contractor]).” *Bindra v. Michael Bowman*

& Assocs., 58 Va. Cir. 47, 50 (Va. Cir. Ct. 2001) (Fairfax County) (emphasis in original) (sustaining third party plaintiff's demurrer against contractor who filed VCPA claim against seller of stucco).

Second, courts have found that plaintiffs can bring claims against suppliers regardless if that supplier was involved in a transaction with the plaintiff. See *Alexander v. Southeastern Wholesale Corp.*, 978 F. Supp. 2d 615, 622 (E.D. Va. 2013) (finding the Plaintiff could bring a VCPA claim against Defendant A, even when the transaction was indirect; Defendant A sold a defective truck to Defendant B, who then resold it to Plaintiff); see also *Merriman*, 55 Va. Cir. at 331 (finding Plaintiff could bring a VCPA claim against Defendant A because a consumer transaction includes a situation where Defendant A sold a defective truck to Defendant B, who then sold it to Defendant C, who then sold it to Plaintiff).

However, Plaintiffs must still show that the transaction occurred for a personal use, rather than for the benefit of potential customers. See *Microsoft Corp. v. # 9 Software, Inc.*, 2005 U.S. Dist. LEXIS 36710, at *10-11 (E.D. Va. Dec. 15, 2005) (finding that even though the Plaintiff was a "person" under the VCPA, it still could not bring a VCPA claim because it was not purchasing certificates of authenticity to use for a personal, family, or household purpose).

Plaintiffs cite *Va. Breach Rehab Specialists v. Augustine Med.*, for the proposition that the VCPA does not "limit the protection only to those transactions that occur directly between a *supplier* and the ultimate consumer." *Va. Breach Rehab Specialists v. Augustine Med.*, 58 Va. Cir. 379, 386 (Norfolk 2002) (emphasis added). The case is

OPINION LETTER

unhelpful to Plaintiffs' cause for it involved a supplier of goods and services for use on patients, rather than a subcontractor to a general construction contractor in a *commercial* transaction, as in this cause.

Plaintiffs also cite *Kieft v. Becker* for the proposition that a construction subcontractor is reachable by the scope of the VCPA. *Kieft v. Becker*, 58 Va. Cir. 171, 175 (Fairfax 2002). Plaintiffs misapprehend the applicability of *Kieft* to the facts at bar. The plaintiffs in that case entered into a home improvement contract with Becker Interiors who allegedly misrepresented its qualifications and had a subcontractor, Brooks, perform shoddy work. In order to lawfully complete the project, Becker and Brooks, unbeknown to the plaintiffs, allegedly enlisted defendant A & L in a scheme to file for construction permits in A & L's name even though it was not acting as either general or subcontractor of the project. Thus factually, *Kieft* is distinguishable from the instant case inasmuch as A & L was not acting as a subcontractor in a commercial transaction with a general contractor, but instead allegedly allowed itself to serve the function of standing as a front for both the sub and general contractors in terms of the permitting process without the knowledge or assent of the plaintiffs. The *Kieft* Court further found the complaint *sufficiently alleged facts* that the defendant was a *supplier* within the meaning of the VCPA that "advertises, solicits or engages in consumer transactions", and merely held that lack of privity of contract was not a bar to assertion of the claim.

In this cause the Defendant is an improper party to this claim as pled because it is alleged as a commercial entity contracting with another commercial entity for the construction of a home, and therefore the transaction did not occur for a "personal, family,

or household purpose.” As a subcontractor, Defendant provided a service to the General Contractor. The service provided was merely for a business purpose.

The Court finds the Plaintiffs did not allege facts supporting the allegation that the transaction at issue falls within the definition of “consumer transaction”, and therefore sustains the objection of Defendant, with leave to amend.²

B. Whether Plaintiffs allege all the elements required

Virginia Code Section 59.1-200 prohibits various practices, including the misrepresentation by a supplier in connection with a consumer transaction. A claim for misrepresentation under the VCPA must allege the following:

In order to state a cause of action for violation of the Virginia Consumer Protection Act (VCPA), the plaintiff must allege a fraudulent misrepresentation of fact. The misrepresentations must be judged by the common law standards of what constitutes a misrepresentation. Allegations of misrepresentation of fact must include the elements of fraud: a false representation, of material fact, made intentionally and knowingly, with intent to mislead, reliance by the party misled, and resulting damage. In addition, plaintiff must allege facts with requisite specificity, including identification of the agents, officers and employees of the entities who are alleged to have perpetrated the fraud and the details of time and place of the fraudulent acts.

Weiss v. Cassidy Dev. Corp., 63 Va. Cir. 76, 78 (2003) (internal citations omitted).

In this case, Plaintiffs have not alleged that Defendant misrepresented a material fact or that Defendant knowingly made a misrepresentation. In turn, Plaintiffs have not alleged all of the required elements for this cause of action.

² The Court has some doubt this claim may be validly amended but in an abundance of caution grants Plaintiffs the chance to muster any additional relevant factual allegations that can be advanced in good faith in support of the claim.

The Court sustains the Defendant's objection, finding that the Plaintiffs did not allege facts supporting all of the elements necessary for a claim under the VCPA, with leave to amend.

C. Whether the two year statute of limitations bars Plaintiffs' claim

An action brought under the VCPA must be commenced within two years from the date of accrual. Va. Code Ann. § 59.1-204.1. The action accrues and the limitation period begins to run when "the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered." Va. Code Ann. § 8.01-230.

In this case, Plaintiffs allege Defendant breached the warranty provided for in the Subcontract on January 23, 2014. Plaintiffs filed their Complaint on April 5, 2017, which is beyond the two year limitation period. However, as Plaintiffs correctly posit, this type of argument is best made by Plea in Bar and not in a Demurrer. "[T]he defense that the statute of limitations period has expired may not be set up by demurrer." Va. Code Ann. § 8.01-235.

Consequently, the Court denies this objection finding that the two year limitation period should not be raised on demurrer but rather by Plea in Bar or as an affirmative defense at trial.

CONCLUSION

The Court having considered Defendant's demurrer to Plaintiffs' Complaint respecting whether causes of action for Breach of Warranty and violation of the VCPA, finds that as pled, the Plaintiffs have not made out a case that a roofing construction

subcontractor involved in a commercial transaction with a general contractor is liable for breach of express warranty or under the VCPA to a remote purchaser of the home in question. Consequently, the Court sustains Defendant Cole's objection to the Breach of Warranty and VCPA claims with leave to amend. The Court overrules the statute of limitations objection finding that by Code it must be raised by Plea in Bar or as an affirmative defense at trial.

The Defendant shall forthwith prepare, circulate and submit to the Court an order incorporating the ruling in this letter opinion and setting the time for leave to amend as twenty-one days from entry of such order.

AND THIS CAUSE CONTINUES.

Sincerely,

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER