

LIABILITY ISSUES IN THE DEFENSE OF CONSTRUCTION DEFECT CASES IN ILLINOIS

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I. *Tort vs. Breach of Contract/Warranty Theories of Recovery*

The first issue to address is whether the plaintiff has properly pleaded a cause of action. The line of demarcation between tort and breach of contract is sometimes difficult to make, and occasionally, the conduct complained of can constitute both a breach of contract and a tort.

In Illinois, the economic loss rule (*Moorman* Doctrine) stands for the proposition that a plaintiff cannot recover under a negligence theory for purely economic losses as a result of expectations not being met in a commercial setting. The idea behind this rule is that qualitative defects are best handled by contract law. *Anderson Electric v. Ledbetter Erection Corp.*, 115 Ill. 2d 146 (1986); *Moorman Manufacturing Co., v. National Tank Co.*, 91 Ill. 2d. 69 (1982).

The court in *Moorman* expressed three exceptions to the economic loss rule. The three exceptions are: where the plaintiff incurred damage as a result of a sudden or dangerous occurrence; where the plaintiff's damages are a result of fraud committed by the defendant; or, where the plaintiff's damages are caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in the business transaction. *In Re Chicago Flood Litigation* 176 Ill. 2d. 179 (1997); *Moorman Manufacturing Co., v. National Tank Co.*, 91 Ill. 2d. 69 (1982).

Subsequently, in *Redarowicz v. Ohlendorf*, 92 Ill 2d. 171(1982), the Illinois Supreme Court held that the economic-loss doctrine developed in *Moorman* was applicable to a construction defect case where a homeowner sued a builder on the theory that the builder was negligent in constructing the plaintiff's home. The plaintiff in *Redarowicz* sought recovery for the costs of repair or replacement of a defectively constructed chimney, wall and patio. The court dismissed the matter holding that there was "no sound reason" for distinguishing between a

"disappointed consumer of a storage tank (*Moorman*) or a disgruntled purchaser of a certain house" and held that when a purchaser of a defectively constructed residence sues the builder and alleges solely economic losses, the purchaser cannot recover under a negligence theory in tort.

The court explained:

"This is not a case where defective construction created a hazard that resulted in a member of the plaintiff's family being struck by a falling brick from the chimney. The adjoining wall has not collapsed on and destroyed the plaintiff's living room furniture. The plaintiff is seeking damages for the costs of replacement and repair of the defective chimney, adjoining wall and patio. While the commercial expectations of this buyer have not been met by the builder, the only danger to the plaintiff is that he would be forced to incur additional expenses for living conditions that were less than what was bargained for."

Morrow v. LA Goldschmidt Associates, Inc., 112 Ill 2d 87 (1986); *Redarowicz v. Ohlendorf*. 92 Ill 2d. 171(1982).

When property damage is caused by disappointed commercial expectations the economic loss rule applies, however, the rule will not apply where there is a showing of damages that are above and beyond disappointed expectations. In *In re Chicago Flood Litigation* the Illinois Supreme Court held that a plaintiff, in order to sue in tort, must show the damage to property was caused by more than gradual deterioration, internal breakage or other non accidental causes, it must arise from a dangerous event. The court allowed the plaintiffs to proceed in tort for damages to perishable inventory as a result of the flood. *In Re Chicago Flood Litigation* 176 Ill. 2d. 179 (1997).

Another option is to plead the construction defect as a breach of contract if a plaintiff is unable to properly plead a cause of action in tort. In order to determine if a contract has been breached courts will look to the language of the contract and related documents, the duties imposed upon the parties, the scope of work of the contractor and any specifications/drawings related to the work and compare the actual work performed by the contractor.

In a suit for damages for breach of an written express warranty, the burden of proof is on the plaintiff to show by a preponderance of the evidence the terms of the warranty, the failure of some warranted part, a demand upon the defendant to perform under the terms of the warranty, a failure of the defendant to do so, a compliance with the terms of the warranty by the plaintiff, and damages measured by the terms of the warranty. Express warranties are contractual in nature and, therefore, the language of the warranty itself is what governs and explains the duties owed and rights of the various parties. Hasek v. DaimlerChrysler Corp., 319 Ill. App. 3d 780 (First Dist 2001).

In real estate transactions, in the absence of an express clause in a contract, the contract for the sale of real estate is "merged" into the deed when it is delivered to the buyer at closing, and the deed supersedes all of the contract provisions. While true, this statement, standing alone, is an oversimplification of the law regarding the doctrine of merger. The main exception occurs when the contract for the sale of real estate contains provisions that are not fulfilled by delivery of the deed, and therefore the contract is not merged as to such provisions, but remains open for performance of such terms. Thus, the merger doctrine is not the absolute bar to plaintiffs' claim for breach of the express warranty in the contract that defendants assert it to be. Instead, the applicability of the merger doctrine here first requires a determination of whether the express warranty constituted a collateral undertaking excepted from the merger doctrine. Neppl v. Murphy 316 Ill. App. 3d 581 (First Dist 2000).

A homeowner may also be able to recover under a violation of the implied warranty of habitability contained in construction contracts. An implied warranty of habitability arises from the sale of a new home to an original purchaser by a developer-vendor. The implied warranty of habitability was created to avoid the harshness of caveat emptor and the doctrine of merger

where the purchasers of new homes discover latent defects in their home. The defect must not simply be present, but must interfere with the dweller's use of the residence. A knowing disclaimer of the implied warranty is not against the public policy of Illinois; however, any such disclaimer must be strictly construed against the builder vendor. The burden is on the seller to prove that the buyer knew that the implied warranty did not attach to the sale of the new residence. Where the language used in the contract is so clear and conspicuous that no other reasonable conclusion could be reached but that the buyer both read and understood the language, a court may find as a matter of law that the implied warranty was effectively disclaimed. *The Board Of Managers Of The Village Centre Condominium v. Wilmette Partners* 198 Ill. 2d 132 (2001); *The Board Of Directors of Bloomfield Club v. The Hoffman group, Inc.*, 186 Ill. 2d. 419 (1999).

There is another implied warranty contained in construction contracts. One who contracts to perform construction work impliedly warrants to perform the work in a reasonably workmanlike manner. Failure to do so is a breach of contract. If the contractor fails to perform the contracted work in a good workmanlike manner, the property owner would be entitled to recover for the contractor's breach of implied warranty. *Zielinski v. Knapp & Son* 277 Ill. App. 3d. 735 (Third Dist 1995); *Vicorp Restaurants v. Corinco Insulating Co.*, 222 Ill. App. 3d 518, (First Dist 1991).

Often, plaintiffs attempt to raise Magnusson Moss and/or UCC claims for alleged defective products installed in their homes. Recently, the Illinois Appellate Court for the First District ruled a Plaintiff's complaint alleging breach of warranty under the Magnusson Moss Warranty Act and UCC with regards to insulated windows incorporated into their new town home was subject to dismissal by the trial court because

windows, after being incorporated into a new structure, are neither consumer goods within the definition of the Magnusson Moss Warranty Act nor goods within definition of UCC. *Weiss v. MI Home Prods.*, 376 Ill. App. 3d 1001 (First Dist 2007)

II. Damages

When a product is sold in a defective condition that is unreasonably dangerous to the user or consumer or to his property, liability in tort is applicable for the physical injury to plaintiff's property as well as to personal injury. When an unreasonably dangerous defect is present, and physical injury does, in fact, result, then physical injury to property is so similar to personal injury that there is no reason to distinguish them. This idea falls in line with the notion that the essence of a product liability tort case is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property." In such cases, as a result of a sudden calamitous event, the plaintiff can recover the amount of damage to the property under tort theories. *United Air Lines, Inc. v. CEI Industries of Illinois, Inc.*, 148 Ill. App. 3d 332 (First Dist 1986); *Redarowicz v. Ohlendorf*. 92 Ill 2d. 171(1982)

The sole purpose of contract damages is to compensate the non-breaching party. It is well settled in Illinois that the measure of damages for a breach of contract when a builder has provided less than full performance or has provided defective performance is generally the cost of correcting the defective condition. When a contract is breached the injured party is, insofar as it is possible to do so by a monetary award, entitled to be placed in the position he would have been in had the contract been performed. However, two exceptions exist. They are: if the defects can only be corrected at a cost unreasonably disproportionate to the benefit of the purchase, or correcting the damages would entail an unreasonable destruction of the builder's work. In such

cases the measure of damages is the amount by which the defects have lessened the value of the property. *Fieldcrest Builders v. Antonucci*, 311 Ill. App. 3d 597 (First Dist 1999).

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." 810 ILCS 5/2-714(2) (West 2008). "While it is not necessary that damages for breach of warranty be calculated with mathematical precision basic contract theory requires that damages be proved with reasonable certainty and precludes damages based on conjecture or speculation. Consequential damages that are reasonably foreseeable are recoverable; and the court adopts an objective approach and permits consequential damages if they are reasonably foreseeable, including an item of damage for loss of profits. Mere inconvenience is not compensable, nor is mental anguish a compensable item of damage when other items of damages are not involved. Thus, the rule is that mere inconvenience, without more, is not a proper element of damages. Nonetheless, there is the possibility of damages for inconvenience when coupled with otherwise independently compensable damages. *Dewan v. Ford Motor Co.*, 363 Ill. App. 3d 365 (First Dist 2005)

III. Statute of Limitation and Statute of Repose

735 ILCS 5/13-214 governs the time limitations for bringing a cause of action in Illinois.

Section A of the statute reads:

“Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission. “

However, section B of the statute further limits the time period for bringing a cause of action.

Section B reads:

“No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section.

735 ILCS 5/13-205 (2008) reads that actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

The Seventh Circuit Court of Appeals dealt with the above statutes in the *Marseilles Hydro Power* matter. The Court held that the four-year statute of limitations under subsection (a) of this section, rather than five-year limitations period on property damage under 735 ILCS 5/13-205, applied to a canal company's claim that a utility company's placement of a utility pole and guywires was responsible for the collapse of a canal retaining wall. The claim was untimely because a letter to the company placed it on notice of the injury more than four years before the claim was filed. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, (7th Cir. 2008). Accordingly, in order to provide that the claim is timely, a plaintiff must file within four years of learning of the damages and the four year clock must commence no later than 10 years after the construction was complete.

IV. Defenses

Defenses afforded to a defendant are fact specific to every case. Some of the defenses that a defendant may be able to assert in negligence and contract/warranty cases include:

- 1) **Economic Loss Doctrine**- a plaintiff cannot recover under a negligence theory for purely economic losses as a result of expectations not being met in a commercial setting.
Redarowicz v. Ohlendorf. 92 Ill 2d. 171(1982)
- 2) **Comparative Negligence**- the plaintiff shall be barred from recovering damages if his actions are more than 50% of the proximate cause of the injury or damage for which recovery is sought. The plaintiff will not be barred from recovering damages if the contributory fault on the part of the plaintiff is not more than 50% of the proximate cause of the injury or damage for which recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of fault attributable to the plaintiff." Ill 735 ILCS 5/2-1116. (West 2008)
- 3) **Assumption of Risk** - Plaintiff can not bring suit when he voluntarily consented, understood and accepted the dangers that ultimately caused the damages that are the subject of the law suit. *Savino v. Robertson* (First Dist. 1995)
- 4) **Intervening Cause** – where negligence charged does nothing more than furnish a condition which made the injury possible and that condition causes an injury by the subsequent independent act of a third party, the creation of that condition is not the proximate cause of the injury. The subsequent independent act becomes the effective intervening cause which breaks the causal connection, and itself becomes the proximate cause. *Carter v. Skokie Valley Detective Agency*, 256 Ill. App. 3d 77 (First Dist 1993).
- 5) **Mitigation of Damages/ Avoidable Consequences** - an injured party is not allowed to recover from a wrongdoer for damages which the injured party should have foreseen and could have avoided without undue risk, burden or humiliation. *Slovick v. All American Bank*, 163 Ill. App. 3d 741 (First Dist 1987).

- 6) **Merger Doctrine** - In the absence of an express clause in a contract, the contract for the sale of real estate is "merged" into the deed when it is delivered to the buyer at closing, and the deed supersedes all of the contract provisions.
- 7) **Disclaimer of Express or Implied Warranties** – A valid and conspicuous disclaimer of express and/or implied warranties can defeat claims based upon those theories.
- 8) **Non-Compliance with Warranty terms** – Non-compliance with the warranty terms will defeat a breach of warranty claim by a plaintiff.