

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

ESSCO OF BIRMINGHAM, LLC,
Plaintiff,

v

Case No. 21-188930-CB
Hon. Victoria A. Valentine

CLARK CONSTRUCTION COMPANY, INC.,
WOODWARD BROWN VENTURES, LLC
d/b/a The Daxton Hotel, and
EAGLE EXCAVATION, INC.
Defendants.

and

CLARK CONSTRUCTION COMPANY, INC.,
Cross-Plaintiff,

v

EAGLE EXCAVATION, INC.,
Cross-Defendant.

/

**OPINION AND ORDER REGARDING DEFENDANT EAGLE EXCAVATION, INC.’S
MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)**

At a session of said Court, held in the
County of Oakland, State of Michigan
July 29, 2024

HONORABLE VICTORIA A. VALENTINE

This matter is before the Court on Defendant Eagle Excavation, Inc.’s Motion for Summary Disposition under MCR 2.116(C)(7). This Court reviewed the pleadings as well as each motion, response and reply brief. Oral argument was held on the motion.

OPINION

I.

Overview

Plaintiff (“Essco”) owns real property containing a building that is commonly referred to as the Plaza of Birmingham. Space in the building is leased to tenants, including non-party Swedanese, Inc. d/b/a Rivage Day Spa.

Essco’s building is next door to real property owned by Woodward Brown Ventures, LLC d/b/a The Daxton Hotel (“Woodward Brown”). In July 2018, Woodward Brown began construction on its hotel through various contractors.

Woodward Brown hired Clark Construction Company (“Clark”) to serve as the general contractor on the project. Clark retained Eagle Excavation, Inc. (“Eagle”) to perform the excavation work and install the systems necessary to support the surrounding buildings during excavation.

On July 12, 2018, the excavation activities caused damage to Essco’s building. The damage was discovered by Essco, Clark, and Woodward Brown on July 12, 2018, by visual inspection. The excavation had caused both horizontal and lateral movement of Essco’s building. The damage was, at least in some major part, found in the space leased by Rivage Day Spa.

Following the incident on July 12, 2018, the following events took place:

- July 16, 2018: Email to Clark indicating the “wall movement is a constructability issue and a result of not following the planned construction sequence” (Exhibit D to Motion).
- July 19, 2018: Email to Clark indicating the “movement is a result of constructing the TERS out of sequence from what is shown on the design plans” (Exhibit F to Motion).
- July 25, 2018: Letter from Clark to Eagle indicating that issue “was caused by Eagle Excavation...You have stated that Eagle failed to follow the specified sequence for the work” (Exhibit G to Motion).
- August 20, 2018: Email from Clark to Eagle disagreeing with Eagle’s assertion that it has no responsibility for the incident (Exhibit H to Motion).

May 13, 2021: Rivage Day Spa filed lawsuit against Essco, Clark, Eagle, and others directly relating to the incident. (“Rivage lawsuit”).

July 9, 2021: The instant matter was filed by Essco against Clark and Woodward Brown only.

July 12, 2021: Clark filed a Cross-Complaint against Eagle in the Rivage lawsuit relating to the incident and specifically alleging breach of contractual duties relating to the excavation.

Sept. 14, 2021: Clark filed an Answer in the instant action without Notice of Non-Party Fault or Third-Party Complaint.

January 3, 2023: Clark’s Cross-Claim against Eagle was dismissed due to discovery obstruction and violations of a stipulated order.

January 25, 2023: Order administratively closing this matter to allow for discovery in the Rivage lawsuit.

April 14, 2023: Deposition taken of Eagle’s representative.

August 9, 2023: Rivage lawsuit was settled and dismissed with prejudice.

March 14, 2024: The instant matter was reopened.

March 27, 2024: Clark filed a Motion for Leave to File Notice of Non-Party Fault.

April 16, 2024: First Amended Complaint filed to add Eagle Excavation, Inc. as a Defendant.

Clark’s Motion for Leave to file a late Notice of Non-Party Fault alleged that the deposition of Eagle’s representative (in April 2023) in the Rivage lawsuit revealed information not previously known and which implicated Eagle as a party responsible for the damages to Essco’s building. Notably missing from the Motion are the many facts in the timeline above from July 2018 through April 2024. The Court was not provided with any of the relevant details regarding Clark’s knowledge of Eagle’s fault in this matter during that timeframe.

The Court, having been misled by the Motion for Leave, granted the Motion and the Notice of Non-Party Fault as to Eagle on April 10, 2024. Essco then filed a First Amended Complaint on April 16, 2024, naming Eagle as a Defendant and asserting a common law negligence claim.

Eagle filed its Motion for Summary Disposition under MCR 2.116(C)(7), arguing that the claims are barred by prior judgment and statute of limitations. Eagle argues that Essco's claims were required to be made in the Rivage lawsuit, and that the claims are barred by the 3-year statute of limitations applicable to negligence actions.

I.

Standard of Review

MCR 2.116(C)(7) provides for summary disposition where a claim is barred by the statute of limitations. The Court of Appeals has explained the standard of review:

Under MCR 2.116(C)(7) . . . this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in the light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate.

RDM Holdings, LTD v Continental Plastics Co, 281 Mich App 678, 687 (2008) (citations omitted.)

III.

Analysis

Statute of Limitations

Essco's negligence claim is subject to a 3-year statute of limitations under MCL 500.5805(2). The damage is agreed to have occurred on July 12, 2018. Essco filed its initial Complaint in this matter on July 9, 2021, or within the limitations period. However, Essco's initial Complaint did not name Eagle as a defendant. Clark filed its Notice of Non-Party Fault under

MCR 2.112(K) on April 10, 2024. Under MCR 2.112(K)(4), a party served with a Notice may file an amended pleading within 91 days of service of the notice. Clark filed the Notice of Non-Party Fault on April 10, 2024. Essco then amended its Complaint to add Eagle as a Defendant on April 16, 2024. Clark and Essco argue that the filing date of the claim against Eagle relates back to the original Complaint under MCL 600.2957(2), which states that a “cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.” *Id.*

The parties all agree that the First Amended Complaint was filed within 91 days of the Notice of Non-Party Fault. Eagle argues that because the Notice of Non-Party Fault was not filed within 91 days of Defendants’ Answer to the Complaint, and because Clark knew of Eagle’s fault at the time the Answer was filed, the limitations-saving provision of MCL 600.2957(2) does not apply. Essco argues that Clark filed a Motion and obtained the Court’s authority to file the Notice of Non-Party Fault, which requires application of MCL 600.2957(2). As authority for its position, Eagle relies upon *Staff v Marder*, 242 Mich App 521; 619 NW2d 57 (2000). In contrast, Essco argues that *Staff* supports its position and not Eagle’s position.

In *Staff*, a defendant filed a motion to file a late-Notice of Non-Party Fault, but only included one name in the Notice. The defendant then also filed a Motion for Leave to amend the complaint. After the hearing, the parties to the action agreed to an order to forego the notice provisions of MCR 2.112(K) and add defendants to the complaint without notice. It was because of the stipulation (and the failure to comply with the court rule’s provisions) that the Court of Appeals held that the relation-back should not apply to that amended complaint. The court discussed the choice to forego notice and attributed it to the party’s apparent inability to establish reasonable diligence in bringing the Notice of Non-Party Fault, but the court did not include that

as part of its reasoning. The court held the relation-back did not apply “[b]ecause plaintiff failed to comply with the notice requirements and the litigation against defendants was commenced after the statutory two-year period.” *Staff*, 242 Mich App at 533-34.

In this matter, Eagle argues that because Clark misled this Court in its Motion for Leave, the reasoning in *Staff* should be employed to prohibit Clark from escaping its statute of limitations problem based upon a less than forthcoming Motion for Leave. Essco also did not inform this Court as to the facts set forth in the timeline. And, Eagle had no opportunity to respond to the Motion for Leave, as it was not a party.

MCR 2.112(K)(3)(c) governs the allowance of Notices of Non-Party Fault, and the allowance of late-filed notices. Under the rule, “the court shall allow a later filing of the notice on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party.” *Id.*

Clark’s showing in its Motion was based upon what the Court now knows were disingenuous statements that it could not have known until a deposition taken in April 2023. Clark argued that prior to that deposition Eagle contended that it was not at fault, so Clark could not name it as a potential party at fault. MCR 2.112(K)(3)(b) requires a party filing a notice to include a “brief statement of the basis for believing the nonparty is at fault.” The rule does not require evidence of fault, as Clark argues. Clark knew or should have known that the assertion that Clark could not have known prior to the deposition was inaccurate. The timeline above clearly establishes Clark knew almost immediately following the incident that Eagle was potentially at fault. In August 2018, Clark informed Eagle that it disagreed with Eagle’s denial of liability,

thereby giving it a belief that the Eagle was at fault. There is nothing before the Court as to why that would change between 2018 and 2024.

MCL 600.2957 does not give the Court discretion in allowing an amendment after a Notice of Non-Party Fault has been filed. The “court shall grant leave to the moving party to file and serve an amended pleading” against the newly named non-party. MCL 600.2957(2). Likewise, the relation-back is not within the Court’s discretion: “A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.” *Id.*

However, the court in *Staff* held that where a trial court finds that the requirements for a Notice of Non-Party Fault were not met, the Court then has discretion to determine that the relation-back will not apply.

This Court was not provided all the appropriate information when leave to file a late Notice of Non-Party Fault was sought. The information that was omitted was significant to this Court’s decision. Had this Court been advised that Clark sent a letter to Eagle informing Eagle that it was at fault for the incident in July 2018, or had this Court seen the email disagreeing with Eagle’s assertion that it was not at fault in August 2018, this Court would have denied the Motion. If this Court had known that Clark filed a Cross-Claim against Eagle in the Rivage lawsuit, alleging its fault for the same incidents in July 2021 (just two months before its Answer was filed), this Court would have Denied the Motion. Any one of the missing events may have been sufficient to have denied the Motion. But each of the many instances of Clark’s knowledge, dating back to July 2018, are more than sufficient evidence that Clark knew of the potential liability when it filed its Answer in this matter in September 2021 and certainly could have filed a timely Notice of Non-Party Fault.

Failure to include those facts in the Notice was a failure to make the proper showing required under MCR 2.112(K).

For the reasons above, the relation-back provision applicable through MCL 600.2957(2) is not applicable in this matter because the requirements of MCR 2.112(K) were not met.

As stated above, Essco's negligence claim is subject to a 3-year statute of limitations under MCL 500.5805(2). The damage is agreed to have occurred on July 12, 2018. Essco added Eagle as a party in April 2024, or nearly six years after the events giving rise to the claim. Because there is no relation-back to the original filing, the claims are barred by the statute of limitations on claims for negligence.

Accordingly, Eagle's Motion for Summary Disposition under MCR 2.116(C)(7) of Plaintiff's negligence claims is granted as the claims were not timely filed.

Application of Res Judicata

Eagle's Motion for summary disposition based upon *res judicata* is moot given this Court's ruling above.

Accordingly, Eagle's Motion for Summary Disposition under MCR 2.116(C)(7) of Plaintiff's negligence claims based upon *res judicata* is denied as moot.

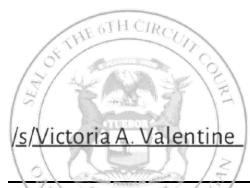
ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Defendant Eagle Excavation, Inc.'s Motion for Summary Disposition as to Plaintiff's Complaint under MCR 2.116(C)(7) is **GRANTED**.

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.



/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 7/29/24