

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

UHFA, L.L.C and UHFC, L.L.C.

Plaintiffs

vs.

Case No. 0616-CV23780

W.G. SAMUELS CO., INC. and
REGENTS FLOORING CO., INC., and
ACE AMERICAN INSURANCE COMPANY,

Defendants.

**ORDER GRANTING REGENTS FLOORING CO., INC.'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST PLAINTIFFS UHFA, L.L.C AND UHFA, L.L.C.**

The Court takes up Defendant Regents Flooring Co., Inc.'s Motion for Partial Summary Judgment as to Counts IV and XI of Plaintiffs UHFA, L.L.C. and UHFC, L.L.C.'S Third Amended Petition. The motion was filed on June 23, 2009, and has now been fully briefed by both sides. The court has considered the motion, suggestions and attachments filed by the parties. The court has not considered Plaintiffs' tendered sur-reply to Defendant Regents' motion because a sur-reply is not allowed by Rule 74.04(c) where the movant did not file any additional statement of facts in its Reply. Leave to file the Sur-Reply is therefore overruled.

Defendant Regents Flooring Co. seeks summary judgment on Counts IV and XI of the Third Amended Petition. In those counts plaintiffs assert negligence claims against both W.G. Samuels and Regents Flooring, Inc. Plaintiffs allege that Regents negligently installed the flooring materials on the Founders Apartments and Cadillac Building project in question. Plaintiffs claim that as a result of Regents' negligent installation the flooring failed and was partially ruined.

Plaintiffs had contracted with W.G. Samuels to provide and install flooring at the project. W.G. Samuels then subcontracted the work to Regents. Regents did not have a contract with plaintiffs. Plaintiffs stated damages from the negligent flooring installation includes repair and cure costs, delay costs and attorneys fees. There are no personal injury damages claimed, or damages related to any property other than the Founders Apartments and Cadillac Building. (Plaintiffs UHFA and UHFC's Interrogatory Answer No.6)

Movant Regents contends that summary judgment should be granted in its favor on Plaintiffs' negligence claims because a party is not liable in negligence to a third party with whom the party is not in privity. Regents relies upon the rule of privity--that where the only damages claimed are economic loss resulting from defects in the item built pursuant to a contract, a negligence action does not lie. Movant Regents also argues that since no contract existed between Regents and plaintiffs regarding installation of the flooring, there was no contractual duty between Regents and plaintiffs, and consequently, plaintiffs were owed no duty of care (a required element for a claim of negligence).

When considering a motion for summary judgment, the movant bears the burden of establishing a right to judgment as a matter of law on the record as submitted. Any evidence in the record that presents a genuine issue as to the material facts defeats the movant's prima facie showing. ITT Commercial Fin Cop. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371 (Mo.banc 1993).

In this case, the material facts are undisputed. Plaintiffs entered into a contract with W.G. Samuels, and W.G. Samuels in turn entered into a contract with Regents to provide flooring installation on the project. Plaintiffs had no contractual relationship with

Regents. (Plaintiffs have, in this same lawsuit, asserted breach of contract claims against W.G. Samuels.) The undisputed material facts in this case establish Defendant Regents' right to judgment as a matter of law on the record submitted here.

Plaintiffs argue that there are other material facts in dispute-- namely, "whether Regents is entitled to escape liability for its defective workmanship on the basis that it lacks privity with UHFA and UHFC, and because UHFA and UHFC have alleged damages to property other than the damages to repair Regents' defective workmanship." (Plaintiffs' Suggestions in Opposition at p.6-7) These are not factual disputes. These are disputes as to the application of established principles of law.

A party is not liable in negligence to a third party with whom it is not in privity. Owens v. Unified Investigations and Sciences, Inc., 166 S.W.3d 89,92 (Mo.App.E.D. 2005). Exceptions to the rule of privity which have been recognized include: where an act of negligence is imminently dangerous to the lives or safety of others or the thing dealt with is inherently dangerous; fraud or collusion; express warranty; implied warranty; and error in the transmission of telegrams. Fleischer v. Hellmuth, Obata & Kassabaum, 870 S.W.2d 832,835 (MO.App.E.D. 1993) Plaintiffs have failed to present competent evidence demonstrating that their claim falls into any of these recognized exceptions.

In their negligence claims against Regents, plaintiffs must establish that the Defendant Regents had a duty of care to protect them from injury, that Regents failed to perform that duty, and that its failure proximately caused injury to plaintiffs. Whether a duty exists is purely a question of law. Owens v. Unified Investigations & Sciences, Inc., supra. at 92. It is generally recognized that one who has contracted with another owes no duty to a plaintiff who is not a party to that agreement, and therefore a non-

party to the contract cannot sue for negligent performance of the contract. Owens, supra., at 92. Plaintiffs have failed to show facts here, which would support the existence and scope of a duty owed to plaintiffs. Absent contractual privity between Regents and plaintiffs, Regents owed plaintiffs no duty "to perform work in a workmanlike manner." Plaintiffs have failed to establish the existence of a duty legally owed to plaintiffs by Regents Flooring on their claims of negligence. Consequently their claims of negligence against Regents fails as a matter of law.

IT IS NOW THEREFORE ORDERED that Plaintiffs' Motion for Leave to File Sur-Reply is now OVERRULED.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Regents' Motion for Partial Summary Judgment on Counts IV and XI is now GRANTED. Summary Judgment is entered in favor of Defendant Regents Flooring, Inc. and against Plaintiffs on Counts IV and XI. This ruling does not affect the negligence claims in each of said counts which are asserted against Defendant W.G. Samuels.

IT IS SO ORDERED.

2/02/10
Date

/s/ Sandra C. Midkiff
Sandra C. Midkiff, Circuit Judge

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