PREPARED BY THE COURT

CITY OF ELIZABETH,

Plaintiff,

vs.

THE REINFORCED EARTH COMPANY, ELIZABETH METROMALL, LLC, NEW JERSEY METRO MALL URBAN RENEWAL, INC., SCHOOR DEPALMA INC, SLATTERY SKANSKA a/k/a SKANSKA USA BUILDING, INC., JOHN SANKEY, P.E., JOHN DOE CORPORATION "1" through "10"; John DOE INDIVIDUAL "1" through "10", and all other individuals and entities who delivered or constructed defective materials in relation to the Complaint,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO.: UNN-L-536-19

CIVIL ACTION

STATUTE OF REPOSE

Statute of Repose does not entitle R. 4:6-2(e) dismissal against municipality

Rule 4:6-2 provides:

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complain, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1. If a motion is made raising any of these defenses, it shall be made before pleading if a further pleading is to be made. . . .

In considering a motion to dismiss under Rule 4:6-2(e), this Court will look at whether the pleading sets forth sufficient facts to give rise to a cause of action. Glass v. Suburban Restoration Co., 317, N.J. Super. 574, 582 (App. Div. 1998). A motion to dismiss for failure to state a claim upon which relief can be granted requires the court to search the plaintiff's complaint in depth and with liberality in order to determine if there is a cause of action. See Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). New Jersey, a notice-pleading state, requires

the plaintiff to plead only a general statement of the claim. Id. at 747. With respect to its adequacy, a pleading must appraise the other party of the claims raised and, if the adequacy is challenged, all facts, reasonable implications or inferences will be considered in favor of the pleader. See In Re Contest of November 8, 2005, 388 N.J. Super. 663, 675-76 (App. Div. 2006), aff'd 192 N.J. 546 (2017). A pleading does not need to "spell out the legal theory upon which it is based" as long as the complaint asserts facts sufficient to put the defendant on notice of the conduct disputed and the relief sought. Teilhaber v. Greene, 320 N.J. Super. 453, 464 (App. Div. 1999) (quoting Farese v. McGarry, 237 N.J. Super. 385, 390 (App. Div. 1989)). This Court is concerned with the legal sufficiency of the pleadings and not "with whether the plaintiff can prove the facts averred in the Complaint." Printing Mart, 116 N.J. at 746.

A motion under R. 4:6-2(e) is brought at a very early stage in the litigation and it will be granted in rare circumstances and usually without prejudice. In Re Contest of November 8, 2005, 388 N.J. Super. at 666. A complaint should not be dismissed under this rule if a cause of action is suggested by the facts and a theory of action may be articulated by amendment of the complaint. Printing Mart, 116 N.J. at 746. However, "if it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate." Sparroween, LLC v. Tp. Of West Caldwell, 452 N.J. Super. 329, 339 (App. Div. 2017) (citations omitted).

On this motion to dismiss, the Court looks at the facts as they are presented in the Amended Complaint and accepts the allegations as true. For the purpose of this motion only, this Court must give the plaintiff all reasonable inferences that one may draw from the facts alleged.

Plaintiff, the City of Elizabeth, filed suit alleging damages associated with the repair and replacement of the defective work, specifically, the plaintiff filed claims against defendants The Reinforced Earth Company ("RECo") and John Sankey ("Sankey"): breach of express warranty; breach of implied warranty; gross negligence; and breach of contract to third party beneficiary. See Am. Compl. ¶¶ 85-106. [Any gross negligence is omitted for the purpose of this opinion. This part of opinion is meant to discuss the Statute of Repose in regard to municipalities.]

In Count I, the plaintiff claims a breach of express warranty against RECo, Sankey and other defendants, alleging that the design plans and design calculations from RECo stated the Walls were designed for a 100-year service, but the Walls had failed after 16 years; because of RECo's calculations, the walls experienced massive corrosion or the components were not

properly design to deal with the impact of corrosion; and the City of Elisabeth has incurred costs and damages associated with the repair and replacement of the defective work. Id. ¶¶ 85-89.

In Count II, the plaintiff claims breach of implied warranty against RECo, Sankey and other defendants, alleging that the defendants' involvement in the project implicated multiple implied warranties: that the work will be performed in a good and workmanlike manner; that the materials and methods used to perform the work were fit for their intended purpose; that the defendants would construct the Walls skillfully, carefully, diligently in accordance with industry standards; that defendants' defective work illustrates that it breached the warranties; and as a direct and proximate result of the defendants' negligence, plaintiff has incurred damages. Id. ¶¶ 90-93..

Defendants argue that the claim cannot be sustained because the Amended Complaint does not allege that the plaintiff saw, heard or was even aware of RECo's design calculations. Defendants also argue that the claim must be dismissed because it does not properly allege that the plaintiff was in privity with the defendants or that defendants made an express or implied warranty to the plaintiff.

In New Jersey, to state a claim for breach of express warranty, the plaintiff must allege: "(1) that Defendant made an affirmation, promise or description about the product; (2) that this affirmation, promise or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description." N.J. Stat. Ann. § 12A:2-313. Courts have noted that "whether a given statement constitutes an express warranty is normally a question of fact for the jury." See Union Ink Co., Inc. v. AT&T Corp., 352 N.J. Super. 617, 645 (App. Div. 2002) ("Whether the advertisements contained material misstatements of fact, or were merely puffing, as alleged by defendants, presents a question to be determined by the trier of fact.") Furthermore, a representation is presumed to be part of the basis of the bargain "once the buyer has become aware of the affirmation of fact or promise." Elias v. Ungar's Food Prods., 252 F.R.D. 233, 251 (N.J.D.C. 2007) (citation omitted); see also Cipollone v. Liggett Group, Inc., 893 F.2d 541, 568 (3d Cir. 1990), rev'd on other grounds, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) ("Once the buyer has become aware of the affirmation of fact or promise, the statements are presumed to be part of the 'basis of the bargain' unless the defendant, by 'clear affirmative proof,' shows that the buyer knew that the affirmation of fact or promise was untrue.") To establish a breach of an express warranty under N.J.S.A.12A:2-313, the plaintiff need not prove privity or traditional reliance. Id. at 563-66. "[A] commercial buyer in a

distributive chain may maintain an action under the U.C.C. for purely economic loss arising out of a breach of warranty by a remote supplier." Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555 (1985). Implied warranties of workmanship and habitability "arise[] whenever a consumer purchases from an individual who holds himself out as a builder-vendor of new homes." McDonald v. Mianecki, 79 N.J. 275, 293 (1979). Generally, construction contracts contain general provisions according to which the contractor will warrant the construction or the material used.

Looking at the pleadings, this Court finds that the plaintiff has satisfied the notice standard required by the pleadings for breach of express and implied warranty. The plaintiff has pleaded that RECo's design calculations stated that the Walls were designed for 100-year service and that RECo failed to remedy the alleged defective work. Am. Compl. ¶¶ 86, 88. This Court finds that this pleading is sufficient to allow the defendants enough facts to deny or disprove the alleged misconduct, and the plaintiff has put the defendants on notice of the specific allegations. Considering the early stage of this action and the lack of access to any agreement between the parties, it is premature for this Court to determine that the plaintiff cannot prove its claims. For the purpose of this motion, the plaintiff does not need to prove the facts alleged in the complaint. Plaintiff asserts that defendants represented that the Walls have 100-year service life. For the purpose of this motion, this Court finds that defendants warranted their product for 100-year service. The cover page stated the 100-year service life. Id. ¶ 43. Plaintiff does not need to plead with specificity that he "saw, hear, or was aware." Instead, at this stage of the action it is enough for a cause of action to be suggested. Accordingly, this Court can infer from the plaintiff's allegation that the plaintiff was aware of the alleged warranty.

Defendants' argument regarding the lack of privity between plaintiff and defendants is not convincing because the plaintiff could establish a vertical privity between the parties, which would impose a responsibility on the subcontractor. Discovery is needed to establish what agreements are between the parties and, if any, the provisions contained by them. There is a question on whether RECo assumed the general contractor's obligations and to what extent. This Court finds that the plaintiff pleaded sufficient facts to put defendants on notice of the specific allegations.

In Count IV, the plaintiff alleges breach of contract to third party beneficiary against Skanska. Defendants argue for the dismissal of this claim in their brief. According to Count IV, "RECo failed to provide a retaining wall system with a one-hundred (100) year service life as required by the 1996 AASHTO Standard Specifications." Id. ¶ 100. This claim could make RECo

a third party defendant brought in by Skanska and it has the same analysis as Count V. Therefore the next analysis applies to Count IV as well.

In Count V, the plaintiff claims a breach of contract to third party beneficiary against RECo, alleging that "on information and belief, RECo had a subcontract with Skanska wherein RECo agreed to be the Designer of Record for the Project," agreement to which the City was an intended Third Party Beneficiary; that "RECo failed to provide a retaining wall system with a one-hundred (100) year service as required by the 1996 AASHTO Standard Specifications"; and that "[a]s a direct and proximate result of the Defendant's negligent construction on the Project, the City of Elizabeth has incurred damages – including, but not limited to, the cost to remedy the retaining walls that resulted from the Defendant's breach of contract." Id. ¶¶ 103-106.

"The ordinary rule is that an action for a breach of contract must be brought either by a party to the contract or someone for whose benefit the contract is made." Styles v. F.R. Long Co., 70 N.J.L. 301, 302 (E. & A. 1904). Third party beneficiaries are characterized as donee, creditor and incidental. Brooklawn v. Brooklawn Housing Corp., 124 N.J.L. 73, 76 (E. & A. 1940). The classification is used "to distinguish between the beneficiary who has a right of action under the contract, and the one who has not." Id. The focus is whether the parties to the contract intended others to benefit from the existence of the contract, or whether that benefit arises merely as an unintended incident of the agreement. Broadway Maintenance Corp. v. Rutgers, State University, 90 N.J. 253, 259 (1982). It is not enough for the third party to benefit from the performance of the contract, it "must appear that the contract was made for his benefit and so intended." Borough of Brooklawn v. Brooklawn Hous. Corp., 124 N.J.L. 73, 76 (E. & A.1940) (citation omitted). If a third party to a contract is an intended beneficiary and its rights under the agreement are violated, the third party can commence a breach of contract action. N.J.S.A. 2A:15-2.

Considering all the inferences that can be made from the alleged facts, this Court is satisfied that the plaintiff has pleaded enough facts in support of a *prima facie* breach of contract to third party beneficiary: plaintiff alleges that the defendant and Skanska entered into a contract to which the City of Elizabeth was an intended third party beneficiary; RECo failed to provide a retaining wall system with one-hundred year service as required by the Standard Specifications; and that the plaintiff has incurred damages. Am. Compl. ¶¶ 103-106.

Defendants, relying on federal precedents, argue that the plaintiff does not allege "any facts **demonstrating** that it is clearly a third-party beneficiary of RECO's written subcontract with

Skanska" and that "there are no 'clear and specific indications' in Skanska's subcontract with RECo that those parties intended to confer on plaintiff the right to enforce that subcontract and bring a claim on it against RECo." This Court disagrees with defendants' argument. At this point in the action plaintiff does not need to demonstrate that the City is an intended beneficiary. Rather, the plaintiff must be given the benefit of discovery, access to the agreements between the parties and all the information beneficial to determine the parties' intention. According to the pleadings, the parties intended the contract to benefit the plaintiff, the City of Elizabeth. Plaintiff pleads multiple acts and omissions by RECo and Sankey that could be the cause of the Wall's failure. Discovery will bring light in this case and provide the plaintiff with the information needed.

The moving defendants seek dismissal, breach of express warranty, breach of implied warranty, breach of contract to third party beneficiary – arguing that their claims are barred by the Statute of Repose. The defendants argue that the Walls were specially designed by RECo and Sankey as an improvement to real property; and the Amended Complaint was filed more than 10 years after RECo and Sankey furnished their design services. Plaintiff counters that the statute does not apply to a contract with the City that expressly provides for a longer effective period. Plaintiff notes that the contract explicitly provided that the walls would be designed for 100 years because the Construction Standards and Specifications required that the Walls to be constructed for a 100-year service life and RICo's Design Calculation cover page stated the 100-year service life along with all the calculations made.

The Statute of Repose, N.J.S.A. § 2A:41-1.1, provides as follows:

> No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such service and construction. This limitation shall serve as a bar to all such actions, bot governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

The Statute of Repose does not operate like a conventional statute of limitation, in that it "does not 'bar' a remedy in the sense of providing an injured person a certain time to institute suit after the 'accrual' of a 'cause of action.'" E.A. Williams v. Russo Dev. Corp., 82 N.J. 160, 167 (1980). Instead, injuries or damages occurring more than ten years after the completion of services simply do not, by legislative edict, form the basis for recovery. In essence, the Statute of Repose prevents what could have been a cause of action from ever arising. The Statute of Repose is triggered by substantial completion, which is the issuance of temporary certificate of occupancy. See Town of Kearny v. Brandt, 214 N.J. 76 (2013). When the project is performed in stages, the ten-year period starts running for all the parties from the final date of construction rather than from the completion of each stage alone. Welch v. Engineers, Inc., 202 N.J. Super. 387, 397 (App. Div. 1985); see also Horosz v. Alps Estates, 136 N.J. 124, 131 (1994). However, for an architect or designer with no involvement in the contract administration phase, the Statute of Repose will commence from the time when the design documents were completed and delivered to the owner. See Hopkins v. Fox and Lazo Realtors, 242 N.J. Super. 320, 329 (App. Div. 1990).

Although courts construe the Statute of Repose broadly to achieve the legislative goal against expanding design and construction professionals liability, Newark Beth Israel Med. Ctr. V. Gruzen & Partners, 123 N.J. 357, 363 (1991), the statute does include exemptions. Particularly, the Statute of Repose does not bar an action by a governmental unit on a "written warranty, guaranty or other contract that expressly provides for a longer period." N.J.S.A. § 2A:14-1.1(b)(1).

This Court does not find that the Statute of Repose bars the claims for breach of express and implied warranty or breach of contract to third party beneficiary. Accepting all the allegations as true, coupled with the reasonable inferences that could be drawn from the pleadings, this Court opines that the plaintiff could establish that the defendant warranted the 100-year service life for the MSE Retaining Walls's design. Although it has been more than ten years since the defendants finished their part of the task, the defendants overlooked one of the most important element that could be proven by discovery: they **chose** to give a 100-year warranty. The Statute of Repose was adopted to limit the **indefinite** liability for design and construction professionals for injuries arising from a structure's defect. The Statute was not adopted to limit the liability of someone who **expressly warranted** the product for a longer time. Therefore, there is an issue as to the agreement between parties and dismissing the claim at this stage of the action is premature. The plaintiff must be given the opportunity to conduct discovery and try to prove its claims.

Accordingly, plaintiff has pled sufficient facts in its complaint to support its *prima facie* breach of express warranty, breach of implied warranty and breach of contract to third party beneficiary. Furthermore, this Court finds that the Statute of Repose does not apply to the plaintiff's claims.