

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD OF
GOVERNORS, a statutory corporation, for and
on behalf of West Virginia University,

Plaintiff,

v.

JACOBS FACILITIES, INC., a Missouri
business corporation, f/k/a Sverdrup Facilities,
Inc.; MOODY/NOLAN LTD., INC., an Ohio
business corporation, OVERLY
MANUFACTURING COMPANY, a
Pennsylvania business corporation, and
DONALD M. MILLER COMPANY, a
Pennsylvania business corporation,

Defendants.

CIVIL ACTION

No. 16-C-383

THE HONORABLE JUDGE RUSSELL
M. CLAWGES, JR.

**OVERLY MANUFACTURING COMPANY'S MOTION TO DISMISS COUNTS III, IV,
V, AND VI OF WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS'
COMPLAINT**

Pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Defendant Overly Manufacturing Company ("Overly") hereby moves this Court to dismiss Count III for breach of express warranty, Count IV for breach of implied warranty, Count V for breach of express limited warranty, and Count VI for negligent misrepresentation.

FACTUAL BACKGROUND

On April 22, 1998, Plaintiff West Virginia University Board of Governors ("WVU" or "Plaintiff") entered into a contract with Jacobs Facilities, Inc., formerly known as Sverdrup Facilities, Inc. ("Sverdrup") to construct a new Student Recreation Center (the "Project"), including installation of a metal roof. Complaint at ¶¶ 9, 11. Overly manufactured the metal roof for the Project, and Donald M. Miller Company ("Miller") installed the roof. Complaint at ¶ 14. Work was completed no later than November 1, 2001. Complaint at ¶ 66.

In April 2015, WVU discovered that a section of the roof was leaking. Complaint at ¶ 23. Subsequently, in December 2015, Overly and Kalkreuth Roofing & Sheet Metal, Inc. ("Kalkreuth") inspected the entire roof at the Project. Complaint at ¶ 29. Overly and Kalkreuth determined that, during installation, Miller failed to anchor the roof with full-width sheet cleats and Rowl fasteners. Complaint at ¶ 30.

Plaintiff filed a complaint (the "Complaint") against Overly (roof manufacturer), Sverdrup (construction manager and constructor), Moody/Nolan Ltd, Inc. (architect), and Miller (roof installer). Overly now moves to dismiss Count III for breach of express warranty, Count IV for breach of implied warranty, Count V for breach of express limited warranty, and Count VI for negligent misrepresentation.

LEGAL ARGUMENT

A. Standard of Review

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure governs the dismissal of a plaintiff's action for failure to state a claim upon which relief can be granted. Rule 12(b)(6) allows a party "to file a motion in the circuit court prior to filing an answer, to dismiss a claim for failure to state a cause of action." *Shaffer v. Charleston Area Medical Center*, 485 S.E.2d 12, 17 (W.Va. 1997). "The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint." *Earley v. Fisher*, No. 14-1232, 2015 WL 7628837, at *2 (W. Va. Nov. 23, 2015)(citing *Colla v. McJunkin*, 358 S.E.2d 242, 243 (W. Va. 1987)). A court should dismiss the complaint when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

B. Plaintiff Has Alleged Insufficient Facts to Support Count III for Alleged Breach of Express Warranty Based Upon the Project Specifications.

Plaintiff claims that Overly "expressly agreed to provide a metal roofing system that

would be free from leaks for a period of thirty (30) years, as specifically provided in specification section 07410, paragraph 1.06.A.1." Complaint ¶ 54. Nowhere does Plaintiff allege that Overly entered into a contract with WVU or any other person or entity that bound Overly to comply with the specification section referenced. Plaintiff's claim against Overly under Count III of the Complaint rests entirely on specification section 07410, which Plaintiff has failed to allege is applicable to Overly.

Moreover, Plaintiff also alleges a separate breach of express limited warranty against Overly at Count V of the Complaint based upon the limited warranty issued by Overly at the conclusion of the Project. Therefore, Plaintiff's Count III for breach of express warranty against Overly is duplicative and superfluous.

Accordingly, Plaintiff's Count III against Overly for breach of express warranty should be dismissed.

- C. Plaintiff's Count IV for Breach of Implied Warranty is Barred by the Statute of Limitations and is Expressly Excluded by the Limited Warranty.**
- 1. Plaintiff's Count IV for Breach of Implied Warranty is Barred by the Statute of Limitations.**

Count IV of Plaintiff's Complaint against Overly for breach of implied warranty must be dismissed because it is barred by the statute of limitations. The West Virginia Uniform Commercial Code ("WVUCC") governs the statute of limitations in regards to Plaintiff's breach of implied warranty claim. *See Harrison v. Porsche Cars N. Am., Inc.*, No. 15-0381, 2016 WL 1455864, at *4 (W. Va. Apr. 12, 2016) (affirming circuit court decision to apply WVUCC to breach of implied warranty claim for allegedly defective product).

WVUCC § 45-2-725(1) states that (1) "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original

agreement the parties may reduce the period of limitation to not less than one year but may not extend it." W. Va. Code § 46-2-725 (emphasis added). Section 45-2-725(2) explains that

[a] cause of action accrues *when the breach occurs*, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

W. Va. Code § 46-2-725 (emphasis added).

If Plaintiff had a claim for breach of implied warranty, which it doesn't, it would have accrued when the roofing work was completed, which was no later than November 1, 2001. This means that the statute of limitations expired no later than November 1, 2005 — over 10 years ago. It is immaterial that Plaintiff did not discover the purported breach until after the statute of limitations expired. Plaintiff's claim for breach of implied warranty is therefore barred by the statute of limitations provided under the WVUCC.

Pursuant to the terms of § 46-2-725, the only way in which the four-year time period could have been extended is by *explicit extension*. See *Basham v. General Shale*, 180 W.Va. 526, 531 (W.Va. 1998) (holding that four-year statute of limitation period under WVUCC had run and no explicit warranty had been given, therefore, the explicit extension exception was not applicable). Explicit extension would mean that any warranty provided by Overly was express, as opposed to implied. See *Harrison*, 2016 WL 1455864, at *4 (holding that explicit extension is only applicable to breaches of express warranty, as opposed to implied warranty). An express warranty is created affirmatively by "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." W. Va. Code § 46-2-313. This is in stark contrast to an implied warranty, which is "implied in a contract for . . .

sale." W. Va. Code § 46-2-314. Plaintiff has not alleged any explicit extension of the statute of limitations and Overly did not agree to any such extension.

In Count IV of its Complaint, Plaintiff alleges that Overly "impliedly agreed to provide a metal roofing system that was fit for a particular purpose" and that Plaintiff "relied upon that implied promise," Complaint, at ¶¶ 60-61. The statute of limitations for a breach of implied warranty expired over 10 years ago. Therefore, Count IV of Plaintiff's Complaint for breach of implied warranty must be dismissed.

2. Plaintiff's Count IV for Breach of Implied Warranty is Expressly Excluded by the Limited Warranty.

Count IV of Plaintiff's Complaint against Overly for breach of implied warranty should also be dismissed because it contradicts the plain language of the limited warranty issued by Overly. The limited warranty states, in type larger than the surrounding type, and in all capital letters,

THIS WARRANTY IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHETHER ORAL OR WRITTEN, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY SAMPLE WARRANTY OR ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Limited Warranty attached as Exhibit A. Despite the clear language of the waiver, Plaintiff alleges that Overly "impliedly agreed to provide a metal roofing system that was fit for a particular purpose," Complaint, at ¶ 60.

To effectively exclude an implied warranty of fitness for a particular purpose, "the exclusion must be by a writing and conspicuous." W. Va. Code § 46-2-316(2). Language is "conspicuous" if the text is "in capitals equal to or greater in size than the surrounding text," W. Va. Code § 46-1-201(b)(10). Because the waiver of the implied warranty of fitness for a particular purpose meets these criteria, it is effective. See *Davis v. Dills Motor Co.*, 566 F.Supp.

1360, 1364 (S.D.W.Va. 1983) (holding that "No Warranties of Merchantability or Fitness" was effective waiver of warranty of fitness).

Because Count IV of Plaintiff's Complaint against Overly for breach of implied warranty contradicts the plain language of the limited warranty, Count IV should be dismissed.

D. Plaintiff's Count V for Breach of Express Limited Warranty is Barred by the Terms of the Limited Warranty.

Count V of Plaintiff's Complaint for breach of express warranty must be dismissed because it is barred by the very terms of the limited warranty. The limited warranty issued by Overly states that Overly "warrants its Overly batten type roof for a period of Thirty (30) years following the acceptance date of NOVEMBER 1, 2001." Limited Warranty attached as Exhibit A (emphasis added). Overly warranted the roof that was supplied by Overly. Overly *did not warrant* the installation of that roof by Miller.

The limited warranty issued by Overly also states:

This warranty is further limited to the roofing only and does not include defects in gutters or conductor leaks caused by defects in the roof which were caused by any other installation and construction of any other materials in conjunction with the Overly batten type roof, or by work occurring on the building or structure by other parties, contractors, and/or subcontractors not under the control or direction of Overly Manufacturing Company.

Limited Warranty attached as Exhibit A (emphasis added). This is consistent with the understanding that Overly warrants only its own workmanship and does not, and cannot, warrant the workmanship of others beyond Overly's control, such as the installation of the roof by Miller.

Plaintiff does not allege that there are any defects with the roof provided by Overly. Rather, Plaintiff simply repeats the results of Overly's inspection, which was that "the roof leaks over the pool area were caused by the failure of Miller to properly install full width sheet cleats under the metal roofing." Complaint, at ¶ 25. Plaintiff also simply repeats the results of Overly's

inspection of the complete roof, which was that "practically all of the metal roofing system lacked full width sheet cleats." Complaint, at ¶ 31.

Overly's limited warranty is limited to the roof provided by Overly and does not cover Miller's installation. Plaintiff has failed to allege, and cannot allege, any deficiency in the roof provided by Overly. Therefore, Count V for Breach of Express Limited Warranty should be dismissed.

E. Plaintiff's Count VI for Negligent Misrepresentation is Barred by the Statute of Limitations and Statute of Repose.

Count VI of Plaintiff's Complaint for negligent misrepresentation must be dismissed because it is barred by both the statute of limitations (W. Va. Code § 55-2-12) and statute of repose (W. Va. Code § 55-2-6a).

1. Statute of Limitations

Claims of negligence are governed by a two-year statute of limitations. W. Va. Code § 55-2-12; *Trafalgar House Construction, Inc. v. ZMM, Inc.*, 567 S.E.2d 294, 299 (W.Va. 2002). The statute of limitations may be tolled by operation of the "discovery rule," which states that the statute is tolled "until a claimant knows or by reasonable diligence should know of his claim." *Id.*

Plaintiff has alleged no facts that would toll the two-year statute of limitations. Plaintiff simply alleges that Overly represented that Miller was a qualified roof installer and that Overly did so "without any reasonable factual basis." Complaint at ¶¶ 72, 75. Plaintiff fails to indicate when Overly allegedly made such representation. Regardless, any such alleged representation could have been made no later than November 1, 2001, when the Project was completed. Further, Plaintiff could have discovered Miller's failure to anchor the roof with full-width sheet cleats and Rawl fasteners at the time that the roof was installed. If Plaintiff did not have a

representative at the Project to observe the roof installation as it occurred, it reasonably should have done so.

If Overly made a misrepresentation regarding whether Miller was a qualified roof installer, which it did not, Plaintiff did discover or should have discovered such misrepresentation no later than November 1, 2001 when Plaintiff or its agent did observe or should have observed Miller's failure to anchor the roof with full-width sheet cleats and Rawl fasteners. Therefore, it has been over 14 years since Plaintiff's cause of action, if any, accrued. Accordingly, Count VI of Plaintiff's Complaint for negligent misrepresentation should be dismissed because it is barred by the two-year statute of limitations.

2. Statute of Repose

In addition to the statute of limitations, claims for damages related to the "planning, surveying, observation or supervision of any construction" are governed by a ten-year statute of repose. W.Va. Code § 55-2-6a; *Gibson v. W. Virginia Dep't of Highways*, 406 S.E.2d 440, 446-47 (W.Va. 1991) (concluding that the ten-year period "strikes a reasonable and rational balance between the rights of an injured plaintiff and the need to fix some outer time limit on liability for those engaged in designing and constructing improvements to real property"). The time limitation in a statute of repose "begins to run from the occurrence of an event unrelated to the accrual of a cause of action." *See id.* at 443 (citation omitted). This time limit begins to run "when the builder or architect relinquishes access and control over the construction or improvement and the construction or improvement is (1) occupied or (2) accepted by the owner of the real property, whichever occurs first." *Neal v. Marion*, 664 S.E.2d 721, 728 (W.Va. 2008). West Virginia courts have determined that the 10-year time period in W.Va. Code § 55-2-6a is not tolled pending the discovery of the defect. *Gibson*, 406 S.E.2d at 443 (discussing *Shirkey v.*

Mackey, 399 S.E.2d 868 (W.Va. 1990) (finding statute of repose precluded claims related to use of improper fill material in home foundation in which defect was discovered 12 years after the house had been built)). The purpose of the statute of repose is to protect parties "from the increased exposure to liability as a result of the demise of the privity of contract defense. . . . Without a statute of repose, a party injured because of a latent design or defect could sue an architect or builder for many years after a construction project was completed. This could result in stale claims with a distinct possibility of loss of relevant evidence and witnesses." *Gibson*, 406 S.E.2d at 446.

Plaintiff admits that roofing work was concluded no later than November 1, 2001. Complaint ¶ 66. Therefore, as noted above, it has been over 14 years since Plaintiff's cause of action, if any, accrued. Accordingly, Count VI of Plaintiff's Complaint for negligent misrepresentation should be dismissed because it is barred by the ten-year statute of repose.

WHEREFORE, Defendant Overly Manufacturing Company respectfully requests that the Court grant its motion and dismiss Count III for breach of express warranty, Count IV for breach of implied warranty, Count V for breach of express limited warranty, and Count VI for negligent misrepresentation.

Respectfully submitted,

COHEN & GRIGSBY, P.C.

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Counsel for Defendants, Overly Manufacturing
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Dated: September 20, 2016

2340160.v3

EXHIBIT A

OVERLY

MANUFACTURING COMPANY

LIMITED WARRANTY

P.O. BOX 70

GREENSBURG, PA 15601-0070

(724) 834-7300

FAX (724) 830-2871

Overly Manufacturing Company, Warranty to: WEST VIRGINIA UNIVERSITY, Owner of an Overly Custom Metal Roofing System installed on a building known as: STUDENT RECREATION FACILITY, Overly Job Number: SO 404888, warrants the Overly Custom Metal Roofing System for a period of thirty (30) years following the acceptance date of NOVEMBER 1, 2001, of such roof, against leakage due to defects in workmanship, excluding those defects caused by unusual, extraordinary, or unforeseen conditions such as hurricanes, fires, earthquakes, lightning, or any other cause of flood, settlement, distortion, or failure of the roof deck, walls, or foundation of the building, incompatible materials, substances and conditions and objects striking the roofing structure or persons walking or climbing on the roofing surface, exposure to corrosive or aggressive conditions such as atmospheric pollution, marine atmospheres, saltwater, acid, or freshwater spray, fallout or exposure to acid rain, animal fecal matter or solid emissions containing acids, alkalis, or compounds of mercury, or other corrosive chemicals, ash, or fumes originating from manufacturing or processing plants, or contaminants generated from inside the building.

The effectiveness of this warranty is contingent upon the Purchaser's satisfaction of the following conditions:

1. Payment of the contract price, in full, and receipt of same by Overly Manufacturing Company and receipt of same by the Purchaser.

2. Within ninety (90) days of the date of the Overly Manufacturing Company's work, the warranty period shall begin (the date the roof is installed or the date the roof is accepted by the Purchaser, whichever is later). If the roof is not accepted by the Purchaser within the ninety (90) day period, the warranty period shall begin on the date the roof is accepted by the Purchaser. The warranty period shall begin on the date the roof is accepted by the Purchaser. The warranty period shall begin on the date the roof is accepted by the Purchaser.

3. The Purchaser shall provide Overly Manufacturing Company with a copy of the contract price, in full, and receipt of same by Overly Manufacturing Company and receipt of same by the Purchaser.

4. The Purchaser shall provide Overly Manufacturing Company with a copy of the contract price, in full, and receipt of same by Overly Manufacturing Company and receipt of same by the Purchaser.

5. Overly Manufacturing Company warrants the roof work or alteration of the roof by its agents, employees, or subcontractors to be free from defects in materials and workmanship.

6. If the roof is damaged by fire, lightning, or other causes, the Overly Manufacturing Company shall not be liable for the cost of repair or replacement of the roof or any part thereof.

7. Overly Manufacturing Company warrants the roof work or alteration of the roof by its agents, employees, or subcontractors to be free from defects in materials and workmanship.

Overly Manufacturing Company warrants the roof work or alteration of the roof by its agents, employees, or subcontractors to be free from defects in materials and workmanship.

The warranty period shall begin on the date the roof is installed or the date the roof is accepted by the Purchaser, whichever is later.

Overly Manufacturing Company's liability under this warranty is limited to the cost of repair or replacement of the roof work or alteration of the roof by its agents, employees, or subcontractors. Overly Manufacturing Company shall not be liable for the cost of repair or replacement of the roof or any part thereof.

This warranty is further limited to the roof work or alteration of the roof by its agents, employees, or subcontractors. Overly Manufacturing Company shall not be liable for the cost of repair or replacement of the roof or any part thereof.

This warranty does not apply to the roof work or alteration of the roof by its agents, employees, or subcontractors. Overly Manufacturing Company shall not be liable for the cost of repair or replacement of the roof or any part thereof.

THIS WARRANTY IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, WHETHER ORAL OR WRITTEN, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

If the building or structure which has the Overly Custom Metal Roofing System installed, sold, transferred, conveyed, or otherwise disposed of, within the warranty period by WEST VIRGINIA UNIVERSITY, this warranty shall automatically expire and terminate.

The Purchaser hereby, by the signature of the authorized officer hereunder, acknowledges the acceptance of the terms and conditions of the limited warranty and in further consideration of acknowledging that Overly's price for the Overly Custom Metal Roofing System, as provided by previous bid or quote, is based upon and dependent upon the acceptance and the intention of the Purchaser to be bound by this Limited Warranty.

OVERLY MANUFACTURING COMPANY

PURCHASER WEST VIRGINIA UNIVERSITY

By: [Signature]

By: Charles A. Peterson

Date: 7/10/02

Date: 7/10/02

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD OF
GOVERNORS, a statutory corporation, for and
on behalf of West Virginia University,

Plaintiff,

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JACOBS FACILITIES, INC., a Missouri
business corporation, f/k/a Sverdrup Facilities,
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MANUFACTURING COMPANY, a
Pennsylvania business corporation, and
DONALD M. MILLER COMPANY, a
Pennsylvania business corporation,

Defendants.

CIVIL ACTION

No. 16-C-383

THE HONORABLE JUDGE RUSSELL
M. CLAWGES, JR.

ORDER

AND NOW, this _____ day of _____, 2016, upon
consideration of Defendant Overly Manufacturing Company's Motion to Dismiss Counts III, IV,
V, and VI of West Virginia University Board of Governors' Complaint and any opposition
thereto, it is hereby ORDERED, ADJUDGED AND DECREED that Defendant's motion is
GRANTED and Count III for breach of express warranty, Count IV for breach of implied
warranty, Count V for breach of express limited warranty, and Count VI for negligent
misrepresentation of West Virginia University Board of Governors' Complaint are DISMISSED
with prejudice.

BY THE COURT,

_____, J.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **OVERLY MANUFACTURING COMPANY'S MOTION TO DISMISS COUNTS III, IV, V, AND VI OF WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS' COMPLAINT** was served upon the following by electronic mail and FedEx Overnight this 20th day of September, 2016:

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A handwritten signature in black ink, appearing to read 'S. H. Simon', written over a horizontal line.



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September 20, 2016

Jean Friend, Circuit Clerk
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Morgantown, WV 26505

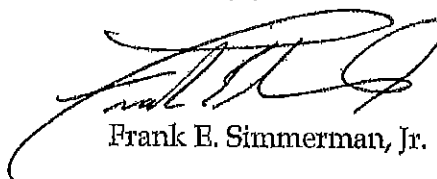
RE: West Virginia University Board of
Governors v. Jacobs Facilities, Inc., et al.
Civil Action No.: 16-C-383

Dear Clerk Friend:

Enclosed for filing in the above-referenced case is **OVERLY
MANUFACTURING COMPANY'S MOTION TO DISMISS COUNTS III, IV, V,
AND VI OF WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS'
COMPLAINT** along with a proposed Order.

Thank you for your assistance in this matter. If you have any questions, please
do not hesitate to contact our office.

Very truly yours,



Frank E. Simmerman, Jr.

FES iii/slf
Enclosures

cc: Marc Monteleone, Esq./Kenneth Webb, Jr., Esq.
Jacobs Facilities, Inc.
Donald M. Miller, Inc.
Samuel H. Simon, Esq.

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