

curtain-wall system (the "canopy") for terminals 1, 2, and 3 ("T-1," "T-2," and "T-3") and, for T-2 and T-3, the integration of the canopy with a glass curtain-wall. The City entered into contracts with various entities in relation to the FACE Project. In January 1999, the City entered into a contract with Defendant McClier Corporation ("McClier"), by which McClier agreed to serve as program manager for the Project, which included being the central point of coordination for the City and its contractors, helping to select design professionals, developing standards, and monitoring budgets and costs. (Plaintiff alleges that Defendant AAC Designers Builders, Inc. ("AAC") has now assumed liability for McClier for the matters alleged in the complaint as a result of a corporate merger.) The City entered into a contract with Defendant Cotter Consulting, Inc. ("Cotter") in June 1999, whereby Cotter agreed to serve as field supervisor for the construction of the Project, which included coordinating contractors' activities, monitoring and enforcing compliance with contract documents and plans, and documenting construction inspections.

The City entered into two professional service contracts with Defendant Murphy/Jahn, Inc. ("Murphy/Jahn"), in June 1999 and July 2003 (the "1999 Murphy/Jahn Contract" and "2003 Murphy/Jahn Contract," respectively), by which Murphy/Jahn agreed to provide architectural and engineering services in connection with the Project. Murphy/Jahn purportedly entered into subcontracts with Defendants Werner Sobek Ingenieure GbmH & Co. KG ("WSI") and Rubinos & Mesia Engineers, Inc. ("Rubinos") in October 1999 to provide professional engineering services related to the FACE Project. WSI designed top-plate welds and erection tolerances for the new canopy and reviewed weld designs proposed by the general contractors. Rubinos provided information to the City and the general contractors regarding the location of certain underground obstructions. In June 2000, the City entered into a written contract with Defendant Turner Construction-O'Brien Kreitzberg, LLC ("TOK"), by which TOK agreed to serve as construction manager for the FACE Project. Plaintiff has included the following Defendants in its suit as those who it believes may be responsible for TOK's liabilities, as TOK has apparently been dissolved: Defendants Turner Construction Company ("Turner") and O'Brien-Kreitzberg, Inc. ("O'Brien"), former members of TOK, and URS Corporation ("URS"), which has purportedly assumed liability for O'Brien for the matters alleged.

Once the design of the FACE Project was complete, the contracts for construction of the portions of the Project relating to T-2 and T-3 ("Bid Package One") were awarded to the low bidder, Walsh Construction Company of Illinois ("Walsh"), in January 2003. The contract for construction of the portion of the Project relative to T-1 ("Bid Package Two") was awarded to FHP Tectonics Corporation ("Paschen") in May 2005. Plaintiff's complaint does not include any claims against Walsh or Paschen.

Plaintiff alleges that Defendants' errors, omissions, and breaches of contract in connection with the design and construction of the FACE Project caused the City to incur additional costs to remedy the construction defects and to hire consultants and attorneys, to suffer a diminution of value in the Project, to lose its competitive advantage, and to expend more time than necessary on the Project. Specifically, Plaintiff alleges that underground obstructions were not incorporated into the construction plans, that the canopy welds were

improperly designed, that the design documents did not include the proper fabrication and erection tolerances for the canopy's structural steel, and that the proper elevation information was not used. Plaintiff has filed a Second Amended Complaint includes the following allegations: breach of contract, contractual indemnity, and breach of fiduciary duty against Murphy/Jahn (Counts I-IV); breach of contract, contractual indemnity against TOK (Counts V-VI); breach of contract, contractual indemnity against McClier (count VII-VIII); breach of contract, contractual indemnity, breach of fiduciary duty against Cotter (Count IX-XI); and breach of contract, contractual indemnity against Walsh (Counts XII, XIII). Defendants have filed Crossclaims and Third Party Complaints therefrom.

In the instant matter, Walsh's Third Party Complaint alleges one count, Count V (Negligent Misrepresentation), against Everest. Everest now moves to dismiss the Third Party Complaint.

ANALYSIS

I. Standards of Review

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. 735 ILCS 5/2-615 (West 2007); City of Chicago v. Beretta U.S.A. Corp., 213 Ill. 2d 351, 364 (Ill. 2004). In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. Beretta, 213 Ill. 2d at 364. We also construe the allegations in the complaint in the light most favorable to the plaintiff. King v. First Capital Financial Services Corp., 215 Ill. 2d 1, 11-12 (Ill. 2005). While the plaintiff is not required to set forth evidence in the complaint (Chandler v. Illinois Central R.R. Co., 207 Ill. 2d 331, 348 (Ill. 2003)), the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action and not simply make conclusions. Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 408 (Ill. 1996). A claim should not be dismissed unless it is clearly apparent that no set of facts can be proven that would entitle the plaintiff to recovery. Canel v. Topinka, 212 Ill. 2d 311, 318 (Ill. 2004). In other words, a claim need only show a possibility of recovery, not an absolute right to recovery, to survive a section 2-615 motion. Platson v. NSM, Am., Inc., 322 Ill. App. 3d 138, 143 (2d Dist. 2001).

Third Party Plaintiff Walsh argues that it sufficiently plead the elements to support a cause of action for negligent misrepresentation, and that its cause of action is not barred by the Moorman doctrine.

Third Party Defendant Everest argues that Walsh failed to plead facts to support each element of its claim for negligent misrepresentation, and is further barred by Moorman from recovering economic losses in tort because Everest is not in the business of providing information.

In the case at bar, we find that Walsh alleges Everest was retained by the City to provide "testing and review" of welds and steel related to the FACE Project. Walsh alleges that Everest had a duty to the City and/or the City's Representatives, and therefore Walsh,

to advise of any defects founds. This Court finds that Walsh did not allege facts to establish creation or existence of a duty between Walsh and Everest. No facts are plead to show a contractual relationship between the two parties. Nor are facts plead, aside from stating "on information and belief" that a duty exists. Instead, Walsh makes conclusory allegations that Everest's duty to the City automatically extends in its opinion to Walsh. Furthermore, Walsh does not plead facts to show reliance as Walsh did not demonstrate that the alleged report and/or representations from Everest were ever communicated to Walsh. See, Cahill v. Eastern Ben. Systems, Inc., 236 Ill. App. 3d 517, 521, 603 N.E.2d 788, 792 (1st Dist. 1992). Therefore, Walsh did not plead facts to show duty or actual reliance.

As to the Moorman doctrine, both parties agree that the economic loss doctrine prevents a plaintiff from recovering in negligence or strict liability for purely economic losses, *i.e.*, losses that do not involve personal injury or property damage. Moorman, 91 Ill. 2d at 91. Both parties also agree that one of the three exceptions to the Moorman doctrine applies where the plaintiff's damages are proximately caused by a defendant's negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions. Id. at 86, 88-89. Finally, both parties agree that subsequent cases have held that Moorman barred tort claims against architects and engineers, refusing to extend the Moorman negligent misrepresentation exception to their services. See Fireman's Fund Inc. v. SEC Donahue, Inc. 176 Ill. 2d 160 (Ill. 1997); 2314 Lincoln Park West Condo. Ass'n. v. Mann, Gin, Ebel & Frazier, Ltd., 136 Ill. 2d 302 (Ill. 1990).

Third Party Plaintiff, however, asserts that the negligent misrepresentation exception should apply to engineers in this case because this case is factually dissimilar per the Court's holding in Tolan and Son, Inc. v. KLLM Architects, Inc., 308 Ill. App.3d 18, 719 N.E.2d 288 (1st Dist. 1999). We disagree.

The Illinois Appellate Court in Tolan clearly maintained the holding set forth by the Illinois Supreme Court in Fireman's Fund. This case involved a residential contractor who hired an architect and a civil engineer for the preparation of plans and designs for the building of residential structures and landscaping for the complex. The Court held that where the focus of the engineer or architect's work is tangible – a building, structure, or other product – it is not in the business of providing information. Tolan, 308 Ill. App. 3d at 30-32. The information is merely incidental to the finished product. Id. The Court also stated that the same was true regarding engineer inspections. Where inspections are done for the purpose of modifying, if necessary, the structure to be or being built, pursuant to existing plans during the course of construction, this work is ancillary to the construction. Thus, the engineer is not retained to provide an analytical end product, and the Moorman negligent misrepresentation exception does not apply. Id.

Similarly, in this case, Everest's work on the FACE Project was to provide "testing and review" of the work performed by LB steel, to ensure compliance of the work with the Contract Documents and the approved shop drawings. Everest's inspection information and review was to ensure compliance. (See, Walsh's Answer, Affirmative Defenses and Third Party Complaint, p.71, ¶¶157-89). Therefore, per the Court's holding in Tolan, Everest's work was ancillary to the construction and design of the FACE Project. Everest was not in the business of supplying information. Thus, the Moorman doctrine exception is not applicable to Everest.

Accordingly, for the reasons stated, Third Party Defendant Everest's Motion to Dismiss Count V for Negligent Misrepresentation is granted with prejudice.

ORDER

WHEREFORE, for all the reasons stated:

- (1) **Third Party Defendant Everest's 2-615 Motion to Dismiss Count V of Walsh's Third Party Complaint for Negligent Misrepresentation is granted with prejudice.**

Hon. Allen S. Goldberg

