IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-PL-294

The Residences at Ivy Quad Unit Owners Association, Inc.,
Appellant

–v–

Ivy Quad Development, LLC, et al.,
Appellees

Argued: September 9, 2021 | Decided: January 25, 2022

Interlocutory Appeal from the St. Joseph Superior Court
No. 71D05-1803-PL-105
The Honorable Jenny Pitts Manier, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 19A-PL-2974

Opinion by Chief Justice Rush
Justices David, Massa, Slaughter, and Goff concur.

Rush, Chief Justice.

At the pleading stage, the viability of a plaintiff's claim is measured by its sufficiency, not its likelihood of success. Thus, to survive dismissal of a claim at this stage, a plaintiff's complaint need only contain facts that support the possibility of relief.

Here, the plaintiff—a homeowners' association—discovered defects at a condominium complex and sued several defendants for both breach of the implied warranty of habitability and negligence. The trial court granted dismissal of the claims against four of the defendants, finding that the implied warranty of habitability did not apply and that the economic loss doctrine barred recovery on the negligence claim.

We affirm in part and reverse in part. As is frequently the case at this early stage, the facts that might support dismissal are not developed. But the plaintiff has alleged sufficient facts to support relief against two of the four defendants on the implied-warranty-of-habitability claim. And though the economic loss doctrine may preclude recovery on the negligence claim as the facts mature, dismissal at this stage is premature.

Facts and Procedural History

Ivy Quad is a sixty-plus-unit residential condominium complex located in South Bend. In fall 2017, residents noticed issues at the complex, such as "crumbling and cracking concrete and water infiltration." In response, the Residences at Ivy Quad Unit Owners Association, Inc. ("HOA") hired an engineering firm to investigate the concerns. The firm inspected the complex multiple times and ultimately five reports were issued that identified a wide range of construction and design defects.

As a result, the HOA—on the unit owners' behalf—sued several parties involved in the development, design, construction, or sale of Ivy Quad, including Matthews, LLC; DMTM, Inc.; David Matthews; and Velvet

Canada (collectively, the "Matthews Defendants").[1] The complaint included claims for breach of the implied warranty of habitability and for negligence. To support its implied-warranty claim, the HOA alleged that defects caused by the Matthews Defendants substantially impaired the residents' use and enjoyment of their units and common areas. And to support its negligence claim, the HOA alleged that the defects produced substantial damage, including expenses incurred for repair and reconstruction as well as "damage to property other than the building itself."

The Matthews Defendants responded by filing a motion to dismiss under Indiana Trial Rule 12(B)(6), arguing that they are not subject to the implied warranty of habitability because they are not builder-vendors and that the negligence claim is barred by the economic loss doctrine. Following a hearing, the trial court granted the motion and dismissed the case as to the Matthews Defendants.

The trial court certified its dismissal order for interlocutory appeal, and the Court of Appeals accepted jurisdiction. The Court of Appeals reversed and remanded for further proceedings. *Residences of Ivy Quad Unit Owners Ass'n, Inc. v. Ivy Quad Dev., LLC*, 164 N.E.3d 142, 149, 152–53 (Ind. Ct. App. 2021). The Matthews Defendants then petitioned for transfer, which we granted, vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).

Standard of Review

We review a Rule 12(B)(6) dismissal de novo. *Collins Asset Grp., LLC v. Alialy*, 139 N.E.3d 712, 714 (Ind. 2020). In conducting our review, we take the facts alleged in the complaint as true, consider all complaint

[1] The HOA also sued John Ward Concrete, Inc.; Todd Miller; and JM Quality Construction, LLC. However, the claims against those defendants were not subject to the trial court's dismissal order at issue in this appeal. The HOA's lawsuit also named the project's developer, Ivy Quad Development, LLC, but that company entered bankruptcy soon after the third amended complaint was filed.

allegations in the light most favorable to the nonmoving party, and draw every reasonable inference in that party's favor. *Id.* Ultimately, we must determine whether the nonmovant has "stated some factual scenario in which a legally actionable injury has occurred." *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 134 (Ind. 2006). If so, dismissal is improper.

Discussion and Decision

It is well settled that a motion to dismiss under Rule 12(B)(6) "tests the legal sufficiency of the plaintiff's claim, not the facts supporting it." *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017) (cleaned up) (quoting *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015)). The dispute here turns on the legal sufficiency of the HOA's claims against the Matthews Defendants for breach of the implied warranty of habitability and negligence. To be sure, the question at this early stage of litigation is not whether the HOA is entitled to relief; rather, the narrow inquiry is whether it is apparent that the complaint allegations are "incapable of supporting relief under any set of circumstances." *City of E. Chi. v. E. Chi. Second Century, Inc.*, 908 N.E.2d 611, 617 (Ind. 2009) (quoting *Couch v. Hamilton Cnty.*, 609 N.E.2d 39, 41 (Ind. Ct. App. 1993)).

The Matthews Defendants maintain that the trial court properly dismissed both claims. As to the implied-warranty-of-habitability claim, the Matthews Defendants argue that they are not subject to the warranty because they are not builder-vendors, a requirement for liability under Indiana law. *See Callander v. Sheridan*, 546 N.E.2d 850, 852 (Ind. Ct. App. 1989). As to the negligence claim, the Matthews Defendants maintain that the economic loss doctrine bars recovery. This rule, as explained in more detail below, generally precludes recovery for "purely economic loss" caused by negligence in the performance of a contract between parties. *See Indianapolis-Marion Cnty. Pub. Libr. v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 729 (Ind. 2010).

On the implied-warranty claim, we partially agree with the Matthews Defendants; but we disagree with them on the negligence claim. The HOA alleged facts supporting a "builder-vendor" status for two of the Matthews Defendants—David Matthews and Velvet Canada. Thus,

dismissal of the implied-warranty claim as to those two defendants is premature. So too is dismissal of the HOA's negligence claim. Not all the alleged damages are "purely economic," and it is not apparent from the complaint that there is any contractual connection between the HOA and the Matthews Defendants.

I. The HOA alleged facts capable of supporting relief on its implied-warranty-of-habitability claims against David Matthews and Velvet Canada.

Embedded in the sale of every newly built home is the implied warranty of habitability: a promise that the dwelling is "free from defects which substantially impair [its] use and enjoyment." *Choung v. Iemma*, 708 N.E.2d 7, 12 (Ind. Ct. App. 1999). This warranty, however, has limits. It extends to subsequent purchasers of a home, but in such cases, it covers only latent or hidden defects. *Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619, 620–21 (1976). And liability for an alleged breach may be imposed only on "builder-vendors"—persons or entities involved in "building and selling homes for profit." *Callander*, 546 N.E.2d at 852; *see also Carroll's Mobile Homes, Inc. v. Hedegard*, 744 N.E.2d 1049, 1051 (Ind. Ct. App. 2001).

Here, the HOA sued each of the Matthews Defendants—David Matthews; Velvet Canada; DMTM, Inc.; and Matthews, LLC—for breach of the implied warranty of habitability. Thus, the relevant inquiry is whether the HOA's complaint contains facts sufficient to support a "builder-vendor" status for each defendant—that is, whether they were involved in both the construction and sale of Ivy Quad.

The complaint includes sufficient facts to support a showing that David Matthews and Velvet Canada are "builder-vendors" because the HOA alleged that both took part in "the design, construction, development and sale of Ivy Quad." In other words, each defendant was purportedly involved in both building and selling residences at Ivy Quad for profit. However, the same is not true for the other two Matthews Defendants. Though the HOA alleged that DMTM, Inc. and Matthews, LLC were

involved in the "design" and "construction" of Ivy Quad, it did not assert that either was involved in selling the residences. As a result, the face of the complaint reveals no set of circumstances under which DMTM, Inc. or Matthews, LLC could qualify as a builder-vendor, and thus neither can be held liable for breach of the implied warranty of habitability. *Cf.* *Carroll's Mobile Homes*, 744 N.E.2d at 1051–52 (finding that a mobile-home company was not a builder-vendor because it was only in the business of selling). Thus, we affirm dismissal of the implied-warranty claim against DMTM, Inc. and Matthews, LLC.

We turn now to the HOA's negligence claim and determine whether—at this early stage in the proceedings—it is barred by the economic loss doctrine.

II. The HOA alleged facts capable of supporting relief on its negligence claim.

Under Indiana's economic loss doctrine, a defendant is not liable in tort "for any purely economic loss caused by its negligence." *Indianapolis-Marion Cnty. Pub. Libr.*, 929 N.E.2d at 729. At the 12(B)(6) stage, however, application of this general rule invites heightened scrutiny. Put simply, the economic loss doctrine's preclusive effect must yield if the plaintiff has set forth any set of circumstances under which it would be entitled to relief—a relatively low bar. And because the HOA has cleared that bar here, the economic loss rule does not warrant dismissal of the negligence claim. To explain why, we begin with an overview of Indiana's economic loss doctrine.

When a plaintiff suffers damages caused by another's negligence, remedies may be available under both contract and tort law. Yet, these bodies of law have distinct remedial purposes, and our economic loss doctrine preserves this distinction. *Indianapolis-Marion Cnty. Pub. Libr.*, 929 N.E.2d at 729. Indeed, the longstanding rule under Indiana law is that a defendant is not liable in tort when a plaintiff alleges only "purely economic loss," which is financial harm "arising from the failure of the product or service to perform as expected." *Gunkel v. Renovations, Inc.*, 822

N.E.2d 150, 153 (Ind. 2005). Because these losses are, essentially, "disappointed contractual or commercial expectations," contract law—not tort law—is most appropriate for resolving liability. *Id.* at 154; *see also JMB Mfg., Inc. v. Child Craft, LLC*, 799 F.3d 780, 785 (7th Cir. 2015) (applying Indiana law). Notably, however, pure economic loss excludes damages that either stem from personal injury or are sustained by "other property." *Gunkel*, 822 N.E.2d at 153–54. When such damages occur, recovery in tort is appropriate, and the economic loss doctrine does not bar recovery. *Id.*

Our economic loss doctrine is rooted in the understanding that parties typically allocate the risk of economic loss through a direct, contractual relationship. *See Indianapolis-Marion Cnty. Pub. Libr.*, 929 N.E.2d at 740. But in the construction-project context—where contractual privity between each participant may be lacking—parties typically allocate that risk through "a network or chain of contracts." *Id.* at 739. With "such a contract chain," the participants retain "the opportunity to bargain and define their rights and remedies, or to decline to enter into the contractual relationship." *Id.* at 740. And when construction-project participants are connected in this way, the economic loss rule prevents a party from recovering in tort for commercial losses that it could have protected itself against through the contractual relationship. *Id.*; *JMB Mfg.*, 799 F.3d at 785.

Thus, when determining whether our economic loss doctrine precludes tort recovery, two considerations guide our review: the type of damages sought and the contractual relationship between the parties. Here, in light of our standard of review, we cannot conclude that the doctrine bars the HOA's negligence claim. We reach this conclusion for two interrelated reasons: (1) the alleged damages are not exclusively "purely economic"; and (2) the complaint does not reveal if, or to what extent, the parties were connected contractually. We address each in turn.

First, at this juncture, the HOA's alleged damages do not trigger application of the economic loss doctrine. The complaint seeks recovery not only for "expense incurred in hiring experts, redesigning of Ivy Quad to correct the deficiencies, and reconstructing, repairing, and restoring Ivy Quad"—which would, indeed, be "purely economic"—but also for "damage to other property, including property inside individual units

and property other than the building itself." Because the complaint contains allegations of "other property" damage—namely, damage to something other than Ivy Quad itself—the economic loss doctrine does not bar recovery. *See Gunkel*, 822 N.E.2d at 155–57. As a result, foreclosing the negligence claim on this ground is premature.

Second, even if the HOA alleged only purely economic damages, dismissal of the negligence claim is premature for an additional reason. As noted above, the economic loss doctrine precludes tort recovery when participants in a construction project are connected through a chain of contracts. But here, the HOA's complaint includes nothing about if, or to what extent, the parties were connected contractually. Accordingly, we cannot conclude that the parties ever had the opportunity to "allocate their respective risks, duties, and remedies." *Indianapolis-Marion Cnty. Pub. Libr.*, 929 N.E.2d at 736. And without a factual basis demonstrating any contractual relationship between the HOA and the Matthews Defendants, it would be unjust to foreclose a tort theory of relief based on the economic loss doctrine. *Cf. Greg Allen Constr. Co. v. Estelle*, 798 N.E.2d 171, 173 (Ind. 2003) ("To the extent that a plaintiff's interests have been invaded beyond mere failure to fulfill contractual obligations, a tort remedy should be available.").

Conclusion

The HOA's complaint includes facts capable of supporting relief on its implied-warranty-of-habitability claims against David Matthews and Velvet Canada, but not against DMTM, Inc. and Matthews, LLC. And the complaint also contains facts capable of supporting relief on its negligence claim. We therefore reverse in part, affirm in part, and remand for proceedings consistent with this opinion.[2]

David, Massa, Slaughter, and Goff, JJ., concur.

[2] We thank all amici for their helpful briefs.

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