NNH CV23-6135044 S	: SUPERIOR COURT
ROBERT SCYMANSKI	: JUDICIAL DISTRICT OF : NEW HAVEN
V.	: AT NEW HAVEN
RIZZO POOLS, LLC	: APRIL 26, 2024

MEMORANDUM OF DECISION ON MOTION TO STRIKE No. 102.00

The defendant, Rizzo Pools, LLC, moves to strike the complaint's first count, which sounds in negligence, on the grounds that it is barred by the economic loss doctrine. The defendant argues that the negligence claim is not independent of the plaintiff Robert Scymanski's breach of contract and breach of warranty claims. The plaintiff opposes the motion. He argues that the doctrine does not apply to this case, and that his negligence claim is not identical to the breach of contract and warranty claims.

"The purpose of a motion to strike is to contest … the legal sufficiency of the allegations of any complaint … to state a claim upon which relief can be granted." (Citation omitted). *Fort Trumbull Conservancy, LLC* v. *Alves,* 262 Conn. 480, 498, 815 A.2d 1188 (2003). This court must construe the complaint "in the manner most favorable to sustaining its legal sufficiency …. Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied …. [A]ll well pleaded facts and those facts necessarily implied from the allegations are admitted." (Citations omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership,* 309 Conn. 342, 350, 71 A.3d 480 (2013). If, however, the plaintiff has failed to allege a valid cause of action, the motion to strike is properly granted. See *Sturm* v. *Harb Dev., LLC*, 298 Conn. 124, 127, 2 A.3d 859 (2010). "In ruling on a motion to strike, the court is limited

to the facts alleged in the complaint." (Citation omitted.) *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 580, 693 A.2d 293 (1997).

All three counts of the complaint allege the following facts. The plaintiff is a homeowner who entered into a written contract with the defendant to construct and install a 32-foot by 12-foot inground, concrete pool at the plaintiff's property. That contract is attached as an exhibit to the complaint. The contract provided that the shallow end minimum depth would be three feet six inches and the deep end depth would be six feet. When the pool was completed, the plaintiff discovered that the drainage system was not working properly. Although the plaintiff notified the defendant of this issue, he received no response, and he engaged in "self help" to remediate it. The plaintiff subsequently discovered that the pool was only two feet five inches deep at the shallow end and did not reach the specified minimum of three feet six inches until the commencement of the deep end. Because the shallow end was not deep enough, an adult swimmer would strike his or her feet on the bottom. Despite the plaintiff making demand, the defendant failed to remedy the "defective and nonconforming pool."

The negligence count goes on to allege in paragraph 15 that the plaintiff's damages were "proximately caused" by the defendant's negligence for four reasons: (1) it failed to hire and supervise competent subcontractors and employees to do the work, (2) it failed to test, measure and inspect its work, (3) it failed to excavate, construct, and install the pool and associated systems, and (4) it failed to take the reasonable and necessary precautions to ensure that the excavation and concrete pour produced a product that met the contractual specifications.

Finally, paragraph 16 lists the damages, which are identical to the damages set forth in paragraph 17 of the breach of contract count: (1) expending labor and money, (2) loss of full enjoyment of the pool, (3) costs of demolition, re-excavating, constructing and installing a

conforming pool, (4) cost of removing and replacing the pool deck, and (5) cost of re-landscaping. There is a single demand for relief for all three counts, which seeks "compensatory and contractual damages."

The economic loss doctrine is a common law rule that "reflects the principle that a plaintiff cannot sue in tort for purely monetary loss unaccompanied by physical injury or property damage." *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, 340 Conn. 200, 202, 263 A.3d 796 (2021). Our Supreme Court has addressed the economic loss doctrine on only a few occasions, and in several of those cases, it mentioned it only as an aside or in a footnote. For example, in *Raspberry Junction Holding, LLC*, and in *Lawrence* v. *O and G Industries, Inc.*, 319 Conn. 641, 126 A.3d 569 (2015), that court engaged instead in an analysis of whether the defendants owed a legal duty to the plaintiffs such that they could assert a negligence claim. In each of those cases, the court declined, "independent of a duty analysis," to adopt the economic loss doctrine as a "categorical bar" to a plaintiff's recovery of economic loss absent personal injury or property damage. *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, supra, 340 Conn. at 211; *Lawrence* v. *O and G Industries, Inc.*, supra, 319 Conn. 648 n.8.[1]

Despite this limited caselaw, our Supreme Court has identified a theme for when the economic loss doctrine applies. The doctrine applies to bar "tort claims that arise out of and are dependent on the contractual relationship between the parties," but it does not apply to "tort claims that are 'independent' of the plaintiff's contract claim, and that can survive even if the contract claim fails." *Ulbrich* v. *Groth*, 310 Conn. 375, 404, 78 A.3d 76 (2013). Stated another way, "[a]n

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[1] The Supreme Court did not reach the application of the economic loss doctrine in *Raspberry Junction Holding, LLC* and *Lawrence* because, in each of those cases, it determined that the defendants did not owe the plaintiffs a duty.

injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, supra, 340 Conn. at 212 (quoting *Eastwood* v. *Horse Harbor Foundation, Inc.*, 170 Wash. 2d 380, 389, 241 P.3d 1256 (2010)).

Two of our Supreme Court decisions illustrate this theme. They applied the economic loss doctrine to bar tort claims where the plaintiffs were seeking to recover economic losses that they could recover under the Uniform Commercial Code.[2] In *Ulbrich* v. *Groth*, the Supreme Court held that the negligence and negligent misrepresentation claims before it were not "independent" from the UCC Article 9 implied warranty of title claim. *Ulbrich* v. *Groth*, supra, 310 Conn. at 404-05. The court went on: "[r]ather, both the tort claims and the warranty claim are premised on the same alleged conduct with respect to the same personal property and rely on the same evidence. More fundamentally, the plaintiffs have pointed to no theory under which they could prevail on their negligence and negligent misrepresentation claims even if their breach of implied warranty of title claim failed." Id. at 405. Similarly, in *Flagg Energy Development Corp.* v. *General Motors Corp.*, the Supreme Court held that the economic loss doctrine barred a negligent misrepresentation claim for "commercial losses arising out of the defective performance of contracts." *Flagg Energy Development Corp.* v. *General Motors Corp.*, 244 Conn. 126, 153, 709 A.2d 1075 (1998), overruled in part on other grds, *Ulbrich* v. *Groth*, supra, 310 Conn. at 409.

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[2] Although these two Supreme Court decisions involved claims under the Uniform Commercial Code, the vast majority of superior court decisions hold that the economic loss doctrine may be applied when there are claims for breach of a common law contract. See, e.g., *Mastrobattisto* v. *Nutmeg Utility Products, Inc.*, Superior Court, judicial district of New Britain, Docket No. CV15-6028626-S (February 23, 2016, *Wiese, J.*) (61 Conn. L. Rptr. 864); *Country Squire I, Inc.* v. *RAW Construction, LLC*, Superior Court, judicial district of Middletown, Docket No. CV12-6008392-S (July 30, 2013, *Aurigemma, J.*) (56 Conn. L. Rptr. 591).

This case fits squarely within the general theme for the application of the economic loss doctrine. The negligence claim is not based upon any duty that is independent of the contract. Indeed, it explicitly pleads the terms of the contract as the basis for the negligence. Moreover, it seeks the same damages as do the breach of contract and breach of warranty claims. The economic loss doctrine bars this claim.

The plaintiff argues that the economic loss doctrine should not apply here because he is a homeowner and not a sophisticated party. Although the court recognizes that some superior courts have relied on the fact that a plaintiff was a sophisticated commercial party when they have applied the doctrine, there is no logical basis to allow a homeowner to pursue a negligence claim that is based on a duty grounded in contract but to bar a more sophisticated party from bringing such a claim. Tort law is not based on the sophistication of plaintiffs.

The plaintiff also argues that because he alleges different conduct in paragraph 15 of the negligence count than he does in his breach of contract count, his negligence count should be allowed to proceed. That argument is rejected. The element of negligence that is at issue here is the duty, not the breach of that duty. To avoid the bar of the economic loss doctrine, the plaintiff must demonstrate that the source of the defendant's duty owed to him is something other than the contract. This he has not done.

Finally, the plaintiff argues that the doctrine does not apply because the defendant engaged in professional malpractice. It is true that the doctrine does not apply to bar claims of professional malpractice. See, e.g., *Morganti Group, Inc.* v. *Stamford Phase Four JV, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV18-6038150-S (September 11, 2019, *Provodator, J.T.R.*). However, the plaintiff has not cited any authority for the proposition that a swimming pool installer is a professional such as a doctor, a lawyer or an architect, that is subject

to a professional malpractice claim. The plaintiff also has not alleged professional malpractice in his complaint.

For the foregoing reasons, the motion to strike the first count for negligence is granted.

BY THE COURT,

Hon. Elizabeth J. Stewart