

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FIREMAN'S FUND INSURANCE
COMPANY,

Plaintiff

v.

Civil No. 98-228-P-C

MAINE MASONRY COMPANY, CHILDS
BERTMAN CASENDINO, and DOE
CORPORATION,

Defendants

Gene Carter, District Judge

**ORDER GRANTING DEFENDANT MAINE
MASONRY COMPANY'S MOTION TO DISMISS**

Defendant Maine Masonry Company has filed two Motions to Dismiss Plaintiff's Complaint arguing, first, that Plaintiff's claims are barred by the applicable statute of limitations (Docket No. 6) and, later, that Plaintiff is either precluded or estopped from relitigating the statute of limitations issue (Docket No. 9). Plaintiff objects to both motions. Finding that Plaintiff's claims are barred by the applicable statutes of limitations, the Court will grant Defendant Maine Masonry's initial Motion to Dismiss.

I. APPLICABLE LEGAL STANDARD

Defendant brings its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). "When evaluating a motion to dismiss under Rule 12(b)(6), [the Court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor."

Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal of the complaint for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990).

II. FACTS

The following factual allegations in the Complaint are relevant to the statute of limitations bar asserted by Defendant Maine Masonry. Plaintiff Fireman’s Fund is the subrogee of Berkeley Hotels Management, Inc., which in 1988 and 1989 entered into “an oral and/or written contract or agreement” with Defendants Maine Masonry and Childs Bertman Casendino¹ pursuant to which Defendants “designed, engineered and constructed” a building in Portland, Maine known as the Portland Jetport Hotel. Complaint (Docket No. 1) ¶¶ 1 and 7-8. On or about October 21, 1996, the hotel was damaged as a result of “water incursion and flooding” resulting from Defendants’ “defective design, engineering and/or construction” of the building. *Id.* ¶ 9. Plaintiff Fireman’s Fund provided insurance coverage to Berkeley Hotels Management, Inc. which was in full force and effect on October 21, 1996. *Id.* ¶ 10. Plaintiff paid Berkeley Hotels Management, Inc. more than \$200,000 under an insurance policy for the water damage. *Id.* ¶ 11.

Plaintiff brings this three-count Complaint for negligence, breach of contract, and breach of warranty. Specifically, Plaintiff alleges that Defendants “improperly design[ed], engineer[ed] and construct[ed]” the hotel so that rain water accumulated within the masonry facade, causing

¹The Complaint alleges that Defendant Doe Corporation is the successor corporation which acquired the assets and assumed the liabilities of Defendant Childs Bertman Casendino.

flooding under foreseeable weather conditions; failed to supervise the construction of the building properly, so as to prevent this problem; and failed to warn Plaintiff's insured about this problem. *Id.* ¶ 13. In addition, Plaintiff alleges that Defendants breached their contract with Plaintiff's insured and breached warranties of workmanlike performance and fitness for a particular purpose. *Id.* ¶¶ 17-18, and 20-21.

III. DISCUSSION

Maine Masonry contends that the claims for negligence and breach of contract asserted in the Complaint are barred by the statute of limitations set forth in 14 M.R.S.A. § 752, which provides:

All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except actions on a judgment or decree of any court of record of the United States, or of any state or of a justice of the peace in this State, and except as otherwise specially provided.

14 M.R.S.A. § 752. The undated Complaint in this action was filed with the Court on June 22, 1998.² The Complaint alleges that Defendants' construction work on the hotel took place in 1988 and 1989. Complaint ¶ 5. This action was thus commenced well after the six-year limit imposed by section 752.³

²Plaintiff's memorandum erroneously asserts that this Complaint was filed on December 18, 1997, and June 30, 1998.

³Plaintiff also alleges breach of warranty in Count III. In a claim for breach of warranty for the sale of goods, the statute of limitations expires four years after the date of sale. *See* 11 M.R.S.A. § 2-725; *see also* *Burke v. Hamilton Beach Div, Scovill Mfg. Co.*, 424 A.2d 145, 149 (Me. 1980). If the commercial code statute of limitations applies, this action was commenced after the four years proscribed by the statute. To the extent that the breach of warranty allegations are not for the sale of goods, the same analysis applies to the warranty count as applied to the contract count.

Nevertheless, Plaintiff argues that his Complaint should not be dismissed because Defendants fraudulently concealed the cause of action. Plaintiff's Answer to Maine Masonry's Motion to Dismiss (Docket No. 8) at 1. The fraud, Plaintiff asserts, tolls the applicable statute of limitations under 14 M.R.S.A. § 859. *Id.* at 3. Section 859 provides:

If a person, liable to any action mentioned, fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within 6 years after the person entitled thereto discovers that he has just cause of action, except as provided in section 3580.

14 M.R.S.A. § 859. Maine Masonry contends that Plaintiff's Complaint contains neither allegations of fraud nor facts that would constitute fraud and, therefore, that section 859 is inapplicable. Maine Masonry also argues that section 859 is inapplicable to this case because under Rule 9(b), fraud must be pled with particularity. Fed. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

After a thorough review of the Complaint, the Court agrees with Maine Masonry that section 859, tolling the statute of limitations, is inapplicable in this case. There are no allegations in the Complaint of fraudulent conduct or facts that would constitute fraud. Moreover, Plaintiff admits that it has failed to plead the now-claimed fraud. In its memorandum, Plaintiff states "[t]hough not yet part of the record, plaintiff is prepared to prove" the facts necessary to show the construction defect was "completely concealed." *Id.* at 2-3.⁴ The Court finds that the applicable

⁴For support, Plaintiff relies on case law in which fraud is alleged in the complaint. *See Webb v. Haas*, 665 A.2d 1005, 1009 (Me. 1995); *Akins v. Firstbank*, 415 A.2d 567, 569 (Me. 1980); *Westman v. Armitage*, 215 A.2d 919, 920 (Me. 1966); *Bates Street Shirt Co. v. Waite*, 156 A. 293, 295, 130 Me. 352 (1931). The Court finds these cases unavailing in resolving the instant motion.

statute of limitation – 14 M.R.S.A. § 752 – bars this action. It appearing, according to the facts alleged, that Plaintiff cannot recover on any theory, the Court will grant Defendant Maine Masonry's Motion to Dismiss.

Accordingly, it is **ORDERED** that Defendant Maine Masonry's first Motion to Dismiss (Docket No. 6) be, and it is hereby, **GRANTED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 17th day of December, 1998.