

causing erosion and pavement damage.

Plaintiff contacted Defendant Keller and efforts were made by the parties to negotiate ways to correct the problems. Eventually, efforts by the parties to amicably resolve the matter broke down.

Plaintiff then contracted with another engineering company, Brinjac Engineering, to redesign the storm water management system. On September 14, 2005, Brinjac Engineering provided Plaintiff with its opinion regarding its recommendation for redesign of the system. See averment 29. Plaintiff then had another entity complete “the correction of the storm water management system in accordance with Brinjac’s report.” See averment 32.

In its complaint Plaintiff asserts theories of negligent design (count 1) and unjust enrichment (count 2) against Defendant Keller Engineers, Inc. Plaintiff, in its assertion of negligent design, alleges that Defendant Keller, as a provider of professional engineering services, breached its duty to Plaintiff by providing engineering services in a negligent manner. See averment 42.

Plaintiff seeks to avoid its obligation pursuant to Rule 1042.3, which requires a certificate of merit to be filed where there is an allegation that a licensed professional deviated from an acceptable professional standard, by arguing that their case is a simple negligence claim. The Court does not believe this is a tenable argument. A jury will not be able to determine whether Defendant, an engineering corporation, defectively designed the storm water management system or whether the water discharge or erosion to the property was caused by a negligent engineering design. Plaintiff cannot change the reality of the legal basis of the case by calling the case a matter of simple negligence. Pennsylvania courts have

routinely found Pa.R.C.P 1042.1, et seq. applicable to architectural and engineering firms. See Varner v. Classic Communities, Corp. 890 A.2d 1068, 1072 (Pa.Super 2006).

Plaintiff also claims Rule 1042.3 certificate of merit, does not apply because Defendant Keller is not “a licensed professional” under the rules, because Defendant Keller is a corporation, not an individual person. As previously stated Pennsylvania courts have routinely found that a certificate of merit is applicable to architectural and engineering firms. Varner v. Classic Communities Corp., supra. To adopt Plaintiff’s interpretation of Rule 1042.3(a) would eviscerate the purpose and import of the Rule.

Finally, Plaintiff argues that even if Rule 1042.3 applies, they should be excused from their failure to file a certificate of merit because they had provided Defendant with a copy of the expert report prepared by Brinjac Engineering. The act of providing an expert report does not excuse a plaintiff’s failure to file a certificate of merit. Womer v. Hilliker, MD, 908 A.2d 269, 278 (Pa. 2006). In the Womer case the Pennsylvania Supreme Court held that a plaintiff’s act of providing a expert report to a defendant does not constitute substantial compliance with Rule 1042.1 et seq and will not excuse a plaintiff’s failure to file a certificate of merit. The Court stated:

We disapprove of any decision to the extent that it holds that a plaintiff substantially complied with Pa. R.C.P. No. 1042. 3 by providing an expert report to a defendant or that Pa.R.C. P. No. 126 may be applied in such circumstances.

908 A.2d at 278 n. 10 (citations omitted).

Finally, the Court notes that the Brinjac report itself does not comply with the requirement of Rule 1042.3. Rule 1042.3 (a) (1) requires the certificate of merit that an

appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised by Defendant fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm to Plaintiff. The Brinjac report, which is attached to Plaintiff's Motion to Open and Exhibit D, offers no opinion about the work and design of Defendant Keller Engineers. The report does speak in detail about ways to rectify the erosion problem and makes recommendations about the storm water management system, but it reaches no opinion or conclusion that the problems were a result of professional negligence of Defendant Keller Engineers. In the first page of Brinjac's report they refer to Keller's storm water management report to be "thorough in scope and of sound engineering methods." Certainly, the Brinjac report does not satisfy or comply with the requirements of a certificate of merit for Plaintiff's professional negligence action.

For these reasons, the Court DENIES Plaintiff's Petition to Strike and Open Judgment of Non Pros.¹

By The Court,

Kenneth D. Brown,
President Judge

cc: Nicholas Noel, III,
Noel, Kovacs, McGuire & Scmillio, P.C.
2505 Newburg Rd, Easton PA 18045
Stephen C. Nudel Esquire
Andrew T. Kravitz

¹ The ruling of the Court would equally apply to Count II of Plaintiff's complaint, which is styled unjust enrichment. The unjust enrichment count also is predicated on the theory of negligent engineering design by Defendant in regard to the storm water management system. In essence, Plaintiff is claiming Defendant was unjustly enriched because they provided a defectively designed system.

219 Pine St., Harrisburg PA 17101
Work file