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# Construction Contracts, Fiduciary Duty and Fraud


I have discussed the interplay between the economic loss rule, fraud and construction contracts on many occasions here at Construction Law Musings. You may ask why the consistent drumbeat? The answer lies in the fact that we attorneys tend to try and think of creative ways to avoid the economic loss rule when contractors act in ways that the average non-lawyer type would characterize as fraudulent. When this happens, the Virginia courts (except in cases of criminal fraud) feel the need to remind us in no uncertain terms that this is not allowed. However occasionally a small exception rears its head.

Recently the Fairfax, Virginia Circuit Court saw a chance to slap down yet another creative attempt to bypass the stringent nature of the economic loss rule, while bringing into focus the parameters of that rule. In *Rock Creek Park View LLC v. Cole Construction LLC et al*, the court considered a two pronged attempt to move outside of a construction contract and bring certain actions within the purview of tort law.

In *Rock Creek Park View* the Plaintiff alleged that the defendant, Cole Construction and its principals, the Coles, presented for payment invoices for work never performed while representing that the work covered by these invoices had in fact been performed. The Plaintiff paid the invoices and later discovered that it had paid for work never performed. Rock Creek Park View then sued for breach of contract, breach of fiduciary duty and fraud (against the two principals).

The Court rejected the breach of fiduciary duty claim stating that without the contract the defendant would have no duty and therefore this claim was squarely barred by the economic loss rule. However, and interestingly, the Court (after rejecting a claim against Mrs. Cole due to failure of the Plaintiff's to particularly plead any facts that could create a fraud claim) refused to dismiss the fraud claim against Mr. Cole. The Fairfax, Virginia court distinguished the statements *of present fact that were false when made (*namely that costs invoiced by Mr. Cole were never incurred) by Mr. Cole from even the most egregious lies relating to whether contractually required work was performed.

In short, had Mr. Cole merely stated that work under the contract been performed (even though that work had not been performed), he would not have been subject to a claim for fraud.  Only when (as alleged in the Complaint), Mr. Cole deliberately and fraudulently invoiced for costs never incurred did his actions create a duty separate from the contract.

This case brings up a couple of questions in my mind:

1.  In this case, the contract was time and materials plus markup.  If this were a fixed price contract would the Court have allowed fraud to go forward because no money beyond the fixed price would have been requested?

2.  In any event, the Cole's duty not to invoice for work never performed arose solely from the contract, why is this duty somehow different in this case as opposed to some others in the past?

Please let me know your thoughts on these points, I value any insight.

*As always, I welcome and encourage your comments below, please share your thoughts.  Also, please subscribe to keep up with the latest Construction Law Musings*