

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

<b>WILMER THOMAS,</b>	:	CASE NO. 3:03CV1398 (DJS)
<b>Plaintiff,</b>	:	
	:	
- v -	:	
	:	
<b>ERIC J. SMITH and ERIC J. SMITH,</b>	:	
<b>ARCHITECTS, PC</b>	:	
<b>Defendants,</b>	:	
	:	
-v-	:	
	:	
<b>BURLINGTON CONSTRUCTION, ET AL,</b>	:	
<b>Defendants.</b>	:	

**MEMORANDUM OF DECISION**

The plaintiff, Wilmer Thomas (“Thomas”), has brought the present action alleging breach of contract, professional malpractice, and other claims against defendants Eric J. Smith and Eric J. Smith Architects, PC (hereafter, collectively, “Smith”). Smith, in turn, brings claims for apportionment pursuant to Connecticut General Statutes §52-102b and §52-572h against the following third-party defendants: Burlington Construction Co., Inc.; Advanced Commercial Contracting, Inc.; Edward Hartson; JRH Acoustical Consulting; Donald DeCapua, individually and/or d/b/a Performance Technology; Performance Technology LLC; Corey Ferrell, individually and/or d/b/a Tech-Know House; Tech-Know House, LLC; Glenn Tucker, P.E., individually and/or d/b/a Tucker Associates; Wireman, Inc.; Progressive Construction Management, Inc.; Shoreline Pools, Inc.; Ferguson & Shamamian Architects, LLP. F/k/a/ Ferguson, Murray & Shamamian, Architects; Mark Ferguson, Oscar Shamamian, Viggo Bonnesen, P.E., individually and/or d/b/a Viggo Bonnesen & Associates; Girard &

Company, LLP; Michael Girard, P.E.; and William A. Zampaglione d/b/a Zampaglione & Associates.

Advanced Commercial Contracting, Inc. (“Advanced”) and Edward Hartson (“Hartson”) have motioned to dismiss Smith’s apportionment claim [**doc. #75**] on the grounds that the underlying harm alleged in this action falls under the “economic damages” rule that bars the apportionment of purely economic losses under §52-572h. Defendants Donald DeCapua (“DeCapua”) and Performance Tech, LLC (“Performance”) [**doc. #105**], Viggo Bonnesen (“Bonnesen”), JRH Acoustical Consulting (“JRH”) and Glenn Tucker (“Tucker”) [**doc. #108**], Shoreline Pools, Inc. (“Shoreline”) [**doc. #109**], Burlington Construc. Co. (“Burlington”) [**doc. #113**], and Wireman, Inc. (“Wireman”) [**doc. #116**], have all filed similar motions, incorporating the arguments put forth by Advanced and Hartson.

### **FACTS**

The facts of this case are drawn from Smith’s Third-Party Apportionment Complaint and from Thomas’s Second Amended Complaint. All facts and inferences are taken in the light most favorable to the non-moving party for purposes of this motion. Wilmer Thomas, in January 1998, engaged David A. Easton and his company David A. Easton, Inc. to complete the building of Thomas’s planned home in Salisbury, Connecticut (the “Project”). As part of the deal, Easton and Thomas hired Eric J. Smith and his firm, Eric. J. Smith Architects, PC, to perform architectural and design services in conjunction with the building of Thomas’s home.

Smith contracted with Burlington to serve as the general contractor for the Project. Advanced and Hartson were hired to install custom windows and millwork. The home theater installed in Thomas’s house was designed by JRH. Defendants DeCapua and Performance supplied acoustical consulting and components. Corey Ferrell (“Ferrell”) and Tech-Know

House (“Tech-Know”) were also involved in the installation of audio-visual and electrical equipment. Tucker is an engineer involved in various aspects of the Project. Wireman was involved in the installation of the home theater and the electrical systems. Progressive Construction Management (“Progressive”) served as a plumbing contractor on the Project. Shoreline installed Thomas’s pool. Ferguson & Shamamian Architects (“Ferguson”) and Bonnesen were sub-contracted by Smith to design and construct portions of the Project. Michael Girard (“Girard”) is an engineer contracted to work on the Project. Finally, William Zampaglione (“Zampaglione”) was hired as Thomas’s representative and construction manager at the work site.

Thomas brought suit against Smith upon completion of the home, alleging professional malpractice and breach of contract resulting either in deficiencies in the construction or damage to Thomas’s property. Thomas alleges a variety of defects, including improper design, construction and installation of: the electrical system; home theater; windows; light switches; swimming pool; second-floor foyer porch; west-porch railings; bathroom drains, venting and flooring; kitchen sink; winter garden air vents; and the ceiling lighting in the guest house. Thomas especially alleges physical damage to the pool, railings, bathroom floors and drains. Further, he claims that the design defects led to expensive re-engineering and repairs of portions of the house. Smith now seeks apportionment from the contractors and sub-contractors that engaged in the allegedly defective workmanship.

### **STANDARD OF REVIEW**

\_\_\_\_\_ When considering a Rule 12(b)(6) motion to dismiss, the court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light

most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). Under Rule 12(b)(6), dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998). “The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims.” United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232). In its review of a motion to dismiss, the court may consider “only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.” Samuels v. Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

## **DISCUSSION**

\_\_\_\_\_The pending motions to dismiss are substantially identical. Each party argues that Smith is improperly seeking to recover economic losses unrelated to any damage to, or loss of the use of, property. Connecticut law permits apportionment claims pursuant to Conn.Gen.Stat. §52-102b(a). The statute reads:

“[a] defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff’s damages in which case the demand for relief shall seek an apportionment of liability.” Conn.Gen.Stat. §52-102b(a).

The section of §52-572h relevant to this action is §52-572h(b) which permits recovery of apportionment damages in causes of action based on negligence to “recover damages resulting from personal injury, wrongful death or damage to property.” Conn.Gen.Stat. §52-572h(b).

The term “damage to property” is not defined in the statute. Also, the statute provides that addition of parties pursuant to §52-102b and §52-572h is an exclusive mechanism; thus, a failure to satisfy the requirements of either section forecloses the addition of apportionment defendants.

Advanced and Hartson<sup>1</sup> argue that Smith’s claims do not satisfy the conditions of §52-572h. According to the movants, Smith’s complaint seeks apportionment for damages that are not founded in personal injury, wrongful death or damage to property. Absent some evidence of personal injury or property damage, Smith may not seek apportionment of his liability to Thomas and so the apportionment claims must be dismissed.

Certainly, it is true that Smith did not suffer any direct injury or death and no property owned by Smith or his firm was damaged. The issue, however, is whether the apportionment defendants are liable for a share of the plaintiff’s alleged damages. The court, to permit the claims to go forward at this stage of the proceeding, need only find that Thomas has properly stated a negligence claim against Smith for damage to life or property where the apportionment defendants might have contributed to the damage. The court will first address the existence of a negligence claim in the complaint and then consider the basis for the harms alleged by Thomas and, by extension, Smith in the apportionment complaint.

#### **A. The Negligence Claim**

The Second Amended Complaint (improperly dated March 19, 2003) filed by Thomas includes seven counts against Smith and Smith Architects. Counts One (breach of contract) and Five (unjust enrichment) are contract claims. Count Four alleges a breach of the

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1. The court’s references to the arguments made by Advanced and Hartson also apply to the arguments of all other apportionment defendants, unless it is specially noted otherwise.

Connecticut Unfair Trade Practices Act and Count Six claims a breach of Conn.Gen.Stat. §20-289 and associated regulations—both counts are statutory in nature. Only Count Two<sup>2</sup> (professional malpractice) and Count Three (breach of fiduciary duty) sound in tort.

Connecticut's courts have not held that a breach of fiduciary duty claim may serve as the basis for apportionment pursuant to Conn.Gen.Stat. §52-572h(b). See, Anderson v. Bitondo, 1998 WL 279810, \*1 (Conn.Super.Ct. May 18, 1998)(holding that no apportionment claim could be maintained on a claim for breach of fiduciary duty). The original complaint in this action contained a claim of common law negligence, but that count was withdrawn, leaving only Count Two alleging professional malpractice as a potential basis for the apportionment claims sought by Smith.

The scope of the apportionment statute as it applies to claims of professional malpractice is not clearly established. The leading decision on the question, Somma v. Gracey, 15 Conn.App. 371 (Conn.App.Ct. 1988), held that “where the claim of malpractice sounds in negligence...the defense of comparative negligence should be made available.” Somma, 15 Conn.App. at 378. Although the Somma case involved legal malpractice, the court can find no basis for distinguishing legal malpractice from architectural malpractice. Further, the Somma opinion does not require the pleading to show that the damages alleged are ultimately based on property damage—the only requirement for bringing an apportionment claim based on professional malpractice is that the malpractice claim be founded on alleged negligence. The Second Amended Complaint in this action alleges a variety of negligent actions in both the design and construction of the Thomas home. These allegations are sufficient to permit Smith to bring an apportionment claim.

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2. Count Seven of the Second Amended Complaint has been dismissed.

## **B. Property Damages**

The court's conclusion that Smith may bring an apportionment claim does not resolve the underlying argument made by Advanced that the damages underlying Smith's claim are not property damages within the meaning of Conn.Gen.Stat. §52-572h(b). The Connecticut Supreme Court has held that the damages encompassed by §52-572h(b) do not "include purely commercial losses, unaccompanied by damages to or loss of the use of some tangible property." Williams Ford Inc. v. Hartford Courant Co., 232 Conn. 559, 581 (1995). Advanced and the other movants claim that Thomas seeks to recover damages, including specifically the cost of repairs and presumably a loss of home value, caused by Smith's negligent architectural work. Advanced asserts that such losses are "economic" and so exempt from the scope of §52-572h(b).

Advanced relies heavily on a lower Connecticut court decision that struck a claim for negligence brought against an architectural firm that was involved in the construction of Amity Regional High School in Woodbridge, Connecticut. Amity Regional School District No. 5 v. Atlas Construction Co., 2000 WL 1161095 (Conn.Super.Ct. July 26, 2000). That case involved a suit by Amity Regional school district against fourteen defendants seeking to recover damages arising out of alleged defects in the design and construction of the Amity Regional High School. Among the defendants was Lukmire Partnership, Inc., an architectural firm that was hired as a subcontractor to perform work on the high school project. The court held that Amity Regional could not bring a claim for negligence directly against Lukmire because there was no privity of contract between the school district and the subcontractor and also because the school district had failed to allege property damage. Amity Regional, 2000 WL 1161095 at \*2. The Amity Regional court did not offer much analysis with its conclusion

that the school district had failed to allege property damage, except to note that there was no “allegation of direct personal injury or property damage caused by Lukmire.” *Id.* This court can only conclude that the plaintiff in Amity Regional failed to delineate the property damage that was directly attributable to the work done by Lukmire and that this failure proved fatal to the negligence claim. No such pleading defect is present in this case.

The plaintiff, Thomas, has specified possible damage to tangible property, including the pool stairs and seating ledge, the west porch, a foyer porch, bathroom floors and shower stalls, doors, windows and light fixtures. The lack of privity of contract so critical in Amity Regional is no impediment to Smith’s statutory claims of apportionment. Advanced argues that the cost to Thomas of repairing the damaged property is economic and unrecoverable, but this assertion is inconsistent with the statute that permits recovery of losses based on damage to property. The law does not require a person to abandon damaged property in order to pursue a monetary recovery.<sup>3</sup> Thomas’s complaint alleges that tangible property was damaged and to the extent that this is the case, Smith may seek apportionment.

The Amity Regional decision is instructive on one point. The extent to which a party may recover for property damages is dependent on a showing of causality between the actions of the defendant and the damages. Smith may bring an apportionment claim based on Thomas’s complaint, but only to the extent that Thomas has alleged damage to property that can be traced to some action of the apportionment defendants. The court must consider each claim for apportionment individually to determine both whether Thomas has claimed potential

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3. Indeed, the court thinks it odd that Advanced would claim that the cost of repairing damaged property is excluded from the apportionment statute while the purely economic damages involved in a claim for compensation arising out of the complete destruction of some property would not be excluded. There is no logical or legal difference, under the apportionment statute, between the restoration and the replacement of damaged property.



damages within the scope of §52-572h(b) and whether those damages can be attributed to the actions of an apportionment defendant.

### **C. The Apportionment Defendants**

Advanced and Hartson have moved to dismiss Count Two of the Apportionment Complaint. Smith alleges that Advanced and Hartson were engaged in the design, fabrication and/or installation of custom windows and millwork in the Thomas home. Thomas clearly alleges damage to windows in his complaint. Further, Advanced and Hartson do not claim that they were uninvolved in the construction of the damaged windows. The motion to dismiss is denied.

DeCapua and Performance move to dismiss Count Four of the Apportionment Complaint. DeCapua and Performance were engaged to provide acoustical consulting services and components for the home theater system and media room. Thomas alleges that the media room is not suited for use as currently designed and constructed. Smith may seek apportionment from DeCapua and Performance to the extent that any damages related to the media room were caused by components or designs provided by DeCapua and Performance. The motion to dismiss is denied.

Apportionment defendants Bonnesen, JRH and Tucker seek to dismiss Counts Three Six and Eleven of the Apportionment Complaint. Count Three seeks apportionment from JRH for damages arising from acoustical consulting work done on the home theater. Count Six seeks damages against Tucker for electrical and mechanical engineering work done on the porch, the bathroom drains and other aspects of the Project. Count Eleven names Bonnesen as the structural engineer hired to work on the Thomas home. The Second Amended Complaint

outlines damage to property that could be attributed to negligent structural, mechanical or electrical engineering as well as the problems with the home theater system discussed *supra*. The motion to dismiss is denied as to all three counts.

Shoreline Pools seeks to dismiss Count Nine of the Apportionment Complaint. Smith claims apportionment of damages resulting from damage to the swimming pool. Thomas's complaint alleges defective construction, design and installation of the pool and a seating ledge in the pool that could give rise to apportionment liability. Shoreline Pools does not claim that it was uninvolved in the construction of the pool in question. The motion to dismiss is denied.

Burlington Construction seeks to dismiss Count One of the Apportionment Complaint. Burlington served as the general contractor during the building of the Thomas home. Thomas has clearly alleged damage to property that might have been caused by the general contractor charged with oversight of the Project. The motion to dismiss is denied.

Wireman moves to dismiss Count Seven of the Apportionment Complaint. Smith alleges that Wireman was contributorily negligent in the installation of wiring and electrical components. Thomas has alleged damages that relate to the installation and construction of various lights and electrical systems. The court notes that Thomas has withdrawn some of the claims of damages relating to lights and lighting, but the parties have not submitted any supplementary briefs that might clarify whether any claims of damage remain that might reasonably be attributed to the work performed by Wireman. Absent some showing by Wireman that no part of its work remains subject to this lawsuit, the court finds that the allegations of the Second Amended Complaint continue to reference damages that may subject Wireman to apportionment damages. The motion to dismiss is denied.

## CONCLUSION

\_\_\_\_\_The court finds that Thomas has alleged damage to property within the scope of Conn.Gen.Stat. §52-102b and §52-572h(b). Smith may bring apportionment claims against the apportionment defendants named in the Apportionment Complaint. The motions to dismiss [**docs. #75, #105, #108, #109, #113 and #116**] are **DENIED**.

**IT IS SO ORDERED** at Hartford, Connecticut, this   3rd   day of September, 2004.

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*/s/DJS*

**DOMINIC J. SQUATRITO**  
**UNITED STATES DISTRICT JUDGE**