UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1711

September Term, 2015

AUTOFLEX, INC. *et al*.

v.

BALTIMORE ELECTRIC VEHICLE INITIATIVE, INC. *et al.*

Graeff,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: December 7, 2016

The parties to this action are all players in the electrical vehicle movement and came together as a result of a grant program that gives rise to this litigation. The plaintiffs/ appellants are Autoflex, Inc. (hereinafter "Autoflex") and its owner and president, Luis D. MacDonald. The defendants/appellees are: (1) Baltimore Electric Vehicle Initiative, Inc. (hereinafter "BEVI"); (2) BEVI's executive director, Jill A.T. Sorensen; (3) BEVI's parent company, the International Center for Sustainable Development, Inc.; and (4) SemaConnect, Inc.

On December 12, 2014, Autoflex and Luis D. MacDonald filed a complaint in the Circuit Court for Baltimore City against BEVI, Ms. Sorensen, SemaConnect, Inc. and the International Center for Sustainable Development. Three months later, on February 12, 2015, Autoflex and MacDonald filed an amended complaint against the same defendants, which was followed by a second amended complaint, filed June 1, 2015, and a third amended complaint filed on August 6, 2015. Each time an amended complaint was filed, the defendant/appellees filed motions to dismiss in which they claimed that the causes of action set forth in the complaints were barred by the three-year statute of limitations.

On August 17, 2015, a hearing was held in the Circuit Court for Baltimore City to consider the motions to dismiss the complaints. The circuit court, on September 4, 2015, filed a memorandum and order dismissing the complaints. The reason for the dismissal was that the causes of action alleged in the complaints were all barred by the three-year statute of limitations. In rendering its decision, the circuit court, *inter alia*, rejected the

contention of Autoflex and Mr. MacDonald that the fraud exception to the three-year statute of limitations was applicable.

MacDonald and Autoflex then filed this timely appeal. They claim that the trial judge erred in granting the motion to dismiss.

I.

BACKGROUND FACTS[1]

BEVI is a non-profit public-private partnership created for the purpose of soliciting government grant funds to fulfill its goal of facilitating the installation of electric vehicle charging stations throughout Maryland. In April 2010, BEVI submitted a grant proposal to the Electric Vehicle Infrastructure Program ("EVIP"), which was created to promote the electric transportation policies of the Maryland Energy Agency (MEA). Under the grant proposal, BEVI would be the prime contractor and Ms. Sorensen would be the project manager. The proposal also stated that SemaConnect would be the manufacturer and supplier of charging stations while Autoflex's proposed role was to develop a project management plan and to install and coordinate the installation of the charging stations supplied by SemaConnect.

In June 2010, BEVI was awarded a $366,666.67 grant by the EVIP. About two months later, in August 2010, BEVI entered into a subcontract with Autoflex and SemaConnect. Under its subcontract, Autoflex was hired "to provide electric vehicle

[1]The facts set forth in Part I of this opinion are taken from the Third Amended Complaint.

charging station installation services for the charging stations to be provided by Sema[C]onnect . . . ." The subcontract provided that BEVI agreed to order and SemaConnect agreed to provide fifty-five (55) charging stations at eleven (11) sites (i.e., five charging stations per site). Autoflex agreed to provide for "[i]nstallation services required to install and oversee operation of fifty-five (55) electric vehicle charging stations at the eleven (11) sites" that were specified in the subcontract. In regard to compensation, Autoflex was to receive $6,000 per charging station or $330,000 ($6,000 x 55) less "Autoflex [i]nstallation cost-share of $218,000" for a total of $112,000. The original subcontract provided for deadlines for the completion of the work to be performed by both Autoflex and SemaConnect.

The original timelines were not met by SemaConnect. One of the reasons for that failure was because BEVI discovered that some of the sites selected for the charging installations were ineligible for use for that purpose. To address the aforementioned problems, BEVI, Autoflex and SemaConnect negotiated an amended subcontract in February 2011. The amended subcontract extended the project completion dates and made other changes. Notably, although the original subcontract stated that "Autoflex agrees to provide the [i]nstallation services required to install and oversee operation of fifty-five (55) electric vehicle charging stations," the amended subcontract stated that "Autoflex agrees to provide the [i]nstallation services required to install and oversee operation of up to fifty-five (55) electric vehicle charging stations[.]" (Emphasis added.)

In April 2011, the MEA imposed an additional obligation upon EVIP, which was a requirement that EVIP negotiate a memorandum of understanding with each installation site owner. This new obligation, which was known at the time by the appellants, apparently created no problem because, by June 2011, those new requirements were met and installation of the charging stations continued.

Autoflex installed forty-six (46) charging stations, which was nine less than the number of charging stations that were contemplated in the original subcontract. The reason for the reduction was that the Maryland Transportation Authority ("hereinafter "MTA") had notified BEVI that it would install its own charging stations at 9 locations. Autoflex, on April 19, 2011, was notified by Ms. Sorensen that it would not be involved in, or compensated for, the nine (9) installation sites at the MTA. By September 2011, all work under the amended subcontract had been completed.

According to the third amended complaint, although Autoflex was due $112,000 for its installation at forty-six (46) charging station sites, it was paid $20,000 less than was due under the amended subcontract.

Meanwhile, on June 8, 2011, the MEA and BEVI entered into an amended grant agreement. In the circuit court, the amended grant agreement between MEA and BEVI was sometimes referred to as "the second round." That amended agreement gave BEVI additional grant monies. The amended grant agreement read, in part, as follows:

> 1. Section "I. Purpose of Performance Grant" of the Agreement is deleted in its entirety and replaced with the following:

I. Purpose of Performance Grant

The purpose of this EVIP Grant is to provide funding to assist the installation of at least 69 UL certified or UL compatible electric vehicle recharging stations. The use of MEA funds for the first 55 stations is limited to purchasing equipment, project administration, permitting, site preparation, installation and marketing. The use of MEA funds for the remaining stations is limited to purchasing equipment, project administration, marketing and education.

2. Section "II. Payment Involving the Project Milestones" of the Agreement is deleted in its entirety and replaced with the following:

II. Payment Invoicing and Project Milestones

All Funds must be invoiced by September 2, 2011. The Grantee [BEVI] may invoice MEA on a monthly basis. Invoices must be accompanied with supporting documentation verifying costs incurred. In addition to the supporting documentation the Grantee shall provide a breakdown of invoiced items in an excel spread sheet. Invoices shall be submitted along with a monthly report.

3. Section "III. Amount and Duration of the Agreement" of the Agreement is deleted in its entirety and replaced with the following:

III. Amount and Duration of the Agreement

The total amount of the Grant is Four Hundred Sixty Thousand Six Hundred Sixty Six Dollars and Sixty Seven Cents ($460,666.67). This Agreement becomes effective upon signing by the Director of MEA. All expenditures by Grantee of amounts to be funded by MEA pursuant to this Agreement must occur by September 2, 2011, and all invoices and reports, including all reports required by ARRA (American Reinvestment and Recovery Act of 2009) and a final report, must be presented to MEA by March 31, 2012. Monthly utilization reports shall continue until July 31, 2013.

4. Section "V. Funding, Disbursement, and Recapture" of the Agreement is deleted in its entirety and replaced with the following:

V. Funding, Disbursement, and Recapture

> During the term of this Agreement, MEA shall provide funds to the Grantee in the amount of no more than Four Hundred Sixty Thousand Six Hundred Sixty Six Dollars and Sixty Seven Cents ($460,666.67). MEA shall provide funds to the Grantee within a reasonable period of time of receiving an invoice from the Grantee detailing costs incurred.

(Emphasis added.)

Ms. Sorensen, the director of BEVI, did not notify Autoflex of the amended grant or the "second round" of negotiation for the $460,666.67 grant. Moreover, commencing in May 2011, BEVI stopped sending Autoflex copies of the monthly reports that BEVI was required to send to the MEA.

In November 2011, after BEVI failed to pay Autoflex the $20,000 that was owed under the amended subcontract, Autoflex filed a Maryland Freedom of Information Act ("MIA") request concerning documents relating to the MEA grant.

On December 19, 2011, Autoflex received a response to its MIA request. By virtue of the MIA response, Autoflex learned the following: 1) that BEVI and the MEA had, in June 2011, entered into the amended agreement, discussed *supra*; 2) Ms. Sorensen, from May 2011 forward, sent the MEA project management plans but did not send Autoflex copies of those plans; and 3) that on August 30, 2011, Ms. Sorensen sent an email to the MEA in which she said that she "did not share [with Autoflex] information about Round 2 installations [i.e., the installations mentioned in the amended grant signed in June 2011]."

Count I of the third amended complaint alleged fraud against Jill Sorensen. The crux of the fraud allegation is set forth in paragraph 89 of the third amended complaint,

which reads: "BEVI, as prime contractor in connection with the EVIP grant, had a duty to inform Autoflex that the number of sites and electric vehicle charging stations were increasing under the [amended June 2011] EVIP grant." The complaint goes on to allege that by failing to inform it of the change in the number of sites and the number of electric vehicle charging stations, Autoflex was damaged.

Count II alleges that BEVI is liable for Ms. Sorensen's "fraud." Count III alleges liability on the part of the parent company of BEVI, i.e., International Center for Sustainable Development, Inc., for the alleged fraud committed by Ms. Sorensen.

Counts IV and VII allege fraud and breach of contract against SemaConnect. We shall not, however, discuss the allegations against SemaConnect because, in oral argument before this panel, counsel for the appellants admitted that any claim Autoflex had against SemaConnect was barred by the three-year statute of limitations.

Count V alleged that BEVI breached its contract with Autoflex and Count VI alleges breach of contract against BEVI's parent corporation. The breach of contract counts claimed, *inter alia*, that BEVI owed Autoflex $20,000 for monies due under the amended subcontract.

II.

THE OPINION BY THE CIRCUIT COURT

In rendering its opinion, the circuit court first pointed out, accurately, that Maryland Code (2013 Repl. Vol.), Courts & Judicial Proceedings Article, section 5-101 provides:

> A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

The court also pointed out that pursuant to the "discovery rule" the accrual of a cause of action is tolled "until the time the plaintiff discovers, or through the exercise of due diligence, should have discovered the injury." Citing, *inter alia*, *Windesheim v. Larocca*, 443 Md. 312, 326-27 (2015). In its written opinion, the court also observed that under section 5-203 of the Courts & Judicial Proceedings Article, the following provision is found:

> If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence, should have discovered the fraud.

After summarizing the pertinent facts set forth in the third amended complaint, the circuit court addressed Autoflex's contention that the three-year statute of limitation was tolled by Ms. Sorensen's "fraudulent" concealment. The circuit court said:

> Plaintiff asserts that [d]efendants['] deliberate withholding of [information concerning] the second round of funding from the MEA was fraudulent. Ms. Sorensen sent an email on August 30, 2011, stating that she "did not share information [with Autoflex] about Round 2 installations. . . ." However, [d]efendants were not obligated to share the details of the new project. Based on the first MEA grant, the [a]mended [s]ubcontract stated [p]laintiffs were "to provide the [i]nstallation services required to install and oversee operation of [up to] fifty-five (55) electric vehicle charging stations." The language was clear and the agreement made no mention of obligations extending beyond the initial grant. Defendants assumed no duty to share information of future grants with [p]laintiffs and, thus, withholding the information was not an act of fraud. Therefore, [p]laintiffs are not exempt by Md. Code, Ann., Cts. & Jud. Pro., § 5-203 from the general three-year statute of limitations prescribed in Md. Code, Ann., Cts. & Jud. Pro., § 5-

101. Plaintiffs' claim is barred by the statute of limitations and [p]laintiff's complaints shall be dismissed.

III.

STANDARD OF REVIEW

> On appeal from a dismissal for failure to state a claim, we must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted. We must confine our review of the universe of facts pertinent to the court's analysis of the motion to the four corners of the complaint and its incorporated supporting exhibits, if any.

Parks v. Alpharma, Inc., 421 Md. 59, 72 (2011) (citations and internal quotation marks omitted).

IV.

DISCUSSION

Autoflex[2] claims that the circuit court erred in dismissing its third amended complaint. According to Autoflex: (1) the appellees, under the amended subcontract between BEVI and Autoflex, owed a duty to it to notify it of the contents of the June 8, 2011 grant agreement between BEVI and the MEA; (2) BEVI breached that duty; (3)

[2]At oral argument before this panel on October 3, 2016, counsel for appellants admitted that the third amended complaint did not state a viable cause of action as to one of his clients, namely, Luis D. McDonald, the President and owner of Autoflex. The reason for this concession was because, under the amended subcontract between BEVI and Autoflex, BEVI owed no duty to Luis D. McDonald, and, concomitantly, owed him no money and had no duty to divulge information to him about the second round of negotiations.

Autoflex did not learn of the breach until December 19, 2011, when it received its answer to its MIA request; (4) Autoflex was damaged by this failure to disclose inasmuch as the June 8, 2011 grant from the MEA to BEVI provided monies for both installation and project management services that could have been used to pay Autoflex; (5) because suit was filed less than three years after it obtained its response from the MIA report, Autoflex's suit was not barred by the three-year statute of limitations.

The circuit court, as well as Autoflex and the appellees, recognized that the appellees could not be guilty of fraud unless they (or any one of the appellees) had a duty to disclose to Autoflex that BEVI had entered into the June 8, 2011 contract with the MEA. The question then becomes: Did any appellee have such a duty? In its brief, the principal basis for Autoflex's claim that BEVI, its parent company, and Ms. Sorenson had a duty to disclose the June 2011 amended agreement between BEVI and the MEA was because of the following language found in Section 7 of the February 2011 amended subcontract between BEVI and Autoflex. Although that amended subcontract was called an "EVIP Subcontract," EVIP was not a party to the subcontract. Section 7 read:

> **CHANGES IN WORK**
>
> This Agreement and Attachments shall govern the work scope, responsibilities, schedules, fees, cost-share, and deliverables of this Project. No changes in the work to be performed under this EVIP Subcontract are authorized unless agreed to in writing by the parties in advance of such work being commenced as summarized in the Project Management Plan and any updates thereto by the parties. Each updated Project Management Plan will be assumed to be consented to within five business (5) days of receipt of same in the absence of written objection. All such changes which may alter the Milestones or Deliverables are subject to MEA approval.

Based on the language just quoted, Autoflex argues:

> The Appellants were to be notified if there were changes in the scope of work. They were not so informed, even though they were in the midst of actively installing the initial up to fifty-five (55) charging stations phase.

Autoflex's argument overlooks the plain language of the amended subcontract. Under the amended subcontract between BEVI, SemaConnect, Inc. and Autoflex, the latter was to be notified only of changes to the scope of work under "this EVIP Subcontract[.]" That scope of work was never changed. So Section 7 of the amended subcontract does not provide support for Autoflex's argument that the appellees owed Autoflex a duty to disclose. The change in the scope of work that Autoflex claims is material was brought about by a separate agreement, i.e., the round 2 agreement between BEVI and the MEA, which was simply an agreement between those parties that spelled out what monies the MEA would pay to BEVI and for what purpose. That agreement gave Autoflex no rights nor did it impose upon Autoflex any duties; Autoflex was not even mentioned in that agreement.

Autoflex set forth a second reason to support its theory that appellees had a duty to disclose. This second reason is based on Section 1 of the amended grant agreement between BEVI and the MEA, which is quoted on pages four - six, *supra*. In this regard, Autoflex asserts that Section 1 "clearly affected [Autoflex's] scope of work." This is not true. Section 1 of the second agreement between BEVI and the MEA made no mention of who would do the work – it simply spelled out the agreement between BEVI and the MEA as to what work would be paid for by the MEA and when the work was to be completed.

Because the third amended complaint did not allege facts showing that appellee owed a duty to disclose any information relevant to the second round of funding, the court acted correctly in dismissing the fraud counts.

Likewise, the breach of contract counts were also properly dismissed. Autoflex completed its work under the amended subcontract by September of 2011. It knew at that date that it was owed $20,000 by BEVI. No information received in response to the MIA's request changed that discovery date. At most, Autoflex learned of an additional money source from which BEVI could pay the $20,000 owed. Limitations barred suit against the appellees because Autoflex did not file suit until December 14, 2014, which was more than three years after Autoflex first learned that it was injured by BEVI's failure to pay it the monies owed.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANTS.