Circuit Court for Howard County
Case No. 13-C-16-107535

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1640

September Term, 2017

CLASS PRODUCE GROUP, LLC

v.

PROVIDENCE ENGINEERING CORP.

Fader, C.J.,
Kehoe,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: July 9, 2019

Appellant, Class Produce Group, LLC ("CPG") sought damages in the Circuit Court for Howard County for negligence and breach of contract related to work by appellee, Providence Engineering Corp. ("Providence") on a building improvements project. Providence moved to dismiss, or in the alternative, for summary judgment, alleging CPG's failure to comply with the Certificate of Qualified Expert Statute ("certificate statute") set forth in Md. Code Ann., §§ 3-2C-01 to 3-2C-02 of the Courts and Judicial Proceedings Article ("CJ"). The circuit court granted Providence's motion, and CPG filed this timely appeal, presenting three questions[1], which we have consolidated into one:

> Whether the trial court was legally correct in granting Providence's motion to dismiss, or in the alternative, motion for summary judgment?

For the reasons that follow, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In its complaint filed on May 10, 2016, CPG stated that it engaged Providence to "design and manage construction" of improvements to its warehouse facility in Jessup, Maryland, and, because of material errors and omissions, the back-up of industrial waste water resulted in damages in the amount of $480,186.84. The three-count complaint

[1] As presented in appellant's brief, the questions are:

1. Whether Providence properly raised the issue of the certificate statute in its motion for summary judgment.
2. Whether the certificate statute is applicable to the present case.
3. Whether the trial court was legally correct when it granted Providence's motion for summary judgment.

alleged breach of contract (count 1), negligent installation (count 2), and promissory estoppel and implied contractual obligation (count 3). As to count 2, it averred, "Providence breached its duty and was negligent in failing to design, and oversee construction of, facilities for the adequate discharge of industrial waste water," and "in designing, and/or overseeing construction of, facilities which were dysfunctional and had to be torn out, fixed, and/or replaced." Exhibit B to the complaint was a letter addressed to the attention of Providence's President, Daniel Fichtner, which CPG's counsel sent to Providence, seeking $480,186.84 in damages.[2]

The circuit court entered a scheduling order on May 12, 2016, requiring, among other things, that CPG designate its experts by February 7, 2017, pursuant to Md. Rule 2-402(g). Providence was served with the complaint on May 23, 2016, and CPG served interrogatories and requests for production of documents on Providence on July 15, 2016.

The circuit court, on July 21, 2016, issued an order of default against Providence that was vacated when Providence answered on September 20, 2016. Providence responded to interrogatories, and produced documents on January 5, 2017, stating that more documents might be produced. In accordance with the scheduling order, CPG designated Kenneth R. McLauchlan as an expert witness on February 7, 2017.

[2] That letter, dated April 22, 2016, identified Providence as "the prime engineer and design professional and construction manager" of the warehouse project. It referred to Providence and the subcontractors hired by Providence "to do design work underneath Providence" as the "Design Team." The alleged omissions and error were charged to the Design Team.

On May 4, 2017, Providence filed a motion to dismiss, or in the alternative, a motion for summary judgment for CPG's failure to file a certificate of qualified expert within 90 days of filing its claim, i.e., August 8, 2016. Its motion included an affidavit of Mr. Fichtner, which stated that he was the licensed professional engineer responsible for performing or supervising Providence's engineering services in connection with the project. CPG opposed that motion on May 22, 2017 for reasons similar to those being advanced on appeal.

After a hearing on July 7, 2017, the circuit court stated:

> Well, I do think that the [certificate] statute is implicated by virtue of the fact that Providence is the employer of the engineer that's alleged to have been negligent.
>
> And [CPG] ha[s] alleged professional negligence and I think the [certificate] statute is in play.
>
> [CPG's] designation of experts does not include a statement and/or affidavit from the expert.
>
> And the 90 days expired on August [8, 2016].
>
> * * *
>
> [I]t appears that the first request for documents wasn't until July of 2016, the request needs to be within 30 days of the Complaint, the deadline would've been June 23rd in this case.
>
> And I find that the demand letter was a demand for money.
>
> Well, I think the statute has a hard and fast deadline that was not modified before the deadline expired.

The court, granting Providence's motion, dismissed CPG's complaint "without prejudice."[3] CPG moved for reconsideration, which the court denied on September 18, 2017. Additional details will be included in our discussion of the question presented.

STANDARD OF REVIEW

In reviewing a grant of a motion to dismiss a complaint:

> [A] court is to assume the truth of the factual allegations of the complaint and the reasonable inferences that may be drawn from those allegations in the light most favorable to the plaintiff. In reviewing a circuit court's decision to dismiss a complaint, an appellate court applies the same standard and assesses whether that decision was legally correct. Thus, we accord no special deference to the [c]ircuit [c]ourt's legal conclusions.

Heavenly Days Crematorium, LLC v. Harris, Smariga & Assocs., Inc., 433 Md. 558, 568 (2013).

The Court of Appeals has explained the standard of review for a grant of summary judgment:

> "On review of an order granting summary judgment, our analysis 'begins with the determination [of] whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law.' " *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (quoting *Appiah v. Hall*, 416 Md. 533, 546 (2010)); *O'Connor v. Balt. Cnty.*, 382 Md. 102, 110 (2004). If no genuine dispute of material fact exists, this Court determines "whether the Circuit Court correctly entered summary judgment as a matter of law." *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condo.*, 404 Md. 560, 571 (2008). Thus, "[t]he standard of review of a trial court's grant of a motion for summary judgment on the law is de novo, that is, whether the trial court's legal conclusions were legally correct." *D'Aoust*, 424 Md. at 574.

[3] CPG's counsel noted that the dismissal would effectively be a dismissal with prejudice because the statute of limitations had run.

Koste v. Town of Oxford, 431 Md. 14, 24-25 (2013) (cleaned up).

DISCUSSION

Subject Matter Jurisdiction

Contentions

CPG, viewing Providence's motion as the assertion of the affirmative defense of "lack [of] subject matter jurisdiction," contends that it was required to "be raised in a motion to dismiss filed before Providence's answer" to the complaint. Providence responds that failure to comply with the certificate statute is not an affirmative defense under Md. Rule 2-322(a).[4]

Analysis

Failure to comply with the certificate statute is not a defense that is required to be raised prior to an answer. To be sure, it is a condition precedent to maintaining the action. *See Carroll v. Konits*, 400 Md. 167, 181 (2007) (holding that, under the Health Care Malpractice Statute, CJ § 3-2A-04(b), a certificate of qualified expert is a condition precedent to a medical malpractice action). And, if the failure to file a certificate might be considered a lack of subject matter jurisdiction assertion, it is a permissive defense

[4] "The following defenses shall be made by motion to dismiss filed before the answer, if an answer is required: (1) *lack of jurisdiction over the person*, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process. If not so made and the answer is filed, these defenses are waived." (Emphasis added).

under Md. Rule 2-322(b)[5] that could "be made in the answer, or in any other appropriate manner after answer is filed."

As the Court of Appeals explained in *Heavenly Days*, 433 Md. at 567, when the plaintiff fails to file the certificate of a qualified expert, "[a] defendant who wishes to put a plaintiff to test" may do so either by a motion to dismiss or a motion for summary judgment that "simply explain[s] how the services alleged in the complaint fit within the scope of the particular license and identify the licensed professional responsible for performing or supervising those services." In short, challenging the failure to file the required certificate by a motion to dismiss or for summary judgment was proper.

Applicability of the Certificate Statute

Contentions

CPG contends that the certificate statute does not apply to its complaint against Providence because (1) it did not allege negligent acts by a licensed professional in rendering professional services within the scope of the professional license, and (2) it did not identify any particular licensed professional. According to CPG, its claim is a breach of contract claim against "design professionals that worked underneath" Providence on

[5] "The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the subject matter, (2) failure to state a claim upon which relief can be granted, (3) failure to join a party under Rule 2-211, (4) discharge in bankruptcy, and (5) governmental immunity. If not so made, these defenses and objections may be made in the answer, or in any other appropriate manner after answer is filed."

the project, which could include employees or subcontractors of Providence. But, it is "unclear" which of those professionals are individually responsible.

CPG asserts that Providence's motion cannot be treated as a motion to dismiss because it is not based on any deficiency in the complaint. It contends that the circuit court erred as a matter of law by granting summary judgment based on facts not contained in the record. In CPG's view, Mr. Fichtner's affidavit statement that he was "the licensed professional engineer who was responsible for performing and/or supervising all of Providence's engineering services in connection with the improvements to [CPG's] warehouse" was neither "pertinent" to the motion to dismiss nor "relevant to the [certificate] statute." In other words, the affidavit advanced facts not stated in CPG's complaint, and Mr. Fichtner's role in the alleged engineering breach remained a disputed material fact. Therefore, summary judgment was also inappropriate.

Providence responds that the certificate statute applies to the complaint because CPG alleged that Providence did not meet the standard of care for the professional engineering services rendered to CPG. It contends that CPG was attempting to evade the certificate statute by filing a vague complaint under the guise of a contract claim that does not identify a licensed engineer by name. Citing *Heavenly Days*, 433 Md. 558, and asserting that Mr. Fichtner's affidavit explained "how the work performed fell within the scope of [his] license," it argues that its motion to dismiss or for summary judgment properly put CPG "to the test."

Analysis

The certificate statute provides:

> (1) Except as provided in subsections (b) and (c) of this section, a claim shall be dismissed, without prejudice, if the claimant fails to file a certificate of a qualified expert with the court.
>
> (2) A certificate of a qualified expert shall:
>
> > (i) Contain a statement from a qualified expert attesting that the licensed professional failed to meet an applicable standard of professional care;
> >
> > (ii) Subject to the provisions of subsections (b) and (c) of this section, be filed within 90 days after the claim is filed; and
> >
> > (iii) Be served on all other parties to the claim or the parties' attorneys of record in accordance with the Maryland Rules.

CJ § 3-2C-02(a).

The statute applies to "a civil action . . . originally filed in a circuit court . . . against a licensed professional or the employer, partnership, or other entity through which the licensed professional performed professional services that is based on the licensed professional's alleged negligent act or omission in rendering professional services, within the scope of the professional's license." CJ § 3-2C-01(b). And, "the certificate requirement is triggered only when the complaint raises the issue of whether that licensed professional deviated from the standard of care for the profession." *Heavenly Days*, 433 Md. at 576-77.

For the purposes of this case, a "licensed professional" includes "[a] professional engineer licensed under Title 14 of the Business Occupations and Professions Article." CJ § 3-2C-01(c)(4). Under Title 14, in regard to "a building or other structure [or]

project[,]" the "practice [of] engineering" includes "consultation[,] design[,] evaluation[,] inspection of construction to ensure compliance with specifications and drawings[,] investigation[,] planning[,] and design coordination." Md. Code Ann., Bus. Occ. & Prof. § 14-101(j)(2)(i)-(vii).

CPG filed a complaint against Providence, an entity that provides professional engineering services. Count 2 of the complaint alleged that, "Providence owed a duty to design the [i]mprovements and manage the construction . . . in accordance with all applicable building and safety codes and . . . accepted industry practices and standards." And, that "Providence breached its duty and was negligent in failing to design, and oversee construction of, facilities for the adequate discharge of industrial waste water," and "in designing, and/or overseeing construction of, facilities which were dysfunctional and had to be torn out, fixed, and/or replaced." Clearly, CPG's claim is based on one or more licensed professionals "deviat[ing] from the standard of care for the profession" in the professional engineering services provided to CPG.

In *Heavenly Days*, cited by both CPG and Providence in support of their arguments, the plaintiff's complaint made "numerous allegations generally against [an engineering firm] without reference to any specific employee." 433 Md. at 571. Although the complaint primarily attributed the alleged negligence to one person, it did not "indicate whether she was licensed as an engineer—or any of the other professions listed in the statute—at the time of the events recounted in the complaint." *Id.* Nor did the defendant firm contend that she was licensed as a professional engineer. *Id.* at n.12.

The *Heavenly Days* Court held that "because the statute requires that the licensed professional's negligence occur in the rendering of professional services within the scope of his or her license, and no 'licensed professional' was identified by the court as responsible for the alleged negligence, it was premature to dismiss the complaint." *Id.* at 578. It remanded the case for further proceedings[6], explaining that "[i]f, on remand, a 'licensed professional' is identified as responsible for the alleged negligent acts or omissions or the supervision of those actions, within the scope of that individual's license, the Circuit Court should dismiss the case without prejudice, as directed by the statute." *Id.* It further explained:

> It may be that, upon further development of the facts by the parties, the relationship between the alleged negligence and *a licensed engineer* will be made manifest. In that event, because the time to seek modification or waiver of the certificate requirement expired long ago, the court may humanely consign this complaint to its final resting place on a motion for summary judgment.

Id. at 580 (emphasis added).

[6] *Heavenly Days* was decided on August 15, 2013. Based on the Maryland Judiciary Case Search database, we summarize the subsequent procedural history of that case on remand:

- On September 30, 2013, the case was reopened in the Circuit Court for Frederick County.
- The defendant firm filed a counterclaim. Heavenly Days answered, amended its complaint, and demanded a jury trial.
- A six-day jury trial took place on June 16-20 and 23, 2014.
- On June 23, 2014, the jury rendered a verdict, finding that the defendant firm breached its contract with Heavenly Days to render professional engineering services to it and awarded damages to Heavenly Days.

In *Heavenly Days*, the complaint was filed on October 29, 2009, *id.* at 565, and the expert certificate was attached to Heavenly Days' April 5, 2010 opposition to the engineering firm's motion to dismiss, *id.* at 567, which was after the 90-day window had closed. But, unlike in this case, Heavenly Days had, in its April 5, 2010 opposition, "asked the court to grant an extension for the filing of a certificate and attached an expert certificate." *Id.* at 567. Here, CPG's May 22, 2017 opposition memorandum did not request an extension pursuant to CJ § 3-2C-02(c).[7] It argued instead that the certificate requirements had either been tolled or waived, or that its expert designation had substantially complied with the statute.

Providence argues that CPG, by not naming a licensed professional, was willfully evading the certificate requirement. The *Heavenly Days* Court addressed that possibility:

> Does this mean that one can file a complaint alleging "professional negligence," ask the factfinder to hold the defendant to the higher standard of care expected of professionals, but evade the gatekeeper function of the certificate requirement by keeping the allegations vague and not naming the individuals responsible? *The answer is "no."* Ultimately, a plaintiff who seeks to hold a defendant to the standard of care expected of a licensed professional will have to assign responsibility for the failure to meet that standard. *Delay in doing so risks missing the 90-day deadline for filing the certificate.*

[7] CJ § 3-2C-02(c) provides:

> (1) Upon written request by the claimant and a finding of good cause by the court, the court may waive or modify the requirement for the filing of the certificate of a qualified expert.
>
> (2) The time for filing the certificate of merit of a qualified expert shall be suspended until the court rules on the request and, absent an order to the contrary, the certificate shall be filed within 90 days of the court's ruling.

433 Md. at 575 (emphasis added).

To be sure, Providence's affidavit identified Mr. Fichtner as the "licensed professional . . . responsible for the alleged negligent acts or omissions or the supervision of those actions, within the scope of [his] license."[8] *See Heavenly Days*, 433 Md. at 578. Providence posits that CPG knew Mr. Fichtner was the responsible "licensed professional" because its April 22, 2016 letter to Providence was addressed to him. (E.15-20) On the other hand, that letter was sent to Providence to Mr. Fichtner's attention as "President" of the company and assigned negligence generally to Providence and its subcontractors as the "Design Team." In short, viewing all facts and inferences in the pleadings at this stage of proceedings in the light most favorable to CPG, we are persuaded that granting either a motion to dismiss or a motion for summary judgment based on Mr. Fichtner's being the licensed professional would have been premature.

That said, however, it appears that even if CPG or the court on a remand were to later identify Mr. Fichtner or a different licensed professional, in the absence of CPG's compliance with filing an adequate certificate or one of the waiver or tolling provisions of the statute, the time for filing the certificate under CJ § 3-2C-02(a)(2)(ii) has expired.[9] We will address that in the following section.

[8] Mr. Fichtner did not concede negligence, and Providence filed cross claims against Ashbrook Simon-Hartley Operations LP and Herbert Rowland & Grubic Inc.

[9] Presumably, the *Heavenly Days* case proceeded to trial on remand because the trial court granted the extension under CJ § 3-2C-02(c)(1).

Compliance, Waiver, or Tolling

Contentions

If the certificate statute is applicable, CPG contends that it is in compliance with the requirements of the statute. That contention is based on any of the following: (1) the April 22, 2016 letter to Providence tolled the certificate deadline under CJ § 3-2C-02(b); (2) the trial court's order of default tolled the certificate deadline; and (3) the good faith filing of the expert designation of Kenneth R. McLauchlan in accordance with the deadline set by the trial court's scheduling order. From a policy perspective, CPG argues that the certificate statute was enacted to screen frivolous malpractice suits against licensed professionals, and that its "otherwise valid claim" against a negligent engineering firm should not be barred.

Providence responds that CPG's February 7, 2017 filing of an expert witness designation does not satisfy the certificate statute's requirements. It further contends: (1) that the April 22, 2016 letter was a demand letter for money and not a written request for production of documentary evidence; (2) that, even if the order of default had tolled the 90 days filing deadline, CPG missed the new deadline; and (3) that the scheduling order did not waive the certificate statute's requirements.

Analysis

CJ § 3-2C-02(b) tolls the 90 days deadline in order for a claimant to obtain documents from a defendant:

> (1) Upon written request made by the claimant *within 30 days of the date the claim is served*, the defendant shall produce documentary evidence that

> would be otherwise discoverable, if the documentary evidence is reasonably necessary in order to obtain a certificate of a qualified expert.
>
> (2) The time for filing a certificate of a qualified expert shall begin on the date on which the defendant's production of the documentary evidence under paragraph (1) of this subsection is completed.
>
> (3) The defendant's failure to produce the requested documentary evidence under paragraph (1) of this subsection shall constitute a waiver of the requirement that the claimant file a certificate of a qualified expert as to that defendant.

(Emphasis added).

CJ § 3-2C-02(c) provides:

> (1) Upon written request by the claimant and a finding of good cause by the court, the court *may waive or modify* the requirement for the filing of the certificate of a qualified expert.
>
> (2) The time for filing the certificate of merit of a qualified expert shall be *suspended* until the court rules on the request and, absent an order to the contrary, the certificate shall be filed within 90 days of the court's ruling.

(Emphasis added).

First, the circuit court had found that the April 22, 2016 letter was "a demand for money," and we agree. Nowhere in that letter is there a request for, or even the mention of, the production of documents. CPG's complaint was served on Providence on May 23, 2016, and CPG did not request production of documents from Providence until July 15, 2016. That request was not "made by the claimant within 30 days of the date the claim is served," under CJ § 3-2C-02(b)(1), and did not toll or suspend the time for filing the certificate that is allotted for document production under CJ § 3-2C-02(b)(2).

Second, we are not persuaded that the order of default tolled the 90 days requirement, but even assuming that it did, CPG still missed the deadline. The 90 days began with the filing of the complaint on May 10, 2016. 72 days had passed when the circuit court issued an order of default against Providence on July 21, 2016. Tolling is not a reset; the days began to run again on September 20, 2016 when the default order was vacated. The 90 days would have expired long before CPG's expert designation filing on February 7, 2017.

CPG also argues that, at the time of the vacating of the default order, it had a pending request for production of documents, which was not responded to until January 5, 2017. That argument is based on the 90 days starting on January 5, 2017. But, as we have discussed, to satisfy CJ § 3-2C-02(b)(1), the written request had to have been "made by the claimant within 30 days of the date the claim is served."

Third, we are not persuaded that the trial court's routine scheduling order could, standing alone, supersede the certificate statute's requirements. The scheduling order, pursuant to Md. Rule 2-402(g), signed by the administrative judge and entered on May 12, 2016, ordered that CPG's experts be designated by February 7, 2017. There is no reference to CJ § 3-2C-02(c)(1) or a written request for a good cause finding by the court. It does not even mention the certificate statute or its application to this case. CPG, citing Md. Rule 2-504(c)[10], argues that the scheduling order "control[led] the subsequent course

[10] "The scheduling order controls the subsequent course of the action but shall be modified by the court to prevent injustice." Md. Rule 2-504(c).

of the action." It does not cite, and we have not found, any authority for the proposition that a routine scheduling order issued two days after the complaint was filed and before service was made on a defendant effectively waives or modifies the statutory certificate requirement, which serves a gatekeeping role in litigation of this type. Here, none of the waiver, tolling, or suspension provisions in CJ § 3-2C-02(b) or CJ § 3-2C-02(c) apply.

As to the content of the certificate, the statute only requires that it "[c]ontain a statement from a qualified expert attesting that the licensed professional failed to meet an applicable standard of professional care." CJ § 3-2C-02(a)(2)(i). While there is no specific form that the certificate must take, CPG's February 7, 2017 filing would not comply. That filing designated Mr. McLauchlan as an expert witness expected to be called at trial pursuant to Md. Rule 2-402(g). It stated that Mr. McLauchlan "is expected to testify that the engineering services performed by Providence . . . failed to meet the standard of care of an engineering consulting firm." This filing does not satisfy the certificate statute because a statement of what an expert "is expected to testify" is not the same as "a statement from a qualified expert *attesting* that *the licensed professional* failed to meet an applicable standard of professional care." (Emphasis added). We agree with the circuit court's finding that the "designation of experts does not include a statement and/or affidavit from the expert."[11]

[11] CPG also contends that its February 7, 2017 filing "incorporated by reference a report from their qualified expert," which Providence subsequently received on March 21, 2017. CPG did not file it with the circuit court, but Mr. McLauchlan's report, dated March 9, 2017, is in the record before us. It concluded that the "[e]ngineering services performed

In regard to CPG's nebulous, overarching policy argument against the bright line language in the certificate statute, the *Heavenly Days* Court explained, "The statutory language plainly establishes the certificate requirement as a hurdle to litigating allegations of malpractice by a licensed professional." 433 Md. at 573. In *Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*, 143 Md. App. 698, 709 n.4 (2002), we compared the certificate statute at issue in this case to "a similar statute which requires the filing of [qualified expert] certificates in medical malpractice claims":

> [I]t is noteworthy that the General Assembly has amended a similar statute which requires the filing of such certificates in medical malpractice claims. In the amendment, the legislature provided that an extension may be granted when the limitations period has expired and the failure to file the certificate was not willful or the result of gross negligence. *See* C.J. § 3-2A-04(b). The amendment was analyzed in *Roth v. Dimensions Health Corp.*, 332 Md. 627, 632 A.2d 1170 (1993). That the legislature declined to include such a provision in the section at issue here supports the inference that *the grace period should not be extended to parties who fail to timely file the requisite certificate*.

(Emphasis added). Without commenting on the merits of CPG's claim or its policy argument, we hold that CPG missed a bright line procedural deadline.

In sum, a remand for further proceeding as occurred in *Heavenly Days* would serve no purpose in this case. CPG was required under CJ § 3-2C-02(a) to file a certificate of a qualified expert within 90 days after its claim was filed, and it is clear

(…continued)
by Providence Engineer Corporation and its subcontractors . . . failed to meet the standard of care for an engineering consulting firm." It did not refer to Mr. Fichtner or anyone else as the licensed professional. Rather, it assigned responsibility to the Design Team.

from the record that this deadline was not met, tolled, waived, or suspended according to the provisions of CJ §§ 3-2C-02(b) or 3-2C-02(c). Because CPG did not file a timely, proper certificate, the circuit court did not err as a matter of law in granting a motion to dismiss without prejudice. As the *Heavenly Days* Court explained, delay in assigning responsibility to an individual licensed professional "risks missing the 90-day deadline for filing the certificate." 433 Md. at 575.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.