Vermont Superior Court
Filed 10/13/26
Washington Unit

VERMONT SUPERIOR COURT
Washington Unit
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CIVIL DIVISION
Case No. 25-CV-04636

David Levis et al v. Reliable Builders, LLC

ENTRY REGARDING MOTION

Title: Motion to Dismiss (Motion: 4)
Filer: Matthew A. Zidovsky
Filed Date: September 01, 2026

The motion is DENIED.

Plaintiffs David Levis and Teresa Gonzales-Ferrer allege that they hired Defendant Reliable Builders LLC to construct an addition to their home. The addition was completed in January 2017. They filed this action in 2025 asserting one count of breach of contract because the roof was improperly constructed, plaguing them with water leaks and mold. Reliable has filed a Rule 12(b)(6) motion to dismiss, arguing that the case is time-barred by the applicable statute of limitation.

I. *Procedural Standard*

The Vermont Supreme Court has described the familiar standard for Rule 12(b)(6) motions to dismiss for failure to state a claim as follows:

> "A motion to dismiss . . . is not favored and rarely granted." This is especially true "when the asserted theory of liability is novel or extreme," as such cases "should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." In reviewing a motion to dismiss, we consider whether, taking all of the nonmoving party's factual allegations as true, "'it appears beyond doubt' that there exist no facts or circumstances that would entitle the plaintiff to relief." We treat all reasonable inferences from the complaint as true, and we assume that the movant's contravening assertions are false.

Alger v. Dep't of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309, 316–17 (citations omitted);

see also 5B A. Benjamin Spencer, et al., Fed. Prac. & Proc. Civ. § 1357 (4th ed.) ("Ultimately, the burden is on the moving party to prove that no legally cognizable claim for relief exists.").

II. *Analysis*

A claim for breach of contract is subject to the ordinary 6-year limitation period generally applicable to civil claims.[1] 12 V.S.A. § 511; *Openaire, Inc. v. L.K. Rossi Corp*., 2007 VT 120, ¶ 10, 182 Vt. 636.

Plaintiffs, on the face of the complaint, concede that during construction (sometime before January 2017), they observed, and were concerned, that the roof appeared to be installed flat, with water collecting on it. They were told that was supposed to happen. Leaks from the roof first appeared inside the addition in December 2018. This case was not filed until October 23, 2025, well over 6 years later.

This timeline presents an obvious question about whether this case was filed in a timely manner. Recognizing that, Plaintiffs allege, on the face of the complaint, that equitable tolling renders this case timely. They assert:

> By offering Plaintiffs false assurances concerning the adequacy of construction, by blaming the leaks on Plaintiffs for failure to remove ice from the roof and deck, and by coming to the house site and falsely declaring the problem to have been addressed, Builder led Plaintiffs into the reasonable belief that there was no problem with the Builder's work, and that the issues they observed had been fully addressed by repairs the Builder had carried out under warranty.
>
> As a result of Builder's false assurances, the Plaintiffs did not undertake any investigation into the water intrusion problems they observed, believing those problems to have been resolved and addressed. Accordingly, the statute of limitations was equitably tolled and has not yet elapsed.

Complaint ¶¶ 18–19.

[1] Reliable asserts without explanation that the 3-year limitation period applicable to personal injury claims more properly applies in this case, dismissing Plaintiffs' attempt to reframe the matter as a breach of contract as "clever." 12 V.S.A. § 512. It is unclear what personal injury Reliable could be seeing in the complaint; it does not say. In any event, without further explanation from Reliable, the Court declines to address this matter further.

Despite the prominence of the issue in the complaint itself, Reliable neither addresses it in its motion nor even recognizes that it is a question in the case. It simply argues that Plaintiffs' claim accrued when they noticed the roof seemed to be too flat during construction or at least no later than December 2018 or April 2019, when leaks occurred and repairs were made, all outside the limitation period.

In opposition to dismissal, Plaintiffs argue that their claim was equitably tolled until October 24, 2019, a scant one day inside the limitations period.

In its reply, for the first time, Reliable argues that a new roof that leaks automatically triggers the limitations period and the discovery rule has no application, citing *Abajian v. TruexCullins, Inc*., 2017 VT 74, 205 Vt. 331.[2] See Reliable's Reply at 2 ("Applying *Abajian*, it is settled law in Vermont that when a new roof leaks, the owner is on inquiry notice of a claim that the roof could be defective and triggers a duty to investigate."). It further argues that the Court should adopt what it describes as the majority rule elsewhere (the "repair rule," never addressed either way in Vermont) that attempts at repair are insufficient to equitably toll a limitation period. It further argues that no formal fraudulent concealment claim has been pleaded generally or with particularity for Rule 9(b) purposes. More generally, Reliable simply argues that the allegations of the complaint are insufficient to demonstrate that equitable tolling may apply to this set of facts.

None of the issues argued in Reliable's reply were asserted in its motion. Plaintiffs reasonably opposed dismissal in reliance on the procedural standard and their relevant allegations in support of equitable tolling; they did not address the other issues first raised in Reliable's reply. An issue is not fairly raised for the first time in a reply brief because that robs the opposing party of a fair chance to respond. See *Maynard v. Travelers Ins. Co*., 149 Vt. 158, 160 (1987) ("Our law is clear that issues not raised in an appellant's original brief may not be raised for the first time in a reply brief."); see also *Titran v. Ackman*, 893 F.2d 145, 148 (7th Cir. 1990) ("When a party moves for summary judgment on ground A, the opposing party need not address grounds B, C, and so on; the number of potential grounds for (and arguments against) summary judgment may be large, and litigation is costly enough without requiring parties to respond to issues that have not been raised on pain of forfeiting their position.").

[2] No question of equitable tolling was presented in *Abajian*.

The sufficiency of the allegations in support of equitable tolling under the general Rule 12(b)(6) standard is fairly presented. The Court declines to address more specific issues first raised in Reliable's reply.

"Though we have had few opportunities to consider the precise contours of the doctrine in Vermont, we have recognized that it may suspend a statute of limitations 'where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit.'" *Doe v. Camacho*, 2024 VT 72, ¶ 38, 220 Vt. 226. "While the representations relied upon need not be fraudulent in a strict legal sense, generally a defendant is not estopped from raising a statute-of-limitations defense absent either a promise or some sort of misrepresentation or concealment of a fraudulent character." *Beecher v. Stratton Corp.*, 170 Vt. 137, 139 (1999) (citation omitted). The doctrine "seeks to promote fair dealing and good faith by preventing 'one party from asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations.'" *Lodge at Bolton Valley Condominium Ass'n v. Hamilton*, 2006 VT 41, ¶ 8, 180 Vt. 497 (2006) (citations omitted). The party invoking the doctrine has a "considerable burden" to overcome. *Doe*, 2024 VT 72, ¶ 40 (citation omitted).

Plaintiffs invoked the doctrine in their complaint and in opposition to dismissal. The only question under Rule 12(b)(6) is whether they should be able to proceed to discovery so that the evidence can be developed before the matter is finally resolved, whether on summary judgment or at trial.

The Court is satisfied that the allegations are sufficient that the case survives the dismissal stage.

Reliable essentially argues that the roof was installed, Plaintiffs were aware of their concerns about it at that time, and soon thereafter it began to fail in obvious ways (leaking into the house). The mere fact that Reliable's principal, Mr. Adam Lambert, and its roofing subcontractor, repeatedly attempted repairs that ultimately did not work is not sufficient to equitably toll the limitation period. This argument may win the day once the evidence has developed.

For now, Plaintiffs' response is that Mr. Lambert did not simply make attempts at repair.

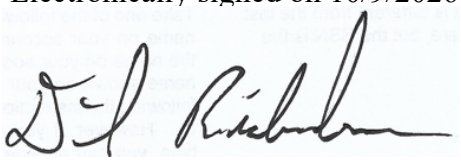
Rather, he repeatedly, actively misrepresented what the problem was, insisting that the roof generally was sound and the repairs sufficient, and they reasonably relied on those misrepresentations, causing them not to investigate further and delaying the accrual date for limitation purposes.

These allegations are sufficient to fairly raise the equitable tolling question. Its resolution will be better addressed once the evidence has had a chance to develop and details come into better focus. The Court cannot conclude beyond doubt now, before the evidence develops, that there will exist no facts or circumstances later, once it has, that may satisfy Plaintiffs' burden.

ORDER

For the foregoing reasons, Reliable's motion to dismiss is **Denied**.

Electronically signed on 10/9/2026 4:22 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge