

FILED
IN THE DISTRICT COURT IN AND FOR BRYAN COUNTY, OKLAHOMA
STATE OF OKLAHOMA

CHOCTAW NATION OF OKLAHOMA,)
Plaintiff,)
v.)
FLINTCO, LLC; WORTH GROUP)
ARCHITECTS, P.C.; SPECIFIED)
TECHNOLOGIES, INC.; ABC ENTITIES)
I-X; and JOHN DOES I-X,)
Defendants.)

DONNA ALEXANDER
COURT CLERK
BY D. Alexander Deputy

Case No.: CJ-2023-230

Judge: Mark Campbell

**REPLY BRIEF IN SUPPORT OF DEFENDANT,
FLINTCO, LLC'S MOTION TO DISMISS**

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I. The tort theories fail as a matter of law.

The Choctaw Nation¹ recognizes that “[w]ithout an independent basis to support a tortious wrongdoing, there is nothing more than an alleged breach of that contract.” *Rodgers v. Tecumseh Bank*, 1988 OK 36, ¶ 18, 756 P.2d 1223, 1227. Yet, the Choctaw Nation asserts that the “independent basis is that Flintco had duties to speak,” i.e., to “report deficiencies.” But the Petition makes it clear that such an obligation is based on the parties’ contract. *See Petition*, ¶ 16 (“The construction manager shall monitor compliance by the separate contractors with their contractual safety requirements and report deficiencies.”) (emphasis added). Thus, the very basis for the “fraud” claim is derived from, and dependent upon, Flintco’s alleged breach of contract.

II. The Petition fails to state the claim of fraud with particularity.

Alleging fraud with particularity affords the defending party with knowledge of the “time, place, and content” of the fraud. *Estrada v. Kriz*, 2015 OK CIV APP 19, ¶ 12, 345 P.3d 403, 407. In defending its inadequate pleading, the Choctaw Nation states in its Response Brief:

The “time, place and content” of this suit as provided in the Petition is that Flintco and others, the architect and subcontractor responsible for the installation of fire suppression measures during the construction of the Projects beginning May 5, 2005 (Pet. at ¶ 13) did not ensure firewalls and life safety related measures were installed (Pet. at ¶ 28) and did not construct the Projects in accordance with the codes and construction agreement (Pet. at ¶¶ 29-30).

See Response Brief, pg. 5 (emphasis added). The Choctaw Nation’s blanket allegations on seventeen (17) Projects render it nearly impossible for Flintco to prepare a responsive pleading.

The purpose of the “particularity” requirement is to “afford an opponent adequate notice to prepare a responsive pleading.” *Oil Valley Petroleum, LLC v. Moore*, 2023 OK 90, ¶ 76, 536 P.3d 556, 575, *as corrected* (Oct. 3, 2023). This failure is compounded by the Choctaw Nation’s

¹ All capitalized terms have the definitions assigned to them in Defendant Flintco’s Motion to Dismiss and Brief in Support, filed on December 4, 2023 (the “Motion to Dismiss”).

persistence in “lumping” the defendants together. *See, e.g., Lee v. Enterprise Fin. Grp*, No. CIV-08-1221-M, 2009 WL 1362605, at *4 (W.D. Okla. May 14, 2009) (“[P]laintiffs impermissibly lumped all defendants together”). Curiously, the Choctaw Nation recognizes that the only improvement that lacks the “safety features,” which are central to its claim for fraud, is the “Nation’s multistory Property.” *Id.* By alleging fraud but providing only one (1) instance—out of seventeen (17) Projects—the Choctaw Nation has not supplied enough facts to provide Flintco with adequate notice to prepare a responsive pleading.

III. The “period of performance” does not alter the statute of repose.

The Choctaw Nation asserts that the contractual “Period of Performance” renders the statute of repose inapplicable to its claims. The statute of repose bars recovery “more than ten (10) years after substantial completion of such an improvement.” Okla. Sta. tit. 12, § 109; *see also Jaworsky v. Frolich*, 1992 OK 157, ¶ 16, 850 P.2d 1052, 1056 (noting that Okla. Sta. tit. 12, § 109 bars recovery ten (10) years after the substantial completion of improvement to real property “regardless of when plaintiff discovers [the] defect.”).

Regardless of when the Choctaw Nation discovered the defect, or the parties’ contractual period of performance, many of the Projects were substantially completed on or before October 31, 2013 (i.e., ten (10) years before the Choctaw Nation filed its Petition). The Choctaw Nation provides no authority that a party may contractually agree to extend the statute of repose, nor does there appear to be any such authority. Further, the statute of repose may bar a claim even if the statute of limitations has not run. *See Reynolds v. Porter*, 1988 OK 88, ¶ 6, 760 P.2d 816, 820 (“A statute of limitation merely extinguishes the plaintiff’s remedy while a statute of repose bars a cause of action before it arises.”).

To avoid the application of this rule, the Choctaw Nation cites *Oklahoma City Mun. Imp. Auth. v. HTB, Inc.*, 1988 OK 149 for the proposition that its fraud claims are not barred because they “would have accrued” within the ten year statute of repose period. *See Plaintiff’s Response*, pg. 11. In that case, the plaintiff brought a cause of action for negligent design and construction of a municipal water pipe system, which was substantially completed in 1974. *Id.*, 1988 OK 149, ¶ 2, 769 P.2d 131, 132. Thereafter, the pipes broke in 1980; thus, the cause of action—i.e., a cause of action for negligence—accrued within the ten (10) year statute of repose period. *Id.* The Supreme Court of Oklahoma noted, “[s]ince plaintiffs initial cause of action arose and vested during the ten year period prescribed by law, public policy compels us to adhere to the general rule that public rights should not be prejudiced by the tardiness of officials to whom those rights are entrusted.” *Id.*, 1988 OK 149, ¶ 28, 769 P.2d 131, 137.

In other words, *Oklahoma City Mun. Imp. Auth. v. HTB, Inc.* stands for the proposition that a sovereign entity² is not barred by the statute of repose if the cause of action accrues during the ten (10) year period. But the Choctaw Nation fails to recognize that its claim for fraud “accrued” when it discovered the alleged fraud,³ not when the underlying work was performed. As pled in the Petition, the Choctaw Nation discovered these “defects” in November 2021, which is after the ten (10) year period of repose. *See Petition*, ¶ 25.

IV. The recovery of “public funds” does not necessarily vindicate “public rights.”

The Choctaw Nation fails to produce one authority that applies the maxim *nullum tempus occurrit regi* to the benefit of a federally recognized Indian Tribe. Instead, it asserts that it can

² As set forth in the Motion to Dismiss, the Choctaw Nation is not one of the “sovereign entities” that can invoke the maxim: *nullum tempus occurrit regi*.

³ A claim for fraud “shall not be deemed to have accrued until the discovery of the fraud.” Okla. Stat. tit. 12, § 95(A)(3); *see also Horton v. Hamilton*, 2015 OK 6, ¶ 18, 345 P.3d 357, 363 (“A claim for fraud accrues when the person discovers the fraud.”).

invoke this rule because it is attempting “to recover tribal dollars, i.e., public funds.” Yet, the recovery of “public funds” does not *ipso facto* exempt a “sovereign nation” from the application of the statute of limitations.

Indeed, Oklahoma case law is clear that even the State of Oklahoma, and its subdivisions, may still be barred by the statute of limitations when it seeks to recover “public funds.” *See, e.g.* *Bd. of Comm’rs of Woodward Cnty. v. Willett*, 1915 OK 788, ¶¶ 1-2, 49 Okla. 254, 152 P. 365, 365; *Brown v. Bd. of Ed. of City of Duncan*, 1930 OK 570, 298 P. 249, 250. Thus, whether the underlying claim is to recover “public funds” is immaterial; instead, the dispositive issue is whether the “sovereign nation” is acting in its “sovereign capacity to vindicate public rights.” *State ex rel. Oklahoma Dep’t of Transp. v. Bd. Of Cnty. Comm’rs. for Cnty. of Comanche Cnty.*, 2007 OK CIV APP 126, ¶ 8, 174 P.3d 1010, 1011.

V. The statute of repose is constitutional.

In a last-ditch effort, the Choctaw Nation argues that the statute of repose is unconstitutional, relying on Article Five, Section 59 of Oklahoma’s Constitution (“Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted”).

As a starting point, Oklahoma’s Supreme Court “do[es] not depart from the long standing rules which cloak any legislation with the presumption of constitutionality unless the statute is ‘clearly, palpably and plainly inconsistent with the constitution.’” *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶ 12, 782 P.2d 915, 918.

To determine whether a statute is unconstitutional, Oklahoma Courts apply a three-part test: “(1) [whether the law is a] special or general law; (2) if the statute is a special law, [whether there is] an applicable general law; and (3) ‘[i]f a general law is not applicable, is the statute a

permissible special law.”” *John v. Saint Francis Hosp., Inc.*, 2017 OK 81, ¶ 21, 405 P.3d 681, 689, as amended (Oct. 25, 2017). In determining whether the statute is a permissible special law, the Court must evaluate whether it is “reasonably and substantially related to a valid legislative objective.” *Oklahoma Coal. for Reprod. Justice v. Cline*, 2016 OK 17, ¶ 30, 368 P.3d 1278, 1288.

Even if the statute of repose is a “special law,” and there is no general law to be applied, it is clearly related to a valid legislative objective. As recognized in previous constitutional challenges to Title 12, Section 109 of the Oklahoma Statutes, the legislature’s objective is to “provid[e] a measure of security for building professionals whose liability could otherwise extend indefinitely … [and] avoid[] the difficulties in proof which arise from the passage of time.” *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶ 25, 782 P.2d 915, 921 (upholding Title 12, Section 109 of the Oklahoma Statutes as constitutional, and noting its legislative intent); *see also Jaworsky v. Frolich*, 1992 OK 157, ¶ 16, 850 P.2d 1052, 1056 (affirming the statute of repose’s constitutionality in line with the Court’s findings in *St. Paul Fire*). Thus, the constitutional challenge lodged by the Choctaw Nation fails, and Title 12, Section 109 of the Oklahoma Statutes bars its tort claims.

WHEREFORE, PREMISES CONSIDERED, Defendant, Flintco, LLC, respectfully requests this Court dismiss the Choctaw Nation’s claims, award it its attorney fees, costs, and grant any further relief this Court deems just and equitable.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2024, I caused to be mailed in the United States Mail with proper postage fully prepaid thereon, a true and correct copy of the above and foregoing upon the following:

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