

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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Re: *Michael Iacono v. Rosemary Barici, et al.*
C.A. No. 06C-02-021-RFS

Submitted: September 5, 2006
Decided: December 29, 2006

Dear Counsel:

This is my decision regarding Coldwell Banker Residential Brokerage, Inc.'s (hereinafter "Coldwell Banker") Motion to Dismiss, and Eleanor V. Genther's¹ (hereinafter "Genther") Motion to Dismiss. For the reasons set forth herein, both motions are granted in part and denied in part.

STATEMENT OF FACTS

On January 6, 2004, Michael Iacono (hereinafter "Plaintiff") executed a Residential Contract of Sale (hereinafter "Contract") with Genther. The Contract was for the sale of a home and accompanying property located at 34491 Spruce Drive, Lewes, Delaware 19958

¹ Rosemary Barici, personal representative of Eleanor V. Genther, is acting on behalf of Ms. Genther, now deceased, for the purposes of this action.

(hereinafter “Property”), in a subdivision known as “Sandy Brae.”

In 2003, the Property was listed for sale with Coldwell Banker. In compliance with the Buyer Property Protection Act, 6 Del. C. §§ 2570-2578, Genther completed a Seller’s Disclosure of Real Property Condition Report (hereinafter “Seller’s Disclosure”). Question 49 on the Seller’s Disclosure asked, “[w]as the structure moved to this site?” Ex. C. of Compl. at 3A. The question further provided three check boxes representing, in the case of a positive response to the initial question, that the structure was a double wide, modular or other type of structure. *Id.* In response to the question, Genther checked the “[n]o” box, indicating that the structure had not been moved to the site. Other possible responses available to Genther included “[y]es” and “[u]nknown.” *Id.*

The home to be sold under the Contract was in fact a modular home, manufactured by Nanticoke Homes in Greenwood, Delaware. Coldwell Banker marketed the home on the multiple listing service (hereinafter “MLS”) database as “[stick/frame]” construction. Ex. B of Compl.

Plaintiff and Genther went to final settlement on the Property on February 17, 2004. At some point thereafter, Iacono sought the assistance of extermination companies to deal with an active infestation of wood destroying insects.² The report offered by one of those companies, American Home Inspections, states that the structure is “typical modular, factory-built, home construction.” *See* Ex. E of Compl.

Plaintiff now seeks relief from Genther, asserting breach of contract, fraud and

² It is alleged by Plaintiff in paragraph 18 of the Complaint, that the inspection was done within nine (9) months of closing, however, the photos taken in connection with American Home Inspections’ report, and attached thereto, bear the date: January 26, 2005.

misrepresentation, violation of the Consumer Fraud Act (6 Del. C. §§ 2511-2527), violation of the Buyer Property Protection Act (6 Del. C. §§ 2570-2578), and negligence. Plaintiff also seeks relief from Coldwell Banker asserting violation of the Consumer Fraud Act (6 Del. C. §§ 2511-2527), and violation of the Deceptive Trade Practices Act (6 Del. C. §§ 2531-2536).

STANDARD OF REVIEW

The court must assume all well-pleaded facts or allegations in the complaint as true when evaluating a motion to dismiss under Rule 12(b)(6). *RSS Acquisition, Inc. v. Dart Group Corp.*, 1999 Del. Super. LEXIS 591, at * 8 (Del. Super. Dec. 30, 1999). The court will not dismiss a claim unless the plaintiff would not be entitled to recover under any circumstances that are susceptible to proof. *Id.* The complaint must be without merit as a matter of fact or law to be dismissed. *Id.* The plaintiff or complainant will have every reasonable factual inference drawn in his favor. *Ramunno v. Cawley*, 705 A.2d 1029, 1036 (Del. 1998).

“Dismissal is warranted where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.” *Hedenberg v. Raber*, 2004 Del. Super. LEXIS 310, at * 2-3 (Del. Super. Aug. 20, 2004), *citing Evans v. Perillo*, 2000 Del. Super. Lexis 243, at * 5-6 (Del. Super. May 26, 2000). “Where allegations are merely conclusory, however (*i.e.*, without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss.” *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000), *citing In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993).

DISCUSSION

1. MOTION TO DISMISS AS TO PLAINTIFF'S CLAIMS AGAINST GENTHER

(a) Breach of Contract

In order to survive a motion to dismiss under a breach of contract claim, plaintiff must demonstrate: “first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff.” *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). Clear and unambiguous language found in a contract is to be given its ordinary and usual meaning. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

It is undisputed that a Residential Contract of Sale existed between Plaintiff and Genther. The terms of that Contract make it unmistakable that the sale of a residential structure was integral to the agreement between the parties. The principal document describing the structure to be conveyed was the Seller's Disclosure. By the language of the Contract and by statutory authority, the Seller's Disclosure was incorporated into the Contract. Ex. C. of Compl. ¶ 23 (“The Report must be signed by the Buyer(s) and Seller(s) and becomes a part of this Contract of Sale.”); *see also*, 6 Del. C. § 2573 (“This written disclosure form, signed by buyer and seller, shall become a part of the purchase agreement.”). The contractual obligation was that the conditions stated in the Disclosure “accurately reflect[] the known condition of the property as of the date of [the] Contract.” Ex. C. of Compl. ¶ 23. Plaintiff could show the breach of an existing contractual duty and resulting damages by pointing to representations made in the Seller's Disclosure. Namely,

Genther's representation that the home was not moved to its present site. For this reason, the breach of contract claim cannot be dismissed at this time.

(b) Fraud and Misrepresentation

To prevail on a claim on common law fraud, or intentional misrepresentation, a party is required to show “that (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose, (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth, (3) the defendant intended to induce the plaintiff to act or refrain from acting³, (4) the plaintiff acted in justifiable reliance on the representation, and (5) the plaintiff was injured by its reliance.” *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005). “Under common law fraud, the representation must not only be material, but must concern an essential part of the transaction.”⁴ *Princeton Inc. Co. v. Vergano*, 883 A.2d 44, 54 (Del. Ch. 2005); *see also, E.I. Du Pont de Nemours & Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 462 (Del. 1999). Rule 9(b) of the Rules of Civil Procedure for the Superior Court of Delaware requires that “[i]n all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity.” More specifically, a well plead fraud claim must include at least “the time,

³ “The misrepresentation may be as to a fact peculiarly within the maker’s own knowledge thereby creating a delusion or such as to lull the suspicion of a careful man inducing him to forego further inquiry.” *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 28 (Del. Super. 1973), *aff’d*, 312 A.2d 632.

⁴ “[B]ecause tort law imposes liability in damages for misrepresentation, while contract law does not, the requirements imposed by contract law are in some instances less stringent. Notably, under tort law a misrepresentation does not give rise to liability for fraudulent misrepresentation unless it is both fraudulent

place, and contents of the false representations.” *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990).

and material, while under contract law a misrepresentation may make a contract voidable if it is either fraudulent or material.” Restatement (Second) of Contracts § Scope (1981).

In the instant matter there was a duty to disclose the information solicited through the Seller's Disclosure. It is alleged by Plaintiff that Genther either knew the information supplied by him was false or should have known the information was false.⁵ Fraud can exist in cases "where the actor does not have actual knowledge of the falsity of his representation, but, rather, recklessly makes the representation, without heed for its validity, or makes it under circumstances not justifying belief in its truth." *Stuchen v. Duty Free Int'l*, 1996 Del. Super. LEXIS 187, at * 19 (Del. Super. Apr. 22, 1996), quoting *Twin Coach Co. v. Chance Vought Aircraft, Inc.*, 163 A.2d 278 (Del. Super. 1960); see also, Restatement (Second) of Torts, § 526, c. e ("Indeed, since knowledge implies a firm conviction, a misrepresentation of a fact so made as to assert that the maker knows it, is fraudulent if he is conscious that he has merely a belief in its existence and recognizes that there is a chance, more or less great, that the fact may not be as it is represented.").

Here, Plaintiff has alleged facts sufficient to identify when the allegedly fraudulent statement⁶ was made, where it was made, and the specific content of the statement. Plaintiff alleges that on or about January 6, 2004 he executed a Contract with Genther. A term in that Contract was that the home to be conveyed was not moved to its present site. Plaintiff

⁵ The phrase "known or should have been known" does not, by itself meet the requirement of Rule 9(b) that fraud must be plead with particularity. *Twin Coach Co. v. Chance Vought Aircraft, Inc.*, 163 A.2d 278, 284 (Del. Super. 1960). Plaintiff, however, did not rest his pleadings solely on such a statement in this case.

⁶ Fraud encompasses more than merely spoken words. Fraud can also occur through deliberate concealment of facts and silence in the face of a positive duty to speak. *Schmeusser v. Schmeusser*, 559 A.2d 1294, 1295-96 (Del. 1989). For purposes of this document the word "statement" is meant to include the representations made by Genther in the Seller's Disclosure.

allegedly relied upon the misrepresentation and consequently suffered damages to the effect of buying a home that he would not have purchased had he known the truth. The facts plead by Plaintiff are sufficient to move forward with the fraud and misrepresentation claim.

Genther further alleges that Plaintiff “does not and cannot plead that his supposed reliance upon the purported misrepresentation was *justifiable*.” Mot. to Dismiss of Defendant Rosemary Barici ¶ 11 (emphasis in original). This statement misses the nature of the inquiry at this stage in the litigation. When alleging a claim for fraud, “the question of whether one’s reliance on false information was reasonable generally is a question of fact.” *Vague v. Bank One Corp.*, 2004 Del. LEXIS 221, at * 2 (Del. May 20, 2004).

A final assertion made by Genther is that the classification of the home as stick-built or modular was neither material nor an essential part of the transaction as required for an actionable fraud claim. As a general rule a provision is material “if a reasonable person would attach importance to it in determining his choice of action in the transaction in question.” *Motorola, Inc. v. Amkor Tech*, 849 A.2d 931, 937 (Del. 2004); *see also*, Restatement (Second) of Torts, § 538. As previously stated, the Seller’s Disclosure was incorporated into the Contract. The information provided on any such disclosure has the potential of playing a key role in the actions of a party seeking to purchase a home. The information could easily dictate the course of the bargaining process. Consequently, the terms of the Seller’s Disclosure could be both essential and material. The simple fact that Plaintiff chose not to conduct his own investigation of the property, instead relying on the Disclosure, does not defeat the significance of the information provided in the Disclosure. A reasonable person could attach significance to the construction type of a home, and

accordingly, such information is appropriately considered as “material.”

(c) Consumer Fraud Act (6 Del. C. §§ 2511-2527)

The Consumer Fraud Act makes it unlawful to use fraud, misrepresentation, or the concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise. 6 Del. C. § 2513. The purpose of the Consumer Fraud Act is “to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices *in the conduct of any trade or commerce.*” 6 Del. C. § 2512 (emphasis added). The Act provides for a private right of action for victims of consumer fraud. 6 Del. C. § 2525. The private right of action does not, however, include the isolated sales of real estate by individual owners. *Young v. Joyce*, 351 A.2d 857, 860 (Del. 1975); *accord, Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1073 (Del. 1983). Such transactions do not constitute the conduct of “trade or commerce” as specifically mentioned in the Code and are thus outside the spirit of the Act.

The transaction between Plaintiff and Genther was an isolated real estate transaction and consequently falls outside the scope of the Consumer Fraud Act. The fact that the Property was listed with an agency in the business of selling real estate does not change the character of the transaction between Plaintiff and Genther. No cause of action can exist between Plaintiff and Genther for violation of the Consumer Fraud Act.

(d) Buyer Property Protection Act (6 Del. C. §§ 2570-2578)

The Buyer Property Protection Act is a consumer protection law that relates specifically to transactions involving residential real property. The Act requires that any

person transferring residential real property “disclose, in writing, to the buyer, agent and subagent, as applicable, all material defects of that property that are known at the time the property is offered for sale or that are known prior to the time of final settlement.” 6 Del. C. § 2572. The disclosure is to be executed with a “good faith effort” by the seller and is part of the sales contract. 6 Del. C. §§ 2573-2574. “By requiring a ‘good faith effort’ to disclose material defects, the maxim of caveat emptor, ‘let the buyer beware,’ is effectively eliminated.” *Snow v. Opal*, 2002 Del. C.P. LEXIS 26, at * 12 (Del. C.P. May 20, 2002).

The language of the Buyer Property Protection Act creates a statutory duty of disclosure which may form the basis of a breach of contract claim. *See Guttridge v. Iffland*, 2005 Del. LEXIS 518 (Del. 2005). Genther has argued that the law does not, however, create a private cause of action for a violation of the Act itself. This argument was not opposed by Plaintiff in response. Plaintiff’s decision not to address this issue is understandable. Even if a private right of action did exist, there would be a complete overlap between the breach of contract claim and the alleged violation of the statutory provisions found in the Buyer Property Protection Act.⁷ For these reasons Plaintiff’s claim for violation

⁷ This Court recognizes that some question exists as to whether in some cases there may be a valid private cause of action for violation of the Buyer Property Protection Act. The ambiguity is partly founded in the language of Title 6 section 2583 which provides for enhanced penalties in cases where an elder or disabled person “suffers damages or injury as a result of an offense or violation described *in this chapter*.” 6 Del. C. § 2583 (emphasis added). The Buyer Property Protection Act is a subchapter of which the enhanced penalty provision would apply. The argument follows that one cannot apply “enhanced” penalties if penalties are not allowed in the first place. Furthermore, one could posit that providing greater relief to the handicap and elderly while providing no relief to those not affected by such infirmity was not the intent of the law. On the other hand, support for the argument that the Buyer Property Protection Act merely creates a statutory duty, and not a private cause of action can be found in the history of the Consumer Fraud Act. It was not until June 30, 2003 that the General Assembly added express language to the Consumer Fraud Act providing for a private cause of action. If it was the legislature’s intent to create a private right under the Buyer Property Protection Act then it could have easily done so at that time. The scope of the Buyer Property Protection Act may be better developed in the future, but the pleadings do not raise the issue so this Court will not undergo the task *sua sponte*. The process used to determine whether a statute creates a private cause of action was summarized in *Schuster v. Derocili*, 775 A.2d 1029, 1036 at fn. 42 (Del. 2001).

of the Buyer Property Protection Act is dismissed.

(e) Negligence

Pleading a negligence cause of action requires that “a defendant must be put on notice of what duty was breached, who breached it, the breaching act, and the party upon whom the act was performed.” *Atwell v. RHIS, Inc.*, 2006 Del. Super. LEXIS 375, at * 4 (Del. Super. Aug. 18, 2006), *quoting Anderson v. Airco, Inc.*, 2004 Del. Super. LEXIS 210, at * 12 (Del. Super. June 30, 2004). A claim for negligent misrepresentation, on the other hand, requires “(1) a pecuniary duty to provide accurate information, (2) the supplying of false information, (3) failure to exercise reasonable care in obtaining or communicating information, and (4) a pecuniary loss caused by justifiable reliance upon the false information. *Id.* The Delaware Superior Court has jurisdiction to hear claims of negligence, but the Delaware Court of Chancery has retained exclusive jurisdiction over negligent misrepresentation causes of action. *Id.* at * 5. The one exception to the exclusive jurisdiction of the Court of Chancery would be cases where the negligent misrepresentation claim is raised in the context of the Consumer Fraud Act. *Id.*

Genther’s Motion to Dismiss mischaracterizes Plaintiff’s claim as one of negligent misrepresentation as opposed to simple negligence. Plaintiff sufficiently alleges a duty (that a seller must make certain disclosures), who breached the duty (Defendant Genther), the breaching act (representing that the home was not moved to the site and further failing to classify it as a modular home), and the injured party (Plaintiff). On these facts Plaintiff has provided enough information to move forward with a claim of negligence.

2. MOTION TO DISMISS AS TO PLAINTIFF'S CLAIMS AGAINST
COLDWELL BANKER

(a) Consumer Fraud Act (6 Del. C. §§ 2511-2527)

The Consumer Fraud Act makes it unlawful to use fraud, misrepresentation, or the concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise. 6 Del. C. § 2513. The purpose of the Consumer Fraud Act is “to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce.” 6 Del. C. § 2512. The Act provides for a private right of action for victims of consumer fraud. 6 Del. C. § 2525.

Coldwell Banker asserts in its Motion that “Plaintiff agreed in writing that he was not entitled to rely on any representations made by Movant [Coldwell Banker] outside of the written Residential Contract of Sale.” Coldwell Banker Mot. to Dismiss ¶ 7. This, as Coldwell Banker suggests, defeats Plaintiff’s Consumer Fraud Act claim because no representation that the home was stick-built appears on the face of the Contract. However, Coldwell Banker’s assertions fail to consider the incorporation of the Seller’s Disclosure into the Contract. *See* Ex. C. of Compl. ¶ 23 (“The Report [Seller’s Disclosure] must be signed by the Buyer(s) and Seller(s) and becomes a part of this Contract of Sale.”). Moreover, statutory authority exists, using similar language as that found in paragraph 23 of the Contract, requiring that the Seller’s Disclosure be integrated into the Contract. *See* 6 Del. C. § 2573 (“This written disclosure form, signed by buyer and seller, shall become a part of the purchase agreement.”). Any representation arising from question 49 on the Seller’s Disclosure is a term of the Contract. It is within the Contract and not subject to exclusion

under paragraph 23.

Coldwell Banker continues by asserting that the representations made in the Contract are between private parties and cannot be used against the real estate broker. In advancing this argument, Coldwell Banker attempts to use one clause of the Contract to its advantage, namely the provision stating that the parties cannot rely on any outside representations, and at the same time reject application of the Contract due to lack of privity. The overarching purpose of the Consumer Fraud Act is to protect the consumer from unfair trade practices. *See* 6 Del. C. § 2512. From the pleadings, it appears that Coldwell Banker drafted the Contract provision disclaiming responsibility for any previously made representations.

With the purpose of the Consumer Fraud Act in mind, it would be contrary to legislative intent to allow Coldwell Banker to escape liability through the use of such contractual provisions. The MLS advertising sheet prepared by Coldwell Banker represented the Property as being “[stick/frame]” construction and may be read with the Seller’s Disclosure in the marketing effort. The MLS sheet was included as Exhibit B to the Complaint and can be considered by this Court in ruling on the present Motion. Coldwell Banker was a dual agent. Discovery may further clarify whether Coldwell Banker adopted Genther’s apparent deception that the home was not moved to the Property and by inference was “stick-built.” There is a sufficient factual basis for Plaintiff to move forward with this aspect of his claim.

A fraud action at common law requires that Plaintiff prove reliance, however, no such requirement exists under the Consumer Fraud Act. *S&R Assocs., L.P., III v. Shell Oil Co.*, 725 A.2d 431, 440 (Del. Super. 1998). The Consumer Fraud Act simply requires that

plaintiff prove “that the [d]efendant intentionally concealed material facts with the intent that others would rely upon such concealment.” *Id.* Plaintiff has alleged facts sufficient to put Coldwell Banker on notice of the false statement at the center of the claim (that the home was stick-built rather than being a modular home), the time frame that the statement was made, and to whom the statement was made. Plaintiff alleges that Coldwell Banker misrepresented the truth and such misrepresentations were of a material nature, causing Plaintiff to purchase Property he would not have otherwise purchased. Additionally, Plaintiff asserts that he relied upon the representations made by Coldwell Banker; however, such a showing is not necessary to a claim for violation of the Consumer Fraud Act. *Id.* Consequently, Plaintiff may move forward his claim against Coldwell Banker for violation of the Consumer Fraud Act.

(b) Deceptive Trade Practices Act (6 Del. C. §§ 2531-2536)

“The [Deceptive Trade Practices] Act is intended to address unfair or deceptive trade practices that interfere with the promotion and conduct of another’s business.” *Grand Ventures v. Whaley*, 632 A.2d 63, 65 (Del. 1993). The Deceptive Trade Practices Act prohibits a variety of conduct with respect to the sale of “goods or services,” it does not, however, apply to the sale of real estate. *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1073 (Del. 1983); *see also, Clarkson v. Goldstein*, 2005 Del. Super. LEXIS 191, at * 22 (Del. Super. May 31, 2005) (“While the Deceptive Trade Practices Act does not apply to sales of real estate, the Act does apply to businesses related to real estate that involve the provision of goods and services.”).

The transaction involved in this matter was the sale of real estate and is not covered

by the Deceptive Trade Practices Act. Plaintiff avers that the opportunity to purchase the “Coldwell Banker Home Protection Plan,” found in the Contract, qualifies the transaction as one involving “goods and services.” However, this transaction was rooted only in the sale of real estate. The present action for violation of the Deceptive Trade Practices Act will be dismissed where the only connection to the sale of “goods and services” is a Home Protection Plan that was declined by Plaintiff.

Plaintiff suggests that the case of *State v. Wellington Homes, Inc.*, 2003 Del. Super. LEXIS 304 (Del. Super. Aug. 20, 2003), supports the application of the Deceptive Trade Practices Act. However, the *Wellington Homes, Inc.* case is not helpful here. The following excerpt illustrates the Court’s position:

I reject the plaintiff’s contention that the word “merchandise” in the Deceptive Trade Practices Act includes real estate. The above-mentioned cases which held that the Deceptive Trade Practices Act does not apply to a sale of real estate would appear still to be good law, until either a reinterpretation by the Delaware Supreme Court or a new statutory amendment clearly extends the Deceptive Trade Practices Act to simple real estate transaction not involving a sale of goods or services.

Wellington Homes, Inc., 2003 Del. Super. LEXIS at * 11. The Court in the *Wellington Homes, Inc.* case further found that “[t]he record of the case, as presented to the Court, [was] insufficient to allow a judgment to be formed as to whether the sale was a simple sale of real estate, or a transaction which included goods or services.” *Id.* at * 14-15. The case here is clearly different.

CONCLUSION

Considering the foregoing, Genther’s Motion to Dismiss Plaintiff’s claims alleging breach of contract, fraud and misrepresentation and negligence is DENIED. Genther’s

Motion to Dismiss Plaintiff's claims for violation of the Consumer Fraud Act and Buyer Property Protection Act is GRANTED. Coldwell Banker's Motion to Dismiss Plaintiff's claim alleging violation of the Consumer Fraud Act is DENIED. Coldwell Banker's Motion to Dismiss Plaintiff's claim alleging violation of the Deceptive Trade Practices Act is GRANTED.

IT IS SO ORDERED

Very truly yours,

Richard F. Stokes

cc: Jeffrey K. Martin, Esquire
Prothonotary