COURT OF CHANCERY
OF THE
STATE OF DELAWARE

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY
COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE
19947

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Richard E. Berl, Jr.
Smith Feinberg McCarney & Berl LLP
406 S. Bedford Street
P.O. Box 588
Georgetown, DE 19947

Craig A. Karsnitz
Young Conaway Stargatt & Taylor LLP
110 West Pine Street
P.O. Box 594
Georgetown, DE 19947

Re: *Grzybowski v. Tracy*,
Civil Action No. 3888-VCG

Dear Counsel:

The Plaintiffs bought a Rehoboth Beach townhouse condominium unit from the Defendant in 2006, for $569,000. In the two years after the sale, necessary repairs of leaks in other units caused by shoddy construction required the condominium board to collect special assessments totaling $65,000 from each unit holder, including the Plaintiffs. Although recoupment from the builder ultimately offset this sum, the Plaintiffs remain out-of-pocket over $40,000. The question before me is whether this loss should be borne by the buyer or the seller. The Plaintiffs allege fraud and equitable fraud as a result of the Defendant's allegedly insufficient disclosures made to the buyers prior to the sale. They seek

rescission—their preferred remedy, having bought at the height of the now-weakened real estate market—or, in the alternative, damages.

A. Background Facts[1]

Defendant Mary Tracy inherited a townhouse from her mother in Canal Landing, a 70-unit condominium project developed in the early 2000s. Tracy's mother had purchased the unit when new. Neither Tracy's mother nor Tracy herself lived in the townhouse full-time.[2] Tracy began noticing leaks around the kitchen and bathroom windows of the townhouse in 2003 and 2004. Problems with leaks persisted until the fall of 2005, when the condominium's property manager had to perform extensive repairs to the Defendant's unit, which required reconstructing the exterior of the unit.[3] Ultimately, the leaks were satisfactorily fixed. Tracy was generally not present for the repairs,[4] and she was not aware that her unit required extensive repairs at the time they were made.[5] Since the unit was under warranty and the repair costs therefore not her responsibility, Tracy was generally unconcerned with how much the repairs had cost or what had been done to fix the leaks; she cared only that the leaks had been fixed.[6] Other units also experienced leaks. The Plaintiffs submitted evidence that the homeowners may

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[1] The following facts represent my findings of fact, drawn from the testimony of witnesses at trial as well as the trial exhibits.
[2] Trial Tr. 96:8-24.
[3] Trial Tr. 56:1-58:4.
[4] Trial Tr. 104:13-17, 110:17-111:6, 117:10-14.
[5] Trial Tr. 122:21-123:9.
[6] Trial Tr. 140:22-24.

have paid a special assessment of $500 to the homeowner's association in 2005 related to leaks and trash services, but Tracy testified, credibly, that she did not recall such an assessment.[7]

In December 2005, the Defendant briefly became a member of the Canal Landing Board of Directors. During meetings that Tracy attended, widespread leaks throughout the condominium were discussed, as is evidenced from the minutes of those meetings. The minutes of the first meeting reflect that $36,000 in leak repair expenses had been incurred in 2005, and that half of the seventy units in Canal Landing had reported problems with leaks.[8] Tracy testified that the reported leaks did not concern her because she was informed that many of those leaks were minor in nature.[9] Tracy resigned from the Board after three months' service in February 2006.

According to a disinterested former member of the Canal Landing board, Edward M. Barberic, in 2006 the board projected that the expenses for leaks would be similar to those incurred in 2005, around $36,000, representing about $500 per unit.[10] By mid-2006, however, $50,000 had already been expended to repair leaks

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[7] Though the Defendant had no recollection of this assessment at trial, Mr. Barberic, a member of the Canal Landing Board, recalled a special assessment. Trial Tr. 35:2-17. However, Mr. Barberic could not recall if the special assessment was specifically for leak repairs. Trial Tr. 40:15-19. Furthermore, no admissible documentation showing Tracy's special assessment was produced. *See id.* 80:20-23.

[8] Trial Tr. 49:19-50:3.

[9] Trial Tr. 125:9-13.

[10] Trial Tr. 5:6-10.

during the year. The Board had not adequately budgeted for these leak repairs.[11] Still, according to the property manager, the board considered the problems to be "manageable" at that point.[12]

According to Mr. Barberic's testimony, the Canal Landing board was not aware of the extent of the leak problem in 2005 or 2006. For example, the board conducted a special assessment in fall 2006 of $1,000 per unit, or $70,000, to cover the additional expenses of the leaks in 2006.[13] According to Mr. Barberic, the board "felt that would cover it through the end of 2006" and Canal Landing's management company "believed that would end the problem."[14] Mr. Barberic's testimony indicates that it was not until spring or summer of 2007, after the board received an engineer's report, that that board realized the true magnitude of the problem.[15] This testimony was corroborated by a representative of the property manager, Mr. Baldo, who testified that the problems "evolved" over the years.[16]

In February 2006, the Defendant accepted a job in California, and decided to sell her townhouse. She resigned from the Canal Landing Board on February 25,

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[11] Trial Tr. 22:3-23:5; *id.* 43:14-44:16. It is unclear from the record whether there was discussion of a $1,000 special assessment as early as the February 2006 meeting, but that special assessment was not actually conducted until late 2006, when the Plaintiffs owned the property.
[12] Trial Tr. 93:6-18.
[13] Trial Tr. 5:15-16.
[14] Trial Tr. 5:18-20. *See also id.* 5:20-21 ("We had a finite number of houses that had leaks at that point.").
[15] Trial Tr. 7:4-6 ("I don't think we saw a report until late spring or early summer 2007. And at that point, we started getting the first sense of just how bad it was going to be.").
[16] Trial Tr. 90:21-91:3.

2006 and listed her unit for sale. As part of the sales process, the Defendant completed a *Seller's Disclosure of Real Property Condition Report* (the "Disclosure Report"), mandated by the Buyer Property Protection Act, 6 *Del. C.* § 2570, *et seq.* Question 51 of the Disclosure Report sought information related to leaks. In answering the question, Tracy disclosed a "window leak in kitchen & main level bathroom, reported to Excel + fully repaired."[17] Tracy also included the name and phone number of the management company, Excel, which could be contacted with questions.[18] At trial, when she was asked why she did not elaborate about the extent of the repair work or the dampness that had been found in the walls, Tracy testified that she believed, correctly, that the problems had been fixed.[19] Question 11 on the form asked whether she knew of any conditions or claims related to the property which might result in an increase in assessments. The Defendant responded to this question by checking a box marked "unknown."[20] When asked why she did not call the management company to ask if special assessments were forthcoming, Ms. Tracy explained that she had no recollection of

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[17] Ex. 2.

[18] Trial Tr. 153:7-11.

[19] Trial Tr. 141:10-13.

[20] Trial Tr. 141:18-24. The form allowed the answers "Yes," "No," and "Unknown." Answering a question that inquires whether one has knowledge "unknown" has a peculiarly Rumsfeldian quality. *See* Rumsfeld's Rules: 'I Stand By What I Meant', ABC News http://abcnews.go.com/blogs/politics/2013/05/donald-rumsfelds-rules-vs-rumsfeldisms/ (May 31, 2013 12:00 p.m.) ("There are things we know we know. There are known unknowns. . . . [T]here are also unknown unknowns. There are things we do not know we don't know.").

any special assessment, and therefore she "wouldn't call to verify something that [she] had no knowledge of."[21]

Finally, Question 20 of on the form sought information regarding "anything else" that might "materially and adversely" affect the property. The Defendant answered this question "no."[22] Tracy testified that it did not occur to her to disclose that 50% of the condominium units had reported leaks.[23] She did not believe that the "minor leaks" in other units were something that a prospective purchaser might want to know about prior to entering into a $500,000 transaction.[24]

In early 2006, the Plaintiffs were looking to buy a replacement second home and had looked at several properties. Before purchasing the Canal Landing townhouse, the Plaintiffs received only the disclosures contained in Tracy's Disclosure Report, discussed above.[25] No one informed the Plaintiffs, prior to the sale, about the widespread problems with leaks in the community.[26] The Plaintiffs agreed to purchase the townhouse from the Defendant in March 2006. The Plaintiffs testified that they relied on the representations in the Defendant's

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[21] Trial Tr. 143:3-4.
[22] Trial Tr. 143:13-18.
[23] Trial Tr. 143:23-144:6.
[24] Trial Tr. 145:1-5, 145:14-22 ("[A]t least to me from the short period of time I was involved and people talk [sic] about it[,] it was a manageable issue[.] [S]o to me it just didn't occur to me to disclose it . . . .").
[25] Trial Tr. 160:17-19.
[26] Trial Tr. 160:23-161:2.

disclosures in deciding to purchase the property.[27] Prior to the sale, the Plaintiffs hired an inspector to perform a home inspection.[28] During the inspection, the Plaintiffs did not inform the inspector that the unit had been subject to leaks in the past.[29] The Plaintiffs also did not call the management company to inquire if there had been any issues with the unit or the community, or whether special assessments were contemplated, despite having an "unknown" response to the question about potential special assessments.[30]

The parties settled on June 9, 2006. In the fall of 2006, the Board approved the above-described special assessment in the amount of $1,000 per townhouse. In the following years, the problems with leaks continued, ultimately resulting in the need for a significant reconstruction, costing over $4 million.[31] To pay for the renovation, the board collected $65,000 in special assessments from *each unit* in the condominium.[32]

The homeowners of Canal Landing sued the developer and architect of the condominium to pay for the necessary repairs. As a result of a settlement of that lawsuit, the Plaintiffs recouped around $20,000 of the $65,000 they were required

[27] Trial Tr. 161:6-8.
[28] Trial Tr. 162:12-22.
[29] Trial Tr. 162:23-163:14.
[30] Trial Tr. 163:15-22.
[31] Trial Tr. 7:16-18; *id.* at 25:13-24.
[32] Trial Tr. 4:3-4.

to pay in special assessments.[33] Therefore, the amount at stake in this litigation is something over $40,000.

The Plaintiffs filed this lawsuit two years after the sale of the townhouse, on July 14, 2008, alleging fraud and equitable fraud. As a remedy, the Plaintiffs seek rescission of the land-sale contract or damages. The case languished for five years after the filing of the Complaint with little to no progress, partly because this suit was not pursued during the homeowners' lawsuit against the developer.[34] I held a one-day trial on May 16, 2013. Following trial, the parties submitted post-trial briefing further clarifying their arguments. This Letter Opinion represents my findings and decision.

B. Analysis

The Plaintiffs allege that the Defendant committed fraud and equitable fraud in neglecting to disclose material facts to the Plaintiffs before the sale of the townhouse. I will address each claim in turn.

1. <u>Fraud</u>

Under common law, a finding of fraud requires:

1) a false representation, usually one of fact, made by the defendant;

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[33] Trial Tr. 9:6-16. According to Barberic, each unit holder received $24,600. I note that Mr. Barberic used his own personal records to testify about the amounts remitted to the homeowners, rather than any official books of the board. Trial Tr. 13:2-14. Plaintiff Grzybowski testified that only $19,854.57 was refunded to her. Trial Tr. 165:23-24. I need not determine which of these sums is correct, since the Plaintiffs have failed to demonstrate actionable fraud.

[34] The Defendant moved to stay this case in 2010, which motion I denied. Nonetheless, activity stalled, and this case remained largely dormant until the trial on May 16, 2013.

2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
3) an intent to induce the plaintiff to act or to refrain from acting;
4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
5) damage to the plaintiff as a result of such reliance.[35]

The burden is on the plaintiff to prove each element by a preponderance of the evidence.[36] To be fraudulent, the false representation need not "consist merely of overt misrepresentations, but 'may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak.'"[37] The disclosure provisions of 6 *Del. C.* §§ 2572 and 2573 create such a duty, requiring a seller's disclosure report.[38]

a. A False Representation or Omission of Material Fact

Here, Tracy made representations to the Plaintiffs about the condition of the townhouse prior to the sale, in the Disclosure Report. On that form, the Defendant disclosed the leaks in the bathroom and kitchen and reported that these leaks had been fixed. The Plaintiffs argue that, though this representation was technically correct, Tracy had a duty to disclose that "major" repairs had been necessary, costing $8,000. By failing to disclose those facts, according to the Plaintiffs, Tracy committed fraud by being silent in the face of a duty to speak.[39] Second, the

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[35] *Zirn v. VLI Corp.*, 681 A.2d 1050, 1060-61 (Del. 1996)(emphasis removed).
[36] *Ranch v. Lynch*, 27 Del. 446, 89 A. 134, 136 (Super. Ct. 1913).
[37] *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992).
[38] *See* 6 *Del. C.* §§ 2572, 2573.
[39] *See id.*

Plaintiffs argue that the Defendant failed to disclose that 50% of the units in Canal Landing had reported leaks. Third, the Plaintiffs argue that the Defendant should have disclosed that special assessments were likely in the future to pay for these leaks. I address each of these arguments in turn.

First, the Plaintiffs argue that the Defendant should have disclosed the extent of the leaks in her unit and that it cost $8,000 to repair those leaks. To the extent there was an omission, it was immaterial. The Defendant disclosed "window leak in kitchen & main level bathroom, reported to Excel + fully repaired." The Defendant also provided the name and phone number of the management company. This disclosure was sufficient. The Plaintiffs paid $569,000 for the condominium. That $8,000 in repairs was required at one point, to remedy a problem that has not yet resurfaced in the unit for seven years, is not material, where the seller disclosed that the leaks had occurred and were fixed. The law requires disclosures to put a purchaser on notice of a problem, and the disclosure made here was adequate for that purpose.

In any event, the sufficiency of the disclosure about the leak in the Defendant's unit is immaterial. Whether the leak problem is characterized as major or minor (or, as in actuality, not characterized at all), the repairs were effective, and the Plaintiffs have suffered no damages from what they characterize as the inadequate disclosure. The Plaintiffs suggest that had they been made aware

of a "major" leak, or one that cost $8,000 to repair, they would not have purchased the property and thus would have avoided the special assessments for leaks in other units that represent the damages sought by the Plaintiffs. If true, such a result would have been a mere fortuity. If there was an actionable misrepresentation here, it must involve the assessments, not the repaired, disclosed damage to the Defendant's unit.

Next, the Plaintiffs argue that the Defendant should have disclosed that 50% of the units in Canal Landing had reported leaks at the time of the sale. This, too, does not rise to the level of materiality. At the time of the sale, the Canal Landing Board considered only two of the leaks to be "major." The rest of the leaks were thought to be minor. Both Mr. Barberic and Mr. Baldo testified that this was the case, neither of whom has an interest here. As of February 2006, the leaks were considered "manageable" by the Board. Furthermore, Ms. Tracy knew that her own unit was unlikely to be susceptible to similar leaks, since her windows had already been repaired. The leaks in other units can be material only to the extent that they relate to the special assessments, which represent the damages sought here. In other words, the Defendant's knowledge of other leaks is relevant to her duty to disclose the likelihood of a forthcoming special assessment, as described below. I find that the Plaintiffs have not met their burden of showing that the Defendant should have disclosed the leaks in other Canal Landing units.

The Plaintiffs real argument is that the Defendant should have disclosed that special assessments were likely forthcoming to pay for repairs arising from leaks. They point out that she answered the query on the disclosure form about special assessments "unknown" rather than "yes." If the Defendant had been aware that $65,000 in special assessments were forthcoming in the next two years, of course, her answer to this question would support an action for fraud. However, the record simply does not support such an assertion. While leaks were discussed during her brief tenure on the Board, it is notable that thousands of dollars in special assessments for the leaks were not. Nothing in the record convinces me that the Defendant was aware that a material special assessment was forthcoming, to correct leaks or otherwise. The Plaintiffs assert that Tracy paid a special assessment of $500 in 2005, a part of which was attributable to leak repair. The existence of that assessment is disputed. However, even assuming that she had paid such an assessment, I cannot from that fact infer that the Defendant could have predicted $65,000 or any material amount in further special assessments. One $500 special assessment during the several years that Tracy and her mother owned the property—one tenth of one percent of the sale price—would not have put Tracy on notice that material special assessments were likely. As I described above, both the property manager and the board of Canal Landing believed that the leak problems could be fixed easily. Even by mid-2006, at which time Tracy was

off the Board, the Board believed that a $1,000 special assessment would be sufficient to effect needed repairs. It was not until spring or summer of 2007—one year after the sale—that the board became aware of the magnitude of the problem. It is notable that the Plaintiffs did not bring this rescission action upon learning of the 2006 $1,000 special assessment, at which point the Plaintiffs knew more about the leak problem than did the Defendant at the time of the sale. It was not until July 14, 2008, *two years* after the sale and once the full extent of the problem was manifest, that the Plaintiffs first sought rescission. The Plaintiffs have not met their burden of proving that by not disclosing any past special assessments, or that such assessments would be required in the future, the Defendant made a material misrepresentation or omission.

b. The Defendant's Knowledge or Belief that the Representation was False, or was made with Reckless Indifference to the Truth

Even if any of the allegedly inadequate disclosures were material, the Plaintiffs have not met their burden of proving scienter. The Plaintiffs argue that, from the board minutes and Mr. Baldo's testimony, I can infer that the Defendant knew (1) that her unit had had extensive problems with leaks, and (2) that half of the units at Canal Landing had problems with leaks. The problem with that argument is that Mr. Barberic, a disinterested witness, testified that the board, itself, had no idea that the issues with leaks would be expensive to fix as of early

2006, when Ms. Tracy sold her unit.[40] Ms. Tracy corroborated that testimony by representing that she had no idea that the leaks would require special assessments or would lead to litigation.[41]

Furthermore, it is not clear to me that the Defendant knew of the magnitude of the damage to her own unit. The Defendant testified that she was not present for the repairs of the leaks, and that the unit was her secondary home. The Defendant did not characterize the leak problems in her unit as "major," and the amount of money it cost to fix the leaks did not concern her because she viewed the leaks as a warranty issue. All that concerned the Defendant was that the leaks were fixed. As a result, it did not occur to the Defendant to disclose the cost of the leaks, none of which was paid by the Defendant, herself.

Nor were the Defendant's disclosures recklessly indifferent to the truth. To the contrary, the Defendant provided the Plaintiffs with information to determine whether the community and the unit had problems: the name and phone number of the property manager. While such a provision does not obviate the need for accurate and sufficient disclosures, it is inconsistent with an inference of an intent to deceive. Instead, I find Ms. Tracy's testimony—that the leaks were not part of her thought-process in filling out her disclosures—credible. That is, I believe the

[40] *See* Trial Tr. 5:6-6:14.
[41] Trial Tr. 153:18-154:10.

Defendant's testimony that she did not make a conscious judgment to forbear from disclosing information concerning leaks.[42]

Based on these facts, I find that the Plaintiffs have not met their burden of proving that Mary Tracy knew that leaks were a major problem at Canal Landing or that special assessments were likely forthcoming. Given that I have found that the Plaintiffs have not met their burden of proving either a material omission or scienter, I need not consider the other elements of fraud.

The Plaintiffs argue that this case is similar to the facts of *Dunn v. Vaudry*, in which the Superior Court denied a seller's motion for summary judgment on a fraud claim where the seller had vaguely disclosed problems with water leaks in their disclosures to buyers.[43] That case is clearly distinguishable, however. The sellers in *Dunn* knew for three years before the sale of their property that extensive repairs to their condominium community were necessary and likely to cost over $2 million.[44] Three separate engineering studies confirmed that the structure was unsound.[45] Yet when the sellers sold the condominium, they failed to disclose those facts to the buyers.[46] Here, it clear that no one, much less Mary Tracy, knew the extent of the damage in Canal Landing at the time of the sale. Furthermore, unlike the Defendants in *Dunn*, Tracy did not know that thousands of dollars in

[42] Trial Tr. 145:23-146:2, 153:12-17.
[43] *Dunn v. Vaudry*, 2011 WL 4638266 (Sept. 30, 2011).
[44] *Id.* at *1-2.
[45] *Id.*
[46] *Id.* at *3-4.

special assessments were likely forthcoming. Therefore, *Dunn* is not persuasive here, and I find that the Defendant has not committed common-law fraud.

I turn now to the Plaintiffs' claim for equitable fraud.

2. Equitable Fraud

The Plaintiffs argue that a finding of equitable fraud is appropriate under these circumstances. The elements of equitable fraud are the same as the elements of common-law fraud, except that proof of scienter is not required to obtain relief for equitable fraud.[47] Entitlement to relief under a theory of equitable fraud is both more and less difficult to establish than with legal fraud: the plaintiff need not demonstrate scienter, but she must demonstrate that considerations of equity require this Court to act.[48] Equitable fraud is appropriate in this case only if there is a legitimate claim for an equitable remedy.[49]

[47] *Craft v. Bariglio*, 1984 WL 8207, at *172 (Mar. 1, 1984) ("[W]hile intent to defraud or deceive is an essential element to a recovery for fraudulent misrepresentations in an action at law, such intent is not essential to equitable relief if a false statement has in fact been made . . . .").

[48] *See Craft*, 1984 WL 8207 at *178-80 (finding that misrepresentations had been made by a seller to a buyer of a business but denying rescission because four years had passed and it was impossible to return the parties to the status quo).

[49] Equitable fraud comes in two flavors. One involves misrepresentation or similar cases in which equitable factors cause this court of equity to relax the elements required to demonstrate common-law fraud; typically, these cases involve a fiduciary relationship between defendant and plaintiff. The second, alleged here, involves the assertion that equity requires that the parties be provided an equitable remedy, as rescission, which places them in the position they were in prior to the misrepresentation, despite the inability of the plaintiff to show scienter. *See generally In re Wayport, Inc. Litig.*, 2013 WL 1811873 (Del. Ch., May 1, 2013)(discussing the varieties of equitable fraud and citing cases).

For example, in *Craft v. Bariglio*, then-Chancellor Brown found that sellers of a business had made material misrepresentations to a buyer before contracting.[50] Nonetheless, the Court entered judgment in favor of the sellers because rescission was inappropriate under the facts of the case.[51] Specifically, the buyers had waited four months to bring suit for rescission, although the facts underlying the suit were known to the buyers as soon as the contract closed.[52] Furthermore, because of protracted litigation, the Court found itself in the "disturbing posture" of "being asked to rescind the sale of an ongoing pizza and delicatessen business more than four years after the transfer of ownership."[53] Because the buyers had waited four months to bring suit, and because returning the parties to the status quo was impossible after four years, the Court refused to grant the rescission.[54] Thus, although misrepresentations had been made, judgment was in favor of the sellers.[55]

Here, the Plaintiffs argue that they are entitled to rescission, an equitable remedy, based on principals of equitable fraud. If so, they would be entitled to seek rescission of the contract even if the Defendant made only an innocent misrepresentation in drafting her disclosures, if the equities otherwise so required. As the Court noted in *Craft*,

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[50] *Craft*, 1984 WL 8207 at *173.
[51] *Id.* at *178-80.
[52] *Id.* at *178.
[53] *Id.* at *167-68.
[54] *Id.* at *177-80.
[55] *Id.* at *180.

> An application for rescission of a contract is addressed to the sound discretion of the Court. It is an application governed by equitable principles. One requirement is that a party who discovers that he has been misled into entering into a contract by false representations must act with reasonable diligence if it is his intention to seek rescission as opposed to affirming the contract and suing for damages. He cannot be permitted to derive all possible benefits from the transaction and then, when he is called upon to comply with its terms, claim to be relieved of his obligation of the grounds of misrepresentation.
>
> This requirement goes hand in hand with another equitable principle which governs an application for rescission, namely, that rescission will not be granted unless the Court can and does, by its decree, restore the parties substantially to the position which they occupied before making the contract.[56]

Based on the above principles, and based on the Court's decision in *Craft*, it is clear that rescission is inappropriate in this case. First, and most importantly, seven years have passed since the sale of the condominium. In the interim, the housing market has materially changed, and home values have generally fallen. Allowing the Plaintiffs to occupy the home for seven years and then shift the lost value of the home onto the sellers—given the pace at which the Plaintiffs have pursued this case—would be inequitable. The Plaintiffs have not acted with reasonable diligence in pursuing rescission. Rescission was not sought until two years after the purchase. Though this case languished for a few years during the trial against Canal Landing's developer and architect, there is no reason why the

[56] *Id.* at *176-77 (internal citations omitted).

Plaintiffs' claims for *rescission* could not have advanced.[57] On the contrary, the Plaintiffs elected to wait for an eventual determination of damages. Having made that tactical decision, it would be inequitable for me to turn a blind eye to the changes in the market which have made it impossible to effectively return the parties to the status quo.[58] Therefore, this is not one of the rare scenarios in which the extraordinary equitable remedy of rescission is warranted. The effect of this decision is that the Plaintiff's claim for equitable fraud fails.

Even if the equities otherwise supported rescission, none of the responses to the disclosure form amounts to a material misrepresentation, innocent or otherwise. Unfortunately for the Plaintiffs, they purchased a condominium unit which became subject to a very large special assessment. If the Defendant had been aware that such an assessment was reasonably likely, equity might compel relief here. The evidence, however, was otherwise.

C. Conclusion

The Plaintiffs, seeking relief from fraud, have failed to meet their burden of proving that the Defendant misrepresented or omitted some material fact before the

[57] In fact, I denied the Defendant's motion to stay in this case on February 9, 2010, finding that a stay was inappropriate since the Plaintiffs had pled a claim for rescission. Teleconf. Def.'s Mot. to Stay 5:5-13, Feb. 9, 2010.

[58] *See Craft*, 1984 WL 8207 at *178 (finding that rescission was inappropriate given the plaintiffs' four-month delay in bringing suit for rescission and four-year period while litigation progressed). I rely on judicial notice—rather than the record—for the observation that the real estate market has weakened. Even if the townhouse had increased in value, however, rescission would be inappropriate here, given the dilatory assertion of the Plaintiffs' rescissory rights and the resulting inevitable wear and aging of the premises.

sale of the condominium or that the Defendant knew that her disclosures were false or inadequate. Likewise, equitable fraud is inappropriate since rescission is not warranted under the facts of this case. Judgment is in favor of the Defendant. The parties should submit a form of order implementing this decision.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III