IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

RIA K. MALINAK and JEFFREY MALINAK,	)	
Plaintiffs,	)	
v.	)	C.A. No. CPU6-11-002145
JOHN KRAMER, and, SHIRL KRAMER,	)	
Defendants.	)	

Submitted: November 14, 2011
Decided: January 5, 2012

Dean Campbell, Esq., Attorney for Plaintiffs
Michael Smith, Esq., Attorney for the Defendants

DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On November 14, 2011 the Court heard oral argument on Defendants' Motion for Summary Judgment. After considering the parties' submissions and arguments, the Motion is granted in part and denied in part.

Background

On September 6, 2011 Plaintiff Ria Malinak filed suit seeking $15,322.50 in damages arising from allegedly improperly installed windows that resulted in extensive water damage to her South Bethany Beach home.[1] Defendants John

[1] On November 8, 2011, Plaintiff moved to amend her complaint to join Jeffrey Malinak as a party plaintiff. The parties stipulated to the amendment on the record at the hearing of this motion.

Kramer and Shirl Kramer, acting as their own general contractors, had the house constructed in 2005. Between 2005 and August 2009, the Defendants both occupied the house themselves and rented it to tenants.

On July 7, 2009, Plaintiffs and Defendants entered into a Standard Form Agreement of Sale of Residential Property ("The Contract"). As part of the Contract, and as required by Delaware law, the Defendants completed a Seller's Disclosure of Real Property Condition Report ("Disclosure Report"). According to the Disclosure Report, the Defendants checked "NO" when asked if they were aware of any problems affecting the windows and/or exterior and interior walls of the property. Plaintiffs assert that, prior to their inspection of the property, the areas around the windows had been painted. Settlement occurred on August 19, 2009.

On March 19, 2010, during a visit to the property, Plaintiffs discovered signs of water leakage in the drywall area below a bank of windows. Further investigation revealed other evidence of water intrusion in other areas of the property. Plaintiffs hired a qualified building inspector to inspect the house. Plaintiffs' inspector claims to have found significant problems with the window constructions, namely that the windows had been installed incorrectly and not in compliance with manufacturer recommendations and without proper flashing and other weather-proofing. Plaintiffs allege they paid $15,322.50 to have the installation defects identified and corrected.

Plaintiffs' complaint contains four separate counts, for breach of contract, breach of implied warranties, fraud and misrepresentation, and negligence.

On November 5, 2011 Defendants filed the present motion for summary judgment as to all counts.

Discussion

A motion for summary judgment is granted only if the pleadings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] In reviewing the pleadings, "[a]ll facts are viewed in a light most favorable to the non-moving party."[3] As the Court finds material facts in dispute as to three of the Counts in the Complaint, the motion for summary judgment is GRANTED in part and DENIED in part.

Plaintiffs' first Count claims breach of contract. The parties entered into a Contract for sale of the property on July 7, 2009, and Defendants completed and provided Plaintiffs a Disclosure Report. Under Delaware law, "a seller transferring residential real property shall 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."[4] The Disclosure Report "is a good faith effort by the seller to make the disclosures required by [The Buyer Property Protection Act]," and once signed by both parties, "become[s] a part of the purchase agreement."[5]

After considering the submissions of the parties, the Court finds that a genuine issue of material fact remains as to whether the Defendants completed the Disclosure Report in good faith. According to the home inspector hired by

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[2] CCP Civ. R. 56 (c).
[3] *Dunn v. Vaudry*, 2011 WL 4638266 (Del. Super. 2011).
[4] 6 *Del.C.* § 2572(a), commonly referred to as "The Buyer Property Protection Act."
[5] 6 *Del. C.* § 2573 and 2574.

Plaintiffs following the discovery of the water damage around the windows, the damage was a result of faulty window installation, dating back to when the house was originally constructed in 2005. In the Complaint, Plaintiffs allege that the areas around the windows had been painted prior to their inspecting the property. Further, the property had been owned and occupied by the Defendants and their tenants for four years prior to its sale to the Plaintiffs. Viewing the facts in the light most favorable to Plaintiffs, the Defendants might have known of the water leakage/damage when completing the Disclosure Report.

Count III alleges fraud and misrepresentation. Common law fraud consists of five elements: "1) a false representation, usually one of fact, made by the defendant; 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."[6] Viewing the facts in the light most favorable to Plaintiffs, what the Defendants knew or should have known regarding the faulty window installations and water leakage and damage remains at issue for determination at trial.

Count IV states a claim for negligence. "In an action based upon negligence, for a plaintiff to recover, it must be shown by a preponderance of the evidence that the defendant's negligent act or omission violated a duty which

[6] *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

was owed to the plaintiff. The plaintiff must also prove, *inter alia,* that there is a reasonable connection between the negligent act or omission of the defendant and the injury which the plaintiff has suffered."[7] In certain circumstances, where the Defendant is alleged to have violated a statute or ordinance, he may be guilty of negligence per se.[8] Plaintiffs assert that Defendants "had a duty to construct the house in conformity with local standards and local building codes."[9] The alleged negligence occurred in construction upon residential real property, so the tort claim, by statute, is not barred by the "Economic Loss Doctrine."[10] Genuine issues of material fact remain as to whether the Defendants, in their capacities as general contractors, violated any building codes applicable to the installation of the windows.

In Count II of the complaint, however, Plaintiffs allege that Defendants breached implied warranties of good quality and workmanship. "Whenever a residential home is sold in Delaware by a person in the business of selling homes, there exists an implied warranty of good quality and workmanship."[11] However, there must be a construction contract or builder-customer relationship between the parties onto which such an implied warranty could bind.[12]

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[7] *Culver v. Bennett*, 588 A.2d 1094, 1096-97 (Del. 1991) (internal citations omitted).
[8] *See Sammons v. Ridgeway*, 293 A.2d 547, 549 (Del. 1972) ("It has been long settled in this State that the violation of a statute or ordinance enacted for the safety of others is negligence in law or negligence per se.").
[9] Paragraph 32, Amended Complaint.
[10] 6 *Del.C.* § 3652.
[11] *Ellixson v. O'Shea*, 2003 WL 22931339 (Del. Com. Pl. 2003).
[12] See *Bougourd v. Vill. Gardens Homes, Inc.*, 2002 WL 32072790 (Del. Com. Pl. 2002) *aff'd*, 2004 WL 98714 (Del. Super. Ct. 2004) ("Generally, the law implies a duty in every building contract that the work or services be performed skillfully, carefully, diligently and in a workmanlike manner."); *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. Ct. 1908) ("Where a person holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possesses the requisite skill to perform such labor in a proper manner, and implies as a part of his contract that the work shall be done in a skillful and workmanlike manner.").

"[B]uilder-vendors are said to impliedly warrant that their houses are built in a workmanlike manner and are fit for habitation."[13] In this case, the parties were never in privity on a construction contract, or a contract of sale on a newly-constructed or to-be-constructed home. There is no evidence Defendants built the house to sell to Plaintiffs or anyone else. The contract was for the sale of a home built four years earlier, and occupied in the interim by both Defendants and their tenants. The mere facts that Defendants acted as their own general contractors to build the home they resided in and eventually sold, and at times may have otherwise been "in the business of selling homes" (as suggested by Plaintiff's counsel at oral argument) does not constitute them "builder-vendors" for the purposes of this home sale. Therefore, as a matter of law, Defendants are entitled to summary judgment as to Count II.

Conclusion

For the reasons discussed above, summary judgment is **GRANTED** in favor of Defendants and against Plaintiffs on Count II. Defendants' motion for summary judgment is otherwise **DENIED**.

IT IS SO ORDERED this _____ day of January, 2012.

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Kenneth S. Clark, Jr., Judge

[13] *Ellixson*, 2003 WL 22931339 (internal citations omitted).