IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

Reserves Development LLC, a Delaware Limited Liability Company, Plaintiff,	)	
v.	)	C.A. No. S07C-11-034 RFS
R.T Properties, L.L.C., a New Jersey Limited Liability Company, and WIND CHOP, L.L.C., FOUNTAIN, L.L.C. WATERSCAPE, L.L.C. and MOUNTAIN RANGE, L.L.C. Delaware Limited Liability Companies, Defendants,	)	
v.	)	
THE RESERVES DEVELOPMENT CORPORATION, a Delaware corporation and ABRAHAM KOROTKI, Third-Party Defendants.	)	

MEMORANDUM OPINION

Reserves' Motion for Declaratory Judgment that Korotki Is not a Party to the Agreement.
Granted.

Defendants' Motion for Summary Judgment that Reserves Warranted to Complete the Infrastructure within Nine Months of Execution of the Agreement.
Granted as to Legal Duty.
Denied as to Whether Reserves Fulfilled that Duty.

Reserves' Motion for Declaratory Judgment that R.T. Properties Is Responsible for Sewer Connection Fees.
Granted.

Reserves' Motion for Declaratory Judgment that R.T. Properties Breached the Agreement by its Failure to Build Homes.
Denied.

Reserves' Motion to Dismiss the Counterclaim and Third Party Complaint for Lack of Notice and Opportunity to Be Heard.
Denied.

Submitted: June 21, 2011
Decided: September 21, 2011

Steven Schwartz, Esquire, Schwartz & Schwartz, Dover, Delaware, Attorney for Plaintiff and Third-Party Defendants.

Marc S. Casarino, Esquire, White and Williams LLP, Wilmington, Delaware, Attorney for Defendants.

STOKES, J.

Plaintiff Reserves Development LLC ("Reserves LLC") brought this declaratory action to determine the rights and responsibilities of the parties under an Agreement of Purchase and Sale of Real Property ("the Agreement" or "the Contract"). The Agreement, executed April 13, 2005, is between co-signers Reserves LLC and Third-Party Defendant Reserves Development Corporation ("Reserves Corp.") as sellers, and Defendant R.T. Properties, LLC ("RTP") as purchaser. Defendants answered and raised a counterclaim and a third-party cross claim.

Defendant RTP and Defendant Landowners, introduced, *infra*, seek partial summary on Reserves LLC's alleged failure to complete the infrastructure pursuant to the Agreement.

The Parties

Reserves LLC and Reserves Corp. are developers of residential communities. Both are owned by Third-Party Defendant Abraham Korotki ("Korotki"). Hereinafter, Reserves LLC, Reserves Corp. and Korotki are referred to either individually or as "Reserves."

Defendant RTP, owned by Thomas Tranovich, is engaged in small-scale real estate development. Tranovich created four LLC's to protect him from personal liability, that is, Defendants Wind Chop, LLC, Waterscape, LLC, Fountain, LLC and Mountain Range, LLC (individually "Landowner," collectively "Landowners"). In November 2005, RTP conveyed title to its 17 lots to the Landowners.

Facts

Sussex County approved Reserves LLC's application to build 185 homes and a clubhouse, known collectively as The Reserves Resort, Spa and Country Club ("the Community"). The Community is located near Ocean View, Delaware, and was divided into four phases for purposes of development. The Agreement between Reserves and RTP pertained to two parcels of land in Phase 3 and consisted of 17 single-family lots ("the Property"). In total, Phase 3 included 71 lots.

Korotki received a notice to proceed with street improvements and drainage ways from the County on June 27, 2005 because he had made the required 125 percent bond to the County. At this point, lots could be sold and building permit applications could be filed. After completion and purchase of a home, a certificate of occupancy issued if, among other things, the residence is connected to a private septic or a public sewer system. Until 2009, the County required developers of subdivisions to pay sewer connection fees for all single family homes to be connected to the County system when the sewer lines within the subdivision were installed and approved by the County.[1]

On June 1, 2006, Korotki was informed by letter that the County refused beneficial acceptance, that is, final approval, for Phases 3 and 4 for several reasons. The incomplete items were the contractor's punch list, approval of an easement, submission of accounting

[1]*See* Affidavit of David B. Baker, County Administrator of Sussex County, dated May 24, 2011, ¶ 4, ¶ 5 and ¶ 6, Responsive Brief in Opposition to Plaintiff's Motion for Declaratory Judgment, Ex. A.

forms, computerized building documentation and, most notably, payment of sewer fees.

The parties made settlement on 10 lots on the Property in June 2005 and on the remaining 7 lots in August 2005. In June, Reserves contracted with Obrecht-Phoenix Contractors, Inc. ("Obrecht-Phoenix") as overall site management contractors. Obrecht-Phoenix was to deliver the lots in so-called "turn-key" condition, that is, all improvements complete and approval received from Sussex County for utilities, roads and curbing.

The site manager was Fresh Cut Custom Landscaping, Inc. ("Fresh Cut"), which was responsible for the infrastructure, including roads, utility lines, drainage systems and landscaping ("infrastructure"). Fresh Cut contracted with Reserves in June 2005, but it remains unclear what, if anything, Fresh Cut accomplished on the Property. In May 2006 Fresh Cut filed for bankruptcy, and Reserves LLC terminated its contract with Fresh Cut pursuant to a bankruptcy court order.

Korotki testified that several other contractors were hired to replace Fresh Cut. Korotki stated that if Bella Via and Crystal Corporation, other lot owners, had made their original $2.2 million contribution, later amended to $1 million, there would be no lawsuit.

Korotki stated that the major infrastructure was completed and the individual lots were buildable by the summer of 2006. In June 2006 the County issued beneficial acceptance for Phases 1 and 2. However, acceptance for Phases 3 and 4 was denied, primarily because the sewer fees had not been paid, as well as some other remaining

items.[2]

In September 2006, Korotki sought contribution from RTP for the sewer fees, for which the County accepts only lump sum payments. RTP refused, as did some other property owners. There had been unsuccessful efforts to draw down on Korotki's letters of credit to cover the expense, which was $4002.00 per lot.

In October 2005, Korotki received notice from the County to proceed with construction with roads and storm management facilities for Phases 3 and 4. These operations were required before Defendants could begin construction of homes. The fact that no houses have been built on the Property led to this lawsuit.

Posture

In November 2007, Reserves LLC filed for declaratory judgment, primarily seeking judgment on whether Defendants are contractually responsible for the sewer connection fees and whether Defendants failed to build houses pursuant to the Agreement. Reserves asserts that there is a ripe controversy among the parties as to whether Defendants' failure to build home has harmed and will continue to harm Reserves.

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[2]Plaintiff's App. to Ans. Br. to Defendants' Mot. For S.J., Ex. S (letter dated June 1, 2006, to Korotki from Sussex County Construction Coordinator Keith A. Bryan stating that beneficial acceptance for Phases 3 and 4 was denied pending completion of relatively minor matters, as well as the more significant fact that sewer connection fees had not been paid. Beneficial acceptance and connection permits would not issue until completion of all outstanding items.

Defendants answered and filed a motion for summary judgment that Reserves breached the Agreement by failing to complete the infrastructure within nine months of the contract, thus preventing Defendants from building houses.[3]

Discussion

A. Korotki not a proper party to a breach of contract action. Reserves moves to dismiss Defendants' breach of contract claims against Korotki because he is not a proper party to this action.

When considering a motion to dismiss, this Court must accept as true all well-pled factual allegations if they provide the opposing party with notice of the claim, draw all reasonable inferences in favor of the non-moving party and deny the motion unless the non-moving party could not recover under any reasonably conceivable set of circumstances susceptible of proof.[4]

Defendants argue that Korotki can be held personally liable for his tortuous conduct. In support of its position, Defendants rely on *T. V. Spano Bldg. v. Dept. of Natural Resources*,[5] a case which arose under Delaware's Hazardous Waste Management

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[3]In their answer, Defendants raised numerous allegations, but in their briefing have pursued only the issue of Plaintiffs' alleged failure to complete the infrastructure. The remaining allegations are deemed waived. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999), (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

[4]*Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 2011 WL 3612992 (Del.).

[5]628 A.2d 53, 61 (Del. 1993).

Act. The *Spano* Court held that the General Assembly intended the Act to impose personal liability on corporate officers who improperly dispose of hazardous waste.[6] Thus, *Spano* is not dispositive here.

Defendants also argue that it is a fundamental principle that Delaware law disfavors contractual provisions releasing a party from the consequences of its own wrong. They rely on *Slowe v. Pike Creek Court Club, Inc.*,[7] in making this argument. In *Slowe*, an individual who signed a liability waiver when he joined a health club brought an action in negligence against the club when he was injured in the club's pool. This Court ruled that the waiver did not release the health club from claims based on its own negligence.[8] *Slowe* has no relevance here.

Korotki is the sole officer and director of The Reserves Development Corporation. He is the sole officer and member of Reserves Development LLC. Korotki signed the Agreement in his capacity of manager of Reserves Development LLC. He co-signed the Agreement in his capacity of President of The Reserves Development Corporation. There is no evidence that in either certificate of formation Korotki accepted personal liability for either entity's debts. Nor did he assume personal liability under the Agreement with RTP. Korotki is therefore shielded from personal liability for the debts of both Reserves

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[6] *Id.*

[7] 2008 WL 5115035, at *2-*3 (Del. Super.).

[8] *Id.* at *3.

Development LLC and The Reserves Development Corporation, under 6 *Del. C.* § 18-303(a) and 8 *Del. C.* § 102, respectively.[9]

Reserves' motion to dismiss Korotki from the breach of contract issues raised in the Counterclaim and Third party Complaint is **GRANTED**.

B. Infrastructure. Defendants moves for summary judgment on the issue of whether the Agreement provides that Reserves warranted to provide access to the Property and necessary utilities for construction within nine months of execution of the Agreement.

Summary judgment should be granted if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[10] The acts must be viewed in the light most favorable to the non-moving party.[11] Summary judgment will not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts to clarify the application of the law to the circumstances.[12]

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[9]*Thomas v. Hobbs*, 2005 WL 1653947, at *2 (Del. Super)(concluding that this Court has no jurisdiction to pierce corporate veil of limited liability company or corporation). *See also Trustees of the Village of Arden v. Unity Construction Co.*, 2000 WL 130627, at *3 (Del. Ch.)(addressing piercing veil of limited liability company).

[10]Super. Ct. Civ. R. 56(c).

[11]*Guy v. Judicial Nominating Comm'n,* 659 A.2d 777, 780 (Del. Super. 1995).

[12]*Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962).

Defendants argue that Paragraph 7(b) of the Agreement unambiguously warrants completion of the Property's infrastructure within nine months from the execution of the contract on April 13, 2005.[13] Plaintiffs argue that in Paragraph 7(b), Reserves warrants only that the site manager had scheduled roads and utilities for completion necessary to provide access to the lots within 90 days. The record shows that on June 7, 2005, Reserves entered into two contracts with Fresh Cut, whereby Fresh Cut agreed to perform certain site improvements in the Community, including roads, utility lines, drainage systems and landscaping. On May 30, 2006, Fresh Cut declared bankruptcy without performing any improvements on the Property.

Interpretation of a contract is a question of law.[14] The Court's role is to determine the parties' shared intent from the contractual language. The Court uses the common or ordinary meaning of the words, unless the contract itself shows that the parties' intent was otherwise.[15] The true test of intent is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it

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[13]Defendants also argue that Plaintiffs' reading of Paragraph 7(b) violates the rule against perpetuities because it establishes a schedule but does not guarantee a completion date. The rule against perpetuities applies to testamentary devices and to rights of first refusal to acquire interests in land. At issue here are contract rights, not direct interests in property, and the rule against perpetuities does not apply.

[14]*Deloitte LLP v. Flanagan*, 2009 WL 5200657 (Del. Ch.); *Global Energy Finance, LLC v. Peabody Energy Corporation*, 2010 WL 4056164 (Del. Super.).

[15]*Id.* at *5.

meant.[16]

Paragraph 7(b) of the Agreement provides in part:

> 7. Representations and Warranties
>
> (b) The Reserves Development Corporation, which presently holds title to the clubhouse site and certain other common areas and facilities appurtenant to and benefitting the Real Property, hereby represents and warrants that all road[s] and utilities necessary to provide access to and utilities for the Real Property are scheduled for completion by the site contractor[17] within the next nine (9) months. . . .

The relevant clause is:

> The Reserves Development Corporation. . . represents and warrants that all road[s] and utilities necessary to provide access to and utilities for the Real Property are scheduled for completion by the site contractor within the next nine months. . . .

Paragraph 7 contains both a representation and a warranty regarding roads and utilities. A warranty is an essential part of a contract, while a representation is a collateral inducement.[18] "Express warranties rest on the 'dickered' aspect of the individual bargain

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[16]*Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[17]The Agreement refers to Fresh Cut as the site contractor, while Obrecht-Phoenix is the overall site management contractor.

[18]57 Mass. Prac., Construction Law § 14:3.

and go to the essence of the bargain. They are part of the basis of the bargain and are contractual, having been created during the bargaining process."[19] A warranty, unlike a representation, is always presumed to be material in order to recover damages.[20] This Agreement contains an express warranty regarding roads and utilities being provided within nine months of the contract.

Based on the warranty, a reasonable person in the position of a land developer would understand that within nine months of execution of the Contract on April 13, 2005, Reserves would have arranged for the site contractor to provide access to the Property and to have utilities in place. In other words, the lots would be ready for the Buyer to begin construction. As a land developer, a reasonable person would also know that completion dates are often affected by circumstance.

Korotki and Tranovich voiced their own understanding in similar fashion. In his deposition, Korotki agreed that when he entered into the Contract on April 13, 2005, he expected that within nine months RTP would begin construction and have houses ready for sale 14–18 months later.[21] Regarding preparation for construction, Tranovich stated, "we had a contract that he was supposed to do it."[22]

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[19]67A Am. Jur. 2d Sales § 625 (citations omitted).

[20]*Masingill v. EMC Corp.*, 870 N.E. 2d 81 (Mass. 2007).

[21]AK Dep. at 145.

[22]TT Dep. at 44.

Paragraph 7(b) represents the parties' intention and Plaintiffs' warranty that the site contractor had scheduled that roads and utilities would be ready for construction within nine months of the Agreement.

On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. As to Paragraph 7(b), the "plain, common and ordinary meaning of the words lends itself to only one reasonable interpretation, [and] that interpretation controls the litigation."[23]

As a matter of law, Defendants are entitled to summary judgment on Plaintiff's contractual warranty to provide access to and utilities within nine months of the Agreement. Defendants' motion is **GRANTED** to the extent that Paragraph 7(b) reflects the parties' shared intention that Reserves would have the lots ready for construction within nine months of the April 13, 2005 Agreement.

Defendants also seek summary judgment on Plaintiffs' failure to meet this obligation. Numerous fact questions arise from the exhibits submitted by the parties.

RTP's lender, Sovereign Bank stated in an executive summary dated November 26, 2007 that Korotki had told an RTP representative that he needed at least nine more months to deliver buildable lots.[24] A determination of the credibility of this statement remains to be made.

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[23] *Towerhill Wealth Management, supra.*

[24] Plaintiffs' Op. Br. on Motion for Declaratory Judgment, App., Ex. S at 3.

In his January 2010 deposition, Korotki stated that "The lots themselves are done. They're done. It's the infrastructure that needs additional work to be completed. . . the features would be the base [and finish coat of the roadway] and finished curbing, the gutter, the roadway and the street lightning. . . All of Phase three, all 71 lots are finished and completed."[25] Korotki attributes the lack of County approval for sewer hook-up to Phase 3 property owners' refusal to make contribution toward the fees. *Id.* at 131, 137. Korotki's 2010 statements do not establish the condition of the roads and utilities in January 2006.

When Tranovich was asked in his August 2010 deposition whether he had any written communication with Korotki about the incomplete infrastructure he stated:

> First of all, we had a contract that he was supposed to do it, so that in itself is, to me, communication. I probably had 50 to 100 conversations with Mr. Korotki about the project. Mr. Korotki does not use email, and most people don't write letters anymore, so the fact he don't use email, it was all verbal. And it was conversations, meetings, promises after promises of, I'll get it done tomorrow, tomorrow, and here we are five years later and it's still not done.[26]

The questions of material fact regarding Plaintiffs' performance of this contractual obligation are reserved for the fact finder. To that extent, Defendant's motion for summary judgment is **DENIED.**

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[25]Korotki Dep. at 135.

[26]Tran. Dep. at 44.

C. Sewer connection fees. Reserves seeks declaratory judgment that Defendants are responsible for the sewer connection fees. The cost for each lot in the Property to be connected to the County sewer system is $4002.00. In June 2006, beneficial acceptance was denied, partly because of unpaid sewer connection fees.[27] Other outstanding items were: (1) completion of contractor's punch list, (2) approval for an easement, (3) completed accounting forms and (4) submission of construction information in specified format. In August 2006, the County rejected Reserves' offer of payment for 19 lots, 17 being lots on the Property itself, two owned by Korotki personally.

No homes have been constructed on the Property and no sewer connection payments have been made.

Reserves argues that under Section 5 of the Agreement[28] payment of sewer fees is

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[27]Plaintiff's Opening Brief, Appendix Ex. U.

[28]Section 5 provides in part:

> 5. Costs and Prorations.
> (c) Prorations. Real estate taxes and any special assessments and all other lienable charges shall be apportioned between Seller and Purchaser at Closing based on the current tax year. For this purpose, special assessments shall not include any governmental exaction, impact or connection fees, impositions or other charges or taxes imposed or to imposed by reason of Purchaser's construction of homes upon the Real Property, including application for building permits for such construction.

In its final, undesignated paragraph, Section 5 provides:

> All other fees and expenses and other incidental expenses in

RTP's responsibility. Although Defendants otherwise dispute this assertion,[29] their responsive brief states that "Paragraph 5(a) makes clear that RT Properties is not obligated to pay sewer connection fees until construction of homes upon the Real Property." This concession is made in the context of Defendants' argument that lack of infrastructure prevented construction. Nonetheless, Defendants have acknowledged their contractual responsibility for the sewer fees.

Reserves' motion for declaratory judgment that RTP is responsible for sewer fees is **GRANTED**.

D. Defendants' failure to construct homes. Reserves seeks declaratory judgment that Defendants breached their duty to build homes and put them up for sale, thereby damaging Reserves by tarnishing the public image of the Community.[30]

> connection with this transaction shall be borne by the party incurring the same, or apportioned as customary.

[29]Defendants argue that under Paragraph 11(g) of the Agreement Reserves failed to give notice and an opportunity to cure regarding the sewer fees. Based on the exhibits submitted with the parties' briefs, it cannot be argued that RTP was unaware of the looming question of responsibility for sewer connection fees. Moreover, Reserves seeks declaratory judgment as to responsibility for the fees, and is not arguing for default.

[30]Defendants do not argue that Reserves fails to meet the threshold requirements for declaratory judgment. These are: (1) it must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting a claim; (3) the controversy must be between parties whose interests are real and adverse; (4)the issue involved in the controversy must be ripe for judicial determination. *Schick* at 1238.

The purpose of declaratory judgment is to settle and to afford relief from uncertainties with respect to rights, status and other legal relations.[31] The decision to entertain an action for declaratory judgment is discretionary with a trial court.[32]

Based on Korotki's deposition, Reserves argues that the utilities and roads were substantially complete within nine months of the Agreement and that Defendants had full access to their lots. Reserves also asserts that since the end of summer 2005, Defendants could have obtained building permits and certificates of occupancy if they paid their sewer connection fees.

As to the incomplete infrastructure, Korotki testified that he cannot finish it until homes are built on the lots. He stated that in a new development, basic infrastructure is put in first (which he claimed to have done), followed by construction of homes, and only then are the final stages of infrastructure completed. This includes curbing, gutters, base coating the roads and street lighting.

Defendants do not dispute that they could have obtained building permits. They argue instead that high-end homes could not be built in the "woefully incomplete development" provided by Reserves.[33] As to certificates of occupancy, Defendants side-step the facts with their assertion that they cannot get one "for any home constructed on

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[31]Title 10 *Del. C.* § 6512.

[32]*Burris v. Cross*, 583 A.2d 1364, 1372 (Del. Super. 1990).

[33]Defendants' Responsive Br. to Motion for Declaratory Judgment, at 4.

its lots in the Community." RTP has no homes in the Community.

Fulfilling the duty of construction presupposes that Reserves provided RTP with access to and utilities for the lots in order to allow construction to begin. In other words, it appears that the warranty to provide access and utilities is a condition precedent of constructing homes on the Property. A contractual condition has been defined as "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."[34] Whether a provision in a contract constitutes a condition precedent depends on the intention of the parties, and the Court must first look to the contractual language and also to the circumstances surrounding its execution.[35]

Three sections of the Agreement are relevant to the determination. Section 3(c) provides that "Purchaser is acquiring the Property in order to construct homes thereon for sale to the general public." In Section 7(b), Reserves warrants that the roads and utilities necessary to provide access and utilities for the Property were scheduled for completion within nine months of the Agreement. Section 11(k) provides that time is of the essence in the satisfaction of each of the conditions precedent contained in the Agreement. Korotki and Tranovich both make clear in their deposition testimony that each man understood that construction of homes cannot begin in a new development prior to

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[34]Restatement (Second) of Contracts § 224 (1981, current through April 2011).

[35]*W & G Seaford Associates, L.P. v. Eastern Shore Markets, Inc.*, 714 F. Supp. 1336, 1339-40 (D.Del. 1989).

infrastructure being in pace. No other explanation presents itself for these contractual provisions.

It is undisputed that RTP did not construct any homes on the Property. However, material fact questions remain as to both parties. Did Reserves meet its warranty? If so, did RTP breach the contract by failing to build? If not, is RTP excused for not building? As a matter of law, Reserves' duty to provide infrastructure sufficient to allow for construction is a condition precedent to construction. The jury must decide whether Reserves met this condition. For now, it is premature to raise the issue of RTP's failure to construct, and Reserves' motion for declaratory judgment on this issue is **DENIED**.

E. Notice and opportunity to cure. Reserves moves to dismiss Defendants' Counterclaim and Third Party Complaint that Reserves breached the contract by failing to timely complete the infrastructure. Reserves argues that this claim is barred because Defendants never gave written notice and an opportunity to cure, as required by Paragraph 11(g) of the Agreement. It is undisputed that written notice was not provided. It is also undisputed that the parties and/or their representatives met on more than one occasion to discuss the status of the infrastructure. Nevertheless, Reserves argues that Defendants had several opportunities prior to filing their Answer to provide notice and thereby avoid litigation.

Reserves speculates that "[h]ad the parties communicated in an atmosphere undisrupted by the heat of litigation, one party may have convinced the other of the

rightness of its position, or the parties may have compromised their differences."[36] The depositions of both Tranovich and Korotki contradict Reserves' assertion.

Delaware courts often enforce contractual pre-suit notice provisions.[37] An overriding truth is that the law does not require a futile act.[38] The record in this case shows that written notice of a default on the infrastructure would not have led to agreement or compromise, as Plaintiffs so unconvincingly assert. The issue had arisen on more than one occasion, the only result being Korotki's continued assurances that everything would be taken care of in due time. Reserves' request for dismissal of Defendants' breach of contract claim regarding the infrastructure is **DENIED.**

F. Fraud. The Counterclaim and Third Party Complaint make a common law fraud claim, a fraud claim under the Deceptive Trade Practices Act (the "DTPA") and a fraud claim under the Consumer Fraud Act ("the CFA"). Reserves moves to dismiss these claims.

In Reserves' Opening Brief, the heading to Argument 7 states that all three fraud allegations fail because they are not pled with particularity. Despite that heading,

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[36]Reserves' Opening Brief at 20.

[37]*U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls, LLC*, 2004 WL 1699057, n. 24 (Del. Ch.).

[38]*See, e.g., Morgan v. Swain*, 2009 WL 3309173 (Del. Super); *State v. Hearn*, 697 A.2d 756 (Del. Super. 1997); *Williams v. Sec'y. of Dept. of Corrections*, 2001 WL 398037 (M. D. Fla.); *Adrian v. McKinnie*, 684 N.W. 2d 91 (SD 2004); *Lyle v. Lyle*, 1995 WL 324033 (Tenn. Ct. App.); *Local 1389 v. United Transportation Union*, 53 A.2d 380 (Conn. 1947).

Reserves' argument encompasses only common law fraud. Reserves addresses the DTPA in a separate section, but does not argue the CFA issue. The heading is not argument, and Reserves' challenge to the CFA claim is waived.

Defendants allege five instances of common law fraud,[39] but as with their briefing for summary judgment, they address only the infrastructure. Defendants' responsive brief section of fraud addresses factor (c), which pertains to Reserves' ability to perform its contractual obligation regarding the infrastructure. Defendants argue that from late 2004 through late 2005, Korotki continued to guarantee to RTP's owner and his representatives that the Property's infrastructure would be timely completed and omitted his difficulties with the site contractors. The other, unargued fraud claims relate to Reserves' experience and ability to complete infrastructure, approvals of the infrastructure, status of the infrastructure and the plan and marketability for the Community. Although they all

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[39]The Third Party Complaint alleges that Reserves intentionally misrepresented the following:

(a) Their experience, knowledge and ability as developer of planned communities, such as the Community, or otherwise;

(b) The status of governmental and other authorities's approval of the work constituting the infrastructure of the Community;

(c) Ability to perform duties and obligations of Purchase Agreement and other contractual obligations, such as. . . the ability to timely and properly complete the infrastructure for the Property;

(d) The status and scope of the infrastructure installation; and

(e) The scope, plan and marketability for the Community.

pertain to infrastructure, these allegations are not argued and are therefore waived.

To sustain the fraud claim, Defendants must allege that (1) Reserves made a false representation, usually, as here, of fact; (2) it was made with knowledge or belief or with reckless indifference to its falsity; (3) Reserves intended to induce Defendants to act or refrain from acting; (4) Defendants' action or inaction resulted from a reasonable reliance on the representation; and (5) the reliance damaged Defendants.[40]

Rule 9(b) and (f) state that fraud be pled with particularity, and that averments of time and place are material. The purpose of Rule 9(b) is to put the opposing party on notice so he can adequately prepare a defense.[41] In fraud cases, notice means identifying the time, place and contents of the false representations.[42]

Reserves argues that the common law fraud claims do not meet these requirements.

Defendants argue that from 2004 through 2005, Korotki intentionally misrepresented Reserves' ability to complete the Property's infrastructure by the end of 2005 and that he continued to fraudulently guarantee that it would be completed, while failing to divulge his difficulties with Fresh Cut. These allegations are supported by facts presented Paragraphs 63, 65, 66, 68, 69, 71, 72 and 77 of the Third Party Complaint.

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[40]*Browne v. Robb*, 583, A.2d 949, 955 (Del. 1990) (citing *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

[41]*Id.* (citing *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 23 (Del. 1983), *aff'd sub nom., Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984.).

[42]*Id.*

These paragraphs provide dates of encounters between Korotki and RTP's principals, Thomas Tranovich, owner, officer and sole stockholder of RTP; Robert Nabrzski, Tranovich's former partner; and Frank LaVerde, RTP's general manager until his contract expired in December 2008.

Based on these alleged facts, the Court finds that Defendants have pled with sufficient particularly the claim that Korotki intentionally and repeatedly made misrepresentations that he would timely complete the infrastructure and intentionally omitted to disclose his problems with Fresh Cut. Reserves' motion to dismiss the common law fraud claim is **DENIED.** Reserves' motion to dismiss the claim of negligent misrepresentation is also **DENIED.**

G. Negligence in hiring and managing contractors. Reserves moves to dismiss this claim based on inadequate pleading under Rule 9(b). Paragraphs 74 through 77 of the Counterclaim and Third Party Complaint provide the factual particulars necessary to meet the pleading requirements for negligence, including Korotki's failure to inform Defendants of the problem. Reserves' motion dismiss this claim is **DENIED.**

H. Violation of the Deceptive Trade Practices Act, 6 *Del. C.* § 2531--§ 2536. Defendants allege that Reserves marketed the Community as having amenities such as a pool, tennis courts and a health center that were never provided. For this reason, they argue that Reserves violated the Deceptive Trade Practices Act ("DTPA"), a subchapter

of the Prohibited Trade Practices Act. Reserves moves to dismiss this "frivolous"[43] claim with an award of costs and attorneys fees to Reserves.

Reserves correctly states that in *Stephenson v. Capano Development, Inc.,*[44] the Delaware Supreme Court held that the DTPA is inapplicable to sales of real property.

Defendants urge that subsequent cases have found that goods and services associated with the sale of real estate fall within the scope of the DTPA. In *State ex rel. Brady,*[45] this Court held that construction of a new home involves a sale of services and goods associated with the services covered under the Act. *Brady* is not helpful in this case where the sale included only real property.

Defendants also rely on *Clarkson v. Goldstein*,[46] where an agent for management of a property misrepresented himself as the owner of the property and went through the motions of selling it to the plaintiffs. This Court found that the defendant should not be shielded from the consequences of his deceptive conduct in the course of his business transactions.[47]

Delaware's DTPA is not applicable to Defendants' marketing claim, but the allegation was not frivolous. Reserves' motion to dismiss is **GRANTED** while its motion

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[43]Op. Br. at 34.

[44]462 A.2d 1069, 1073 (Del. 1983).

[45]2003 WL 22048231 (Del. Super.).

[46]2005 WL 1331776 (Del. Super.).

[47]*Id.* at *7.

for fees and costs is **DENIED.**

Lack of notice. Reserves argues that the Counterclaim and Third-party Complaint should be dismissed because Defendants gave no notice of default. The record is rife with evidence that the parties and their representatives experienced continuous concern and conflict about the infrastructure since 2004, prior to and following execution of the Agreement Korotki acknowledged and discussed this conflict in his deposition testimony.

Having filed this action seeking judgment that it did not warrant to complete the infrastructure within nine months, Reserves now asserts that it has a contractual right to notice of default in regard to the allegations in the Counterclaim and Third Party Complaint. At the core, each of the ten allegations pertains to the infrastructure. Reserves' argument could be resolved by applying the principle that the law does not require a futile act.[48] Instead, it is rejected because it has no legal merit.

Reserves argues that Defendants cannot sustain their claims because Defendants' Answers to Interrogatories are nothing more than "frivolous objections."[49] Reserves explores this blanket assertion by speculating about Defendants' motives, but stops short of making legal argument. This is thin support for dismissal.

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[48]*See* n. 10, *supra.*

[49]Op. Br.at 35.

Reserves' motion to dismiss Defendants' Counterclaim and Third Party Complaint is **DENIED.**

To summarize:

A. Reserves' motion for declaratory judgment that Korotki is not a party to the Agreement is **GRANTED.**

B. Defendants' motion for summary judgment that Reserves warranted to complete the infrastructure within nine months of the execution of the Agreement is **GRANTED** as to the legal duty and **DENIED** on the question of whether Reserves fulfilled that duty.

C. Reserves motion for declaratory judgment that RTP is responsible for the sewer connection fees is **GRANTED.**

D. Reserves' motion for declaratory judgment that RTP breached the Agreement by its failure to build homes is **DENIED.**

E. Reserves' motion to dismiss the Counterclaim and Third Party Complaint for lack of notice and opportunity to cure is **DENIED.**

IT IS SO ORDERED.