IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH S. DUNN and BARBARA G. DUNN, husband and wife,	)	
Plaintiffs,	)	
	)	C.A. No. N10C-04-252 MMJ
v.	)	
ROGER VAUDRY, TEVVY FRIEDMAN VAUDRY, and DEL CON IND, a limited liability company,	)	
Defendants.	)	

Submitted: August 3, 2011
Decided: September 30, 2011

On Defendants' Motion for Summary Judgment

MEMORANDUM OPINION

Stephen B. Potter, Esquire, Tiffany M. Shrenk, Esquire (argued), Potter Carmine & Associates, P.A., Wilmington, Delaware, Attorneys for Plaintiffs

Christopher J. Curtin, Esquire, MacElree Harvey, Ltd., Centerville, Delaware, Attorneys for Defendants

JOHNSTON, J.

Defendants Roger Vaudry, Tevvy Friedman Vaudry, and Del Con Ind, LLC (collectively referred to as "Defendants") move for summary judgment against Plaintiffs Joseph S. Dunn and Barbara G. Dunn (collectively referred to as "Plaintiffs"). The Plaintiffs entered into a sales contract with the Defendants to purchase 900 North Broom Street, Unit 10, Wilmington, Delaware 19806 ("Unit 10") located within the Broomall Condominium Apartment Building ("Broomall"). The Plaintiffs allege that following settlement on the condominium, they learned, for the first time, that the Broomall had sustained prolonged water leakage which compromised the structural beams of the building and would necessitate an assessment of approximately $60,000-$70,000.

Defendants filed this Motion for Summary Judgment, arguing that all material defects relating to Unit 10 were disclosed in the Seller's Disclosure of Real Property Condition Report ("Disclosure"), which the Plaintiffs received. By completing this Disclosure, the Defendants claim that the Plaintiffs were put on "actual notice that there were significant problems with the exterior cladding of the building that would have to be addressed by an assessment, the amount of which was unknown and unknowable."

The Court finds that a genuine issue of material fact exists as to whether the Defendants completed the Disclosure in good faith, placing the

Plaintiffs on notice of the material defects affecting the property. Additionally, a genuine issue of material fact exists as to whether the Defendants falsely represented the true extent of the water damage as well as the need for repairs. Therefore, as to these two issues, Defendants' Motion for Summary Judgment must be denied.

FACTUAL AND PROCEDURAL CONTEXT

In May 2005, Tevvy Friedman Vaudry deeded, to herself and Roger Vaudry, Unit 10 located within the Broomall. During their ownership of the condominium, the Vaudrys served on the Broomall Condominium Council ("Council") in various capacities.

On October 5, 2005, the Breckstone Group, Inc. ("Breckstone"), an architectural firm, conducted field work at the Broomall to determine the extent of steel deterioration from water infiltration over the past thirty years. Breckstone subsequently issued an engineering report on October 21, 2005. Breckstone recommended that all existing wall panels and insulation be removed, and a new insulation, flashing and cladding system be installed to prevent water infiltration. A copy of this report was submitted to Broomall's property management company, the Council, and Roger Vaudry.

On February 3, 2006, the Council sent each unit owner a packet entitled "Broomall 2006 Restoration Project." The enclosed documents

indicated that an ongoing water infiltration problem had compromised the structural beams of the Broomall. Architectural and engineering firms had been consulted to assess the extent of the problem. The Council projected that the "Restoration Project" would cost approximately $2.2M[1] with each unit owner required to pay his or her proportionate share of the assessment by March 15, 2006.

On February 27, 2006, Breckstone again contacted Broomall's property management company, reiterating the need for the proposed exterior wall system work to commence. Breckstone indicated that if remedial action was not taken, there "exist[ed] imminent danger that one or more of the panels could be torn from the building. This scenario is most likely to occur during a high wind situation."

Homsey Architects ("Homsey"), an architectural firm, also conducted an investigation to assess the extent of the deterioration of the exterior wall resulting from water infiltration. In a March 2, 2006 letter addressed to Roger Vaudry, Homsey indicated that the structural integrity of the exterior wall had, indeed, been compromised. According to Homsey, "If action [was] not taken to remedy the problems…, structural failure of the exterior

[1] The owners of Unit 10, specifically, would be assessed approximately $64,000 for the restoration work.

wall of the building [would] likely occur." Homsey further indicated that "[w]hile it is impossible for us to predict when, and to what extent, a failure will occur, there is certainly a potential for catastrophic failure."

A third architectural firm, TBS Services, Inc. ("TBS"), was retained to review the prior reports of Breckstone and Homsey, and to issue its own recommendation. In a March 12, 2006 letter addressed to Roger Vaudry, TBS indicated that it concurred with the recommendations of both Breckstone and Homsey, finding that imminent danger existed with respect to the structural integrity of the exterior cladding. As such, TBS recommended that remedial action be taken immediately. After receiving TBS's report, the Council elected to proceed with the "Restoration Project."

On March 16, 2006, a majority of unit owners filed suit in the Court of Chancery seeking a declaratory judgment and temporary restraining order, alleging, *inter alia*, that the Council failed to comply with the Broomall Condominium's Code of Regulations when levying the assessment for the "Restoration Project." Ultimately, however, the unit owners' complaint was dismissed with prejudice.

In the meantime, the Council moved forward with the "Restoration Project," inquiring as to whether the work could be phased in order to lessen the financial impact on each unit owner. In a March 23, 2006 letter

addressed to Roger Vaudry, Breckstone responded to the Council's inquiry, stating that phasing the restoration would not be the recommended course of action. Chief among its concerns, Breckstone cited the continuing degradation of the exterior wall panel system. According to Breckstone, such degradation "constitutes a life safety and liability issue to Broomall Condominium that cannot be ignored, or postponed for future attention. It has been reported to us that an existing air-conditioner has already fallen into one of the condominium units due to deterioration of the surrounding wall framing." Breckstone advised that the "Restoration Project" be executed as soon as possible.

On May 8, 2006, the City of Wilmington's Department of Licenses and Inspections ("Licenses and Inspections") conducted an inspection of the Broomall, and determined that the building had experienced, and continued to experience, "moisture infiltration and/or penetration through the exterior wall panels" which caused "various components of the exterior wall panels to deteriorate." In a May 31, 2006 letter addressed to Roger Vaudry, Licenses and Inspections ordered that "the structural stability of all four wall panels [of the Broomall] be addressed immediately."

Within the next few months, the Council solicited bids from subcontractors for the "Restoration Project." Only two bids were received –

both significantly exceeded the anticipated project estimate.[2] Cognizant of the fact that commencement of the "Restoration Project" would be delayed, Breckstone notified Licenses and Inspections of the status of the project. Licenses and Inspections subsequently contacted Roger Vaudry on November 9, 2006, and advised him that if the unit owners chose not to perform the wall repair work, a citation would be issued. If repairs still did not commence, Licenses and Inspections warned that it would "potentially shut down the building as [] unsafe, and evict the residents, utilizing police force if necessary."

On November 22, 2006, a "Restoration Project" review meeting was held with Roger Vaudry in attendance. At the meeting, the attendees discussed plans to negotiate with the bidders to lower the cost of the project. The record is silent as to whether negotiations occurred, and if so, the result of such negotiations. It does not appear that any restoration work was performed on the Broomall until after the Plaintiffs took ownership in 2008.

In April 2007, the Vaudrys formed Del Con Ind, LLC, and subsequently transferred ownership of Unit 10 to the corporation. In September 2007, Unit 10 was listed for sale with Patterson-Schwartz Real Estate agent Scott Deputy ("Deputy"). Pursuant to 6 *Del. C.* § 2572, Del

[2] The bids received were $4.2 million and $4.4 million.

Con Ind, LLC completed the Disclosure, which required identification of material defects. On this Disclosure, Del Con Ind, LLC answered affirmatively to the following items:

> II. Deed Restrictions, Homeowners Associations/Condominiums and Co-ops
>
> > 11. Is there any condition or claim which may result in an increase in assessments or fees?
>
> IV. Miscellaneous
>
> > 17. Have you received notice from any local, state or federal agencies requiring repairs, alterations or corrections of any existing conditions?
>
> VII. Structural Items
>
> > 51. Is there any past or present water leakage in the house?
>
> XV. Major Appliances and Other Items
>
> > (B) Are you aware of any problems affecting the exterior and interior walls?

Del Con Ind, LLC elaborated on these responses, noting:

> "From time to time their [sic] have been water infiltration issues during heavey [sic] rain and high wind weather conditions."
>
> "Possible assessment for exterior wall repairs."

On the same Disclosure, Del Con Ind, LLC answered "no" to the following items:

> II. Deed Restrictions, Homeowners Associations/Condominiums and Co-ops
>
> > 10. Have you received notice of any new or proposed increases in fees, dues, assessments or bonds?
>
> IV. Miscellaneous

18. Is there any existing or threatened legal action affecting this property?

20. Is there anything else you should disclose to a prospective buyer because it may materially and adversely affect the property, e.g. zoning changes, road changes, proposed utility changes, threat of condemnation, noise, bright lights, or other nuisances, etc.?

VII. Structural Items

47. Is there any movement, shifting, or other problems with walls or foundation?

In February 2008, the Plaintiffs became interested in purchasing Unit 10. The Plaintiffs received a copy of the Disclosure, and have stated that they believed that any necessary repairs to Unit 10 would be minor. The Plaintiffs claim that they subsequently conducted an inspection of the condominium, which did not reveal any noticeable signs of water damage. On February 5, 2008, the Plaintiffs made an offer on Unit 10 for $150,000. Eventually, the parties agreed upon a selling price of $159,900 in cash with settlement on the property occurring on March 7, 2008.

In the spring of 2008, after the Plaintiffs had moved into Unit 10, they attended a Broomall Condominium Association meeting, where they learned, for the first time, about the 2006 assessment, the Licenses and Inspections' Order, the possibility of condemnation, and the dangerous condition of the exterior walls. The Plaintiffs were further informed that the

necessary repairs for the exterior wall panels would cost approximately $2-3 million, with their share projected to be between $60,000 and $70,000.

In July 2010, a majority of unit owners approved a special assessment of $2.6 million to remedy the deterioration of the exterior walls caused by the water infiltration. In order to pay their $73,580 share of the special assessment, the Plaintiffs secured a mortgage on their condominium.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[3] All facts are viewed in a light most favorable to the non-moving party.[4] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[5] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[6] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish

[3] Super. Ct. Civ. R. 56(c).
[4] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).
[5] Super. Ct. Civ. R. 56(c).
[6] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

the existence of an element essential to that party's case," then summary judgment may be granted against that party.[7]

DISCUSSION

Fraudulent Misrepresentation

Parties' Contentions

The Defendants argue that in completing the statutorily-mandated Disclosure, they provided the Plaintiffs with truthful information regarding the damage to the exterior walls caused by water leakage. Furthermore, the Defendants claim that their realtor, Deputy, orally advised the Plaintiffs' realtor, David Edwards, of the long history of water leakage at the Broomall as well as the resultant deterioration. Accordingly, the Defendants contend that the Plaintiffs had "actual notice that there were significant problems with the exterior cladding of the building that would have to be addressed by an assessment, the amount of which was unknown and unknowable."

In response, the Plaintiffs argue that the Defendants failed to disclose the "dangerous and expensive material defects" that affected the property. Moreover, and contrary to the Defendants' assertion, the Plaintiffs claim that no oral representations were made by Deputy to Edwards concerning the exterior wall issues.

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Analysis

To establish a *prima facie* case of common law fraud, a plaintiff must show: (1) a false representation, usually one of fact; (2) made by the defendant with 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) action or inaction taken by the plaintiff in justifiable reliance upon the representation; and (5) damage as a result of such reliance.[8]

In determining whether a false representation was made, the Court may review evidence of overt misrepresentations,[9] including evidence of "oral promises or representations … made prior to the written agreement."[10] A false representation also may be established by evidence that a defendant deliberately concealed material facts, or was silent in the face of a duty to speak.[11]

Here, the Defendants contend that they provided truthful information to the Plaintiffs concerning exterior wall issues as well as the need for an assessment to remedy the problem. The Defendants also claim that Deputy orally disclosed the following issues to Edwards: the long history of water

[8] *Stephenson v. Capano Dev., Inc*., 462 A.2d 1069, 1074 (Del. 1983).
[9] *Id.*
[10] *Anglin v. Bergold*, 1989 WL 88625, at *2 (Del. Super.) (citing *Scott-Douglas Corp. v. Greyhound Corp*., 304 A.2d 309, 317 (Del. Super 1973)).
[11] *Stephenson*, 462 A.2d at 1074..

leakage at the Broomall; the proposed 2006 assessment to repair the exterior wall system; the ensuing lawsuit to prevent the 2006 assessment; the order from Licenses and Inspections' to address the exterior walls; and the devaluation of the unit resulting from the 2006 assessment.

Plaintiffs, however, deny that any oral discussions occurred between Deputy and Edwards. According to Plaintiffs, Edwards was never advised that in 2006 there was an assessment to repair the exterior walls or that Licenses and Inspections ordered that the exterior walls be repaired immediately. The Court finds that a genuine issue of material fact exists as to whether any oral discussions occurred between Edwards and Deputy regarding the extent of the damage to the Broomall and the need for repairs. Therefore, summary judgment must be denied on Plaintiffs' fraudulent misrepresentation claim.

Buyer Property Protection Act[12]

Parties' Contentions

The Defendants claim that they truthfully disclosed all information related to water infiltration issues at the Broomall as required by Delaware's Buyer Property Protection Act. According to the Defendants, the only

[12] 6 *Del C.* §§ 2570 *et seq*.

information they did not disclose was the projected cost of the assessment because it was "unknowable."

In response, the Plaintiffs claim that the Defendants failed to disclose the full extent of the water infiltration issues which affected the Broomall. Specifically, the Plaintiffs argue that the Defendants did not disclose the dangerous condition of the exterior walls or that the cost to repair the walls was over $2 million.

Analysis

Pursuant to Delaware's Buyer Property Protection Act, a seller transferring residential real property is required to "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."[13] The disclosure is neither a warranty nor a substitute for any inspections or warranties that either party may wish to obtain.[14] Rather, the disclosure serves as a good faith effort by the seller to comply with the Buyer Property Protection Act's requirements, and upon its completion, becomes part of the purchase agreement.[15]

[13] 6 *Del. C.* § 2572.
[14] 6 *Del. C.* § 2574.
[15] 6 *Del. C.* §§ 2573-74.

The undisputed record establishes that, prior to Unit 10 being placed on the market, there were significant material defects that affected the exterior wall system of the Broomall. The Defendants were well aware of these defects. Indeed, by virtue of his position on the Council, Roger Vaudry was privy to all information concerning the "Restoration Project," including the reports and/or recommendations prepared by the architectural firms, the bidding process, and the projected cost of the repairs.

The record establishes that three architectural firms were retained by the Council to survey the Broomall in order to assess the extent of the structural damage. All three firms noted that ongoing water infiltration had compromised the structural integrity of the building to such an extent that imminent danger to the safety of the residents existed.[16] In fact, the deterioration was so detrimental to the safety of the residents that Licenses and Inspections threatened to condemn the Broomall if remedial steps were not taken.

Cognizant of the impending threat to the residents and the need to take remedial action promptly, the Council solicited bids from subcontractors.

[16] Though the engineering reports did not specifically indicate that the "structural beams" had been compromised, they all agreed that the structural integrity of the Broomall had been compromised due to deterioration.

The bids received significantly exceeded the projected estimate, and thus, delayed commencement of repairs to the Broomall.

Despite this delay, at the time Defendants placed Unit 10 for sale, the record establishes that they were aware of the fact that the repairs were necessary and would need to be completed in the near future in order to prevent structural failure. During the course of litigation, the Defendants acknowledged that the Broomall had "significant problems with the exterior cladding of the building" caused by a "long history of water leakage." Such damage, the Defendants conceded, "would have to be addressed by an assessment, the amount of which was unknown and unknowable." On the Disclosure, the Defendants indicated only that there had been water infiltration issues "from time to time" that affected the exterior walls, and that an assessment for repairs was "possible."

The Court finds that a genuine issue of material fact exists as to whether the Defendants' Disclosure sufficiently put the Plaintiffs on notice of the extent of the material defects affecting the property. Although the Defendants disclosed the existence of water infiltration, the Disclosure could be interpreted as somewhat misleading as to the extent of the problem. First and foremost, contrary to the Defendants' Disclosure, the imposition of an assessment for repairs to the exterior walls was more than "possible." The

Defendants candidly acknowledge that an assessment, albeit of unknown value, would be forthcoming. Second, although water infiltration may have occurred from "time to time," the resultant issues were indisputably persistent and ongoing. Moreover, and absent from the Defendants' Disclosure, experts had opined that these issues had significantly compromised the structural integrity of the Broomall. There was no affirmative disclosure that the resultant deterioration might cause the building to be condemned by Licenses and Inspections if remedial action were not taken, and that the projected estimate for repairs was tens of thousands of dollars per unit. A question of material fact exists as to whether the Disclosure complied with the Buyer Property Protection Act and sufficiently put the Plaintiffs on notice of the significant defects. Summary judgment cannot be granted on Plaintiffs' Buyer Property Protection Act claim.

Consumer Fraud Act[17]

Parties' Contentions

The Defendants argue that no fraud was committed because all issues with Unit 10 were properly disclosed to the Plaintiffs. The Defendants

[17] 6 *Del. C*. §§ 2511 *et seq.*

further argue that because this was an isolated sale of real estate, it does not come within the ambit of the Consumer Fraud Act's protection.

The Plaintiffs counter this argument, claiming that because the Vaudrys engaged in business as agents of Del Con Ind, LLC, they can be held liable under the Consumer Fraud Act.

Analysis

The Consumer Fraud Act was enacted "to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce."[18] The Consumer Fraud Act explicitly protects consumers from, *inter alia*, unfair or fraudulent practices in the sale of real estate.[19] Only "those involved in the sale of real estate as a business or occupation are subject to the Act."[20] "[T]he isolated sale of real estate by its owner, outside a course of trade or commerce, does not lie within the scope of the Act."[21]

The undisputed record establishes that Del Con Ind, LLC was not engaged in the sale of houses as a business or occupation. Rather, the record establishes that the sale of Unit 10 was an isolated sale of real estate by Del

[18] 6 *Del. C.* § 2512.
[19] 6 *Del. C.* §§ 2511, 2513.
[20] *Stephenson*, 462 A.2d at 1073.
[21] *Id. See also Iacono v. Barici*, 2006 WL 3844208, at *4 (Del. Super.); *Young v. Joyce*, 351 A.2d 857, 860 (Del. 1975).

Con Ind, LLC. Therefore, the Court finds that the Consumer Fraud Act is inapplicable.

CONCLUSION

The Court finds that genuine issues of material fact exist as to whether oral discussions occurred between the parties' real estate agents; and whether the Defendants sufficiently disclosed material defects in the property. **THEREFORE,** summary judgment is hereby **DENIED** on the issues of fraudulent misrepresentation and the Buyer Property Protection Act.

The Court also finds, based upon the undisputed record, that this case involves an isolated sale of real property, and that Delaware's Consumer Fraud Act does not apply. **THEREFORE,** summary judgment is hereby **GRANTED** on Plaintiffs' consumer fraud claim, which is hereby dismissed.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston