Mount Snow Grand Summit Hotel and Crown Club Owners Ass'n, et al. v. Grand Summit Resort Properties, et al., Docket No. 564-12-03 Wmcv (Wesley, J., Mar. 1, 2007)

STATE OF VERMONT **WINDHAM SUPERIOR COURT**
WINDHAM COUNTY, SS. **DOCKET NO. NO. NO. 564-12-03 Wmcv**

MOUNT SNOW GRAND SUMMIT HOTEL AND CROWN CLUB OWNERS ASSOCIATION INC. d/b/a GRAND SUMMIT RESORT HOTEL AND CONFERENCE CENTER OWNERS ASSOCIATION, INC.,
Plaintiffs,

v.

GRAND SUMMIT RESORT PROPERTIES, INC., ENGELBERTH CONSTRUCTION, INC. and JSA, INC. a/k/a J.S.A. ARCHITECT PLANNERS,
Defendants.

ENGELBERTH CONSTRUCTION, INC.,
Third-Party Plaintiff,

v.

VERMONT MECHANICAL, INC., VERMONT ROOFING COMPANY, INC. and BUILDERS INSULATION COMPANY, INC., JOSEPH CANTY d/b/a C&C PAINTING, MARTIN CARRIER, ESTATE of MARTIN CARRIER, ORWELL CONSTRUCTION CO., and HUNT BUILDERS, LTD.,
Third-Party Defendants.

JSA, INC. a/k/a J.S.A. ARCHITECT PLANNERS,
Third-Party Plaintiff,

v.

LINDBERG ENGINEERING, INC.,
Third-Party Defendant.

ORDERS ON MOTIONS FOR SUMMARY JUDGMENT

This multi-party law suit was initiated three years ago by a condominium ownership association on behalf of its residential and commercial members against the condominium developer, the condominium general contractor, and the condominium designer, with allegations focused on claimed defects in the roof and in the heating, ventilation and cooling (hereafter "HVAC") systems in the Grand Summit Resort Hotel (hereafter "Hotel"). Since that time claims have been filed against numerous third-party defendants, and in February 2006 the complaint was amended to include new allegations concerning defective windows. In addition to the original three defendants, there are now nine third-party defendants and two parties who have been permitted to intervene on behalf of third-party defendant Vermont Mechanical Inc. (hereafter "VMI"). Notwithstanding the addition of parties and new factual matters, the primary complaint still essentially consists of four claims: negligence, breach of contract, breach of warranties, and negligent misrepresentation/consumer fraud.[1] Two motions for summary judgment are currently pending, one by Grand Summit Resort Properties and the other by intervenor Acadia Insurance

[1] Each of these claims was the subject of a separate count in the original complaint. The amended complaint includes ten separate counts, each addressed only to one defendant. Counts I-IV are directed at Grand Summit Resort Properties, Inc., and include each of the original statements of claims. By revised Counts V-X, the amendment clarified that Plaintiff seeks recovery from Engelberth, the condominium general contractor, and from JSA, INC., the condominium architect, only on the first three claims.

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I. Grand Summit Resort Properties' Motion for Summary Judgment

Defendant condominium developer, hereafter referred to as GSRP, first moved to dismiss the first and fourth counts for negligence and for negligent misrepresentation/consumer fraud in November 2004. In the absence of any ruling, GRSP renewed its motion in July 2006. In August, the Court granted the motion under the mistaken impression that Plaintiff, hereafter referred to as GSOA, had failed to respond.[2] After agreeing to reconsider its decision, the Court converted the motion into one for summary judgment pursuant to V.R.C.P. 12(c) on account of factual allegations raised in the parties' briefs, and extended the briefing schedule to allow for additional discovery. Having now fully reviewed the summary judgment record in consideration of the parties' earlier and more recent submissions, the Court concludes that GSRP is entitled to judgment as a matter of law on Count I, but not as to Count IV. It also concludes that GSRP is entitled to judgment as a matter of law on GSOA's claim for lost rents.

Summary judgment is appropriate if the court determines that there are no genuine questions of material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In making this determination, the court views the evidence favorably to the non-moving party and gives it the benefit of all reasonable doubts and inferences. *Samplid*, 165 Vt. at 25.

[2] Although GSOA had clearly opposed the initial motion for dismissal, it was confused about its obligation to respond to the renewed motion.

A. Count I - Negligence

The gravamen of Count I is that GSRP was careless and negligent, breaching its duty to GSOA's residential and commercial unit members, by failing to use proper care in developing, planning, designing, constructing, supervising, and inspecting the Hotel, resulting in serious design and construction defects to the roof, windows and HVAC systems. Allegedly, the defects have caused water damage, heat loss, lost rental revenue and repair expenses which are ongoing and expected to cost Plaintiff in excess of $3,000,000.00. Although GSOA alleges significant harm to its property, it does not contest that its losses are purely economic. As a result, GSRP contends that any recovery for negligence is barred by the economic loss rule.

As the Court explained in its previous order denying JSA INC.'s motion to dismiss,[3] the economic loss rule prohibits tort recovery for purely economic losses because "[n]egligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless ones's conduct has inflicted some accompanying physical harm." *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 314(2001) citing *Gus' Catering, Inc. v. Menusoft Systems*, 171 Vt. 556, 558(2000)(mem.). The premise underlying this rule is that negligence actions are better suited for resolving claims for unanticipated physical injury while contract principles are better suited for determining claims for consequential damage that parties have, or could have, addressed by agreement. *Id*. citing *Spring Motors Distribs. v. Ford Motor Co.*, 489 A. 2d 660, 672(N.J 1985). Although the rule had its origins in products liability, it is now well established in Vermont that the economic loss rule also applies to commercial disputes outside

[3] While describing Plaintiff's efforts to circumscribe the economic loss rule as novel, the Court declined to dismiss them without an opportunity for pre-trial development, such has now occurred in connection with GSRP's motion for similar relief.

the confines of product liability. *Id.* at 315.

In a recent decision, *Heath v. Palmer*, 2006 VT 125, 17 Vt. L.W. 426, issued after the parties had filed their briefs, our Supreme Court applied the economic loss rule to a claim for construction negligence and confirmed that it is a bar to recovery in such actions.[4] The case arose from a "buy-build" contract for a new home, in which Plaintiffs claimed that construction defects had resulted in repairs costing $30,000. The homeowners sued their contractor alleging construction negligence, consumer fraud, and breach of contract and warranty. The trial court rejected the claim for contractor's negligence observing that any remedy for purely economic damages resulting from reduced value or costs of repair sounded in contract rather than tort, and the Supreme Court affirmed *Id.* ¶15; citing *Gus' Catering, Inc.*, 171 Vt. at 558-59(reaffirming principle that negligence law does not generally recognize duty to exercise reasonable care to avoid economic loss, and defining economic loss to include "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits"), and *Paquette v. Deere & Co.*, 168 Vt. 258, 263(1998)(rejecting tort claim for allegedly defective motor home and holding that claim for purely economic damages for reduced value of home was actionable in warranty). The Court explained that "[t]he limitation to contract remedies in this context is the general rule in most other jurisdictions, as well."*Id.* ¶16 (with citations to cases in construction context).

[4] Compare *Colgan v. Agway, Inc.*, 150 Vt. 373(1988). Although cited by GSOA, this holding contains no discussion of the principles or applicability of the economic loss rule. Whatever negative inference might have been arguable, they are foreclosed by the *Heath* analysis.

GSOA relies on the potential application of the special relationship exception to the economic loss rule noted, but neither adopted nor rejected, in *Springfield Hydroelectric*, 172 Vt. at 316 (taking note of recent decisions in other jurisdictions limiting the broad application of economic loss rule in specific contexts). In that case, the owners of commercial hydroelectric facilities alleged that two former employees of Vermont Power Exchange, acting in their individual capacities, had negligently administered a power purchase agreement resulting in shared economic losses. *Id.* at 312. In a decision affirming summary judgment for the defendants based on the economic loss rule, the Court nevertheless acknowledged the potential significance of a "special relationship between an alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor." *Id*. at 316 quoting *Aikens v. Debow*, 541 S.E. 2d 576, 589(2000).

GSOA contends that this kind of "special relationship" exists between a condominium developer and individual unit purchasers, particularly where individual units consist of hotel rooms which will be managed by the developer or its affiliates, because the developer is in a unique position to manipulate its duty of care in construction and design. *Springfield Hydroelectric* lends little support to the argument, especially in light of *Heath*. In the former, the Court considered but rejected the theory that defendants had a duty of care deriving from their professional status (a "professional services" exception), without ruling on whether such a duty might ever arise, because it was undisputed that defendants were not licensed professionals. *Id.* at 316-17. The holding yields no further discussion presaging the recognition of a "special relationship" exception to the economic loss rule, and Plaintiff has established no facts that

would implicate such an exception.[5] Accordingly, the Court concludes that *Heath* controls, and that the economic loss rule precludes any action in negligence for the recovery of Plaintiff's claimed damages. GSRP is entitled to judgment as a matter of law on Count I.

B. Count IV - Negligent Misrepresentation/Consumer Fraud

Although plead as a single count, Count IV includes separate claims for negligent misrepresentation and consumer fraud, causes of action that have distinctly different elements. The definition for negligent misrepresentation derives from the Restatement(Second) of Torts § 552(1)(1977) as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

[5] GSOA suggests that it will "produce evidence at trial showing that there is a 'special relationship' between GSRP and Plaintiff sufficient to compel the conclusion that GSRP had a duty to Plaintiff independent of contractual obligation." However, it was bound to adduce such evidence at this stage of the proceedings in order to avoid summary judgment. V.R.C.P. 56; *Gallipo v. City of Rutland*, 178 Vt. 244 (2005).

Howard v. Usiak, 172 Vt. 227, 230-231 (2001) citing *Limoge v. People's Trust Co.*, 168 Vt. 265, 268-69(1998). Consumer fraud, in contrast, is a creation of statue governed by Title 9, chapter 63. The express purpose of the Vermont Consumer Fraud Act is to "protect the public" against "unfair or deceptive acts or practices." 9 V.S.A. § 2451. Three elements are necessary to establish a "deceptive act or practice" under the Act: (1) there must be a representation, omission, or practice likely to mislead consumers; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is, likely to affect the consumer's conduct or decision regarding the product. *Carter* v. *Gugliuzzi*, 168 Vt. 48, 56(1998).[6]

In connection with both claims plead in Count IV, GSOA alleges that GSRP advertised, promoted, marketed and sold units in the condominium representing that the Hotel was properly designed, built free of defects, and fit for use despite actual or imputed knowledge that it contained serious design and construction defects. Although it would appear that the factual record as to these allegations ought to quite robust by now, its exposition in connection with the pending motion is anemic. This is principally due to the narrow grounds on which GSRP has challenged the claim, resulting in a slim proffer of "undisputed facts", thus prompting an equally

[6] With these elements and a lower standard of proof, the Act is intended to create a claim for relief that is easier to establish than common law fraud. *Poulin v. Ford Motor Co.*, 147 Vt.120,124-26(1986)(where common law requires clear and convincing proof, Act requires only preponderance to establish fraud). The Act also specifies remedies unavailable at common law, including attorney fees and exemplary damages, see 9 V.S.A. § 2461(b).

meager response by GSOA.

Eschewing possible issues as to; e.g. i) the standing of the Association to pursue individual claims of negligent misrepresentation or consumer fraud on behalf of its individual members; or ii) the particularity of each such individual claim as to the timing and content of allegedly deceptive statements in relationship to the sale of each unit, and GSRP's awareness at that time of problems with the construction; or iii) the possible legal distinctions between misrepresentations of fact and mere opinions as to general quality, GSRP focuses exclusive attention on its argument that Count IV is unsustainable due to so-called "temporal impossibility". This argument is encapsulated in GSRP's brief as follows: "Plaintiff's claim is rendered impotent due to a temporal impossibility, because the sales information was communicated by GSRP before the defects were apparent, id est, before GSRP could have knowledge of its falsity."

GSRP supports its attack on the deceptive representation claims by acknowledging that while it "made express representations to time-share owners that the property was a premium time-share with luxury features", and that sales representatives "represented to various purchasers that the hotel was of the highest quality", nevertheless: a) some of these representations were in the form of extracts from reviews printed in *Ski Magazine* in 1996 and 1997; b) "problems arose during construction" which were discovered "almost immediately following construction; c) a certificate of occupancy was issued on June 4, 1998; and d) 31% of the units had been sold by the completion of construction and 50% were sold by May 21, 1999.

By its memorandum, GSRP suggests no other facts which the Court needs to consider in order to grant its motion for judgment as a matter of law, but merely references these extracts from its

eight-paragraph statement of undisputed facts without further explanation as to how they cohere into the asserted "temporal impossibility" barrier.

Plaintiff responds that this set of facts, even if accepted as undisputed, fails to demonstrate that its deceptive representations counts are unfounded. Indeed, while GSRP apparently assumes that Count IV is such a rickety edifice as to be blown over in a breath, so far it has mounted little more than a wheeze. Plaintiff has demonstrated that until 2001 when 75% of the units had been sold, GSRP had majority control of the GSOA board. Taking this time line into consideration, and giving Plaintiff the benefit of all favorable inferences, it is impossible to conclude as a matter of law that GSRP was "temporally incapable" of providing representations about the quality of the condominium units to many, if not most, prospective buyers. During a significant duration of GSRP's marketing efforts, its representations ought to have taken into account the construction problems which had become manifest by that time. By its own admission, GSRP knew of significant problems "almost immediately following construction", presumably sometime in 1997-1998 prior to the certificate of occupancy.[7] These problems included "defects with the roof and the HVAC system", but GSRP's efforts "to correct acknowledged defects proved to be fruitless". The Court is simply puzzled and unpersuaded by GSRP's assumption that it is insulated from any duty of accurate disclosure as to those who purchased after discovery of the defects, merely because some earlier sales occurred before construction was completed and problems arose.

To be sure, at least as regards this summary judgment record, Plaintiff has made a very

[7] This admission is included in GSRP's Statement of Undisputed Facts, Paragraphs 1-4 of which incorporate by reference Plaintiff's Answers to GSRP's Interrogatories, thereby adopting them as stipulated facts.

thin showing as to which of its members bought units at a time when the construction problems had become patent, or as to any specific false representations or deceptive statements made to those purchasers. Even assuming the standing of the Association to assert the claims of its members, including actions for negligent misrepresentation and consumer fraud, presumably some distinction will be necessary at trial between damages associated with members who purchased before the completion of construction, and those who bought after defects were known to the developer. See, *Meadowbrook Condominium Ass'n v. South Burlington Realty Corp.,*152 Vt.16 (1989)(in breach of warranty action, for individuals who acquired interests after defects ought to have been patent to the purchaser, the trial court should have granted apportionment of damages awarded for injury to the common elements to exclude the claims of those unit owners). Furthermore, whether marketing statements can be considered deceptive presents a mixed question of law and fact, which GSRP expressly declined to pursue by its motion.[8]

Despite these several angles of approach by which GSRP might conceivably have required Plaintiff to demonstrate a broader factual underpinning for its claims of negligent misrepresentation and consumer fraud, it elected to stake its motion on the "temporal impossibility" riposte. As discussed, limited by the confines of its logic, this argument lacks force

[8] See, Motion for Partial Summary Judgment, p.5 ("Our dispute, however, is not whether the representations made by GSRP were fact or opinion"). But see, *Heath,*¶14 ("Defendants' representations here of "quality construction" and "exceptional value" unquestionably fall within the category of opinion as subjective evaluations of workmanship rather than objectively verifiable statements of fact); compare, *Hughes v. Holt,* 140 Vt. 38, 41 (1981)("whether statements as to the 'excellent' condition of the house were statements of fact or opinion is for the jury to determine").

even if all the facts advanced to support it are accepted. Defendant is not entitled to judgment at this time on either its claim for negligent misrepresentation or consumer fraud.

C. Lost Rents

The final issue raised in GSRP's motion concerns the recoverability of lost rents, a remedy sought in each of the four pending counts. The Court accepts that the Common Interest Ownership Act (CIOA) gives GSOA, as a common interest ownership community in existence prior to CIOA's effective date of January 1, 1999, the right to initiate litigation on matters affecting the common interest community, but only with regard to events or circumstances that occurred after CIOA's effective date. 27A V.S.A. §§ 1-204 and 3-102(a)(4).[9] The temporal limitation with respect to events which may be the subject of litigation does not refer to the date a cause of action is initiated but to the occurrence of the events giving rise to the cause. See *Alpine Haven Prop. Owners Ass'n, Inc. v. Deptula*, 2003 VT 51, ¶ 9, 175 Vt. 559(mem.)(holding CIOA inapplicable because none of the fees which were the subject of the suit were assessed after the effective date of the law); *Will v. Mill Condominium Owners' Ass'n*, 2004 VT 22, ¶ 14, 176 Vt. 380(noting that foreclosure resulted from unpaid assessments which occurred after CIOA's

[9] The Court rejects GSRP's contention that COIA is *per se* inapplicable to time shares. As discussed in Official Comment 25, included in the Reporters' Notes to section 1-103 (including 1-103(7) and 1-103(29) respectively defining "common interest community" and "time share"), "whether or not a particular interval ownership project must comply with this Act depends on whether or not the ownership arrangement meets the definition of a "common interest community."GSOA satisfies that definition because its unit members pay support and maintenance expenses for common areas. See 27A V.S.A. § 1-103(7).

effective date and that neither party contested its applicability with respect to events occurring after effective date).

In this case, GSOA's allegations involve design and construction that clearly began well before the effective date. Nevertheless, the final date of construction is unestablished and the discovery of alleged defects, while they may have occurred first before January 1999, apparently continued beyond it. Thus, there are grounds for a jury to find that at least some of the alleged conduct occurred after January 1999, and is therefor actionable under COIA.

Notwithstanding this conclusion, the Court rejects the claim for lost rents on account of their speculative nature. Regardless of whether the claim is raised in tort or contract, a plaintiff must show

> reasonable certainty or a reasonable probability that the apprehended future consequences will ensue from the original injury. Consequences which are contingent, speculative, or merely possible [are not included]. *Howley v. Kantor*, 105 Vt. 128, 133(1933) ; see also *Callan v. Hackett*, 170 Vt. 609, 609 (2000) (mem.) (tort damages must be the "direct, necessary, and probable result" of defendant's tortious act); *My Sister's Place v. City of Burlington*, 139 Vt. 602, 612(1981) . For their contract claims, plaintiffs had to show that their damages were reasonably certain and foreseeable and were reasonably within the contemplation of the parties at the time in which they entered into the contract. See *Wyatt v. Palmer*, 165 Vt. 600, 602(1996) (mem.); *Pareira v. Wehner*, 133 Vt. 74, 78-79(1974) .

Gettis v. Green Mt. Econ. Dev. Corp., 2005 VT 117, ¶ 33, 179 Vt. 117. Although , it is GSOA's position that GSRP knew that condominium units would be rented by purchasers and that the units would be placed in a rental pool, the material facts establish only that owners had the option to place their units in a rental pool, not that all rental units would be so placed. Accordingly, even if Plaintiff can strictly identify the dates units were uninhabitable and not capable of being in the rental pool due to damage or repair work, it has demonstrated no means

by which it can establish with any reasonable certainty whether particular units would have been placed for rental, in use by owners, or vacant on any given date. These crucial uncertainties make the loss of rental income too speculative a harm to permit recovery. *My Sister's Place* at 613 (in a new business "expected profits...are too speculative and uncertain to be considered in a damage award"). Therefore, on Plaintiff's claims for lost rental income, GSRP is entitled to judgment as a matter of law.

II. Acadia Insurance Co.'s Motion for Summary Judgment

Acadia Insurance Co. (hereafter "Acadia") is one of two insurance companies permitted to intervene on behalf of VMI. Named as a third-party defendant by Engelberth Construction, Inc. (hereafter "Engelberth") for its role as the project's HVAC subcontractor, VMI initially appeared through counsel appointed by Continental Casualty Co., which covered VMI's corporate successor in interest, Encompass Mechanical Services Northeast, Inc. (hereafter "Encompass"), under a commercial insurance policy from April 28, 1999, to May 1, 2001. Acadia insured VMI under a commercial general liability policy during the period from January 1, 1997, to January 1, 1999. In a proceeding held in the Southern District of Texas and approved on May 28, 2003, Encompass was reorganized under Chapter 11 of the Bankruptcy Code, and all its debts were discharged except those claims covered by insurance. Contending that neither VMI nor Acadia has any liability for Engelberth's damages or for its defense, on November 8, 2006, Acadia moved for summary judgment in its favor on all counts and claims pending against VMI.

Although Engelberth has twice been granted an extension of the time for reply, the last of those extensions expired on January 19, 2007 and no opposition has been filed. Per V.R.C.P. 56(e), "all material facts set forth by the moving party will be deemed to be admitted unless

controverted by the statement required to be served by the opposing party." See, *Gallipo v. City of Rutland*, 178 Vt. 244 (2005).

Acadia's central premise is two-fold; it asserts, first, that any occurrences of property damage transpired after the policy period and after VMI's operations at the Hotel had been completed; and second, that there is no evidence of a causal connection between VMI's alleged negligence and property damage to the Hotel's roof. As these claims were set forth as matters of undisputed fact, Acadia's failure to respond results in the conclusion that they have been established as a matter of law.[10] *Gallipo*. In the procedural posture thus created, the Court has no alternative but to grant Acadia's motion for summary judgment as to all claims for relief plead against VMI.

ORDERS

Based on the foregoing discussion, it is hereby **ORDERED**:

GSRP's Motion for Partial Summary Judgment is **GRANTED** as to Count I and as to Plaintiff's claim for lost rents, and as those claims **JUDGMENT FOR DEFENDANT IS ENTERED.**

GSRP's Motion for Partial Summary Judgment is **DENIED** as to Count IV.

Acadia's Motion for Summary Judgment is **GRANTED** and **JUDGMENT FOR**

[10] The Court notes that Acadia's additional evidentiary submissions, including the Affidavit of Charles Monroe and the letter opinion of Kenneth M. Elovitz, PE, do not unequivocally support its position, and could have been placed in dispute had Engelberth responded to the Statement of Undisputed Facts with *any* probative evidence of an occurrence within the policy period, and/or a causal connection between VMI's breach and damages identified to Plaintiff's claims.

DEFENDANT IS ENTERED as to all claims by Third-Party Plaintiff Engelberth against Third-Party Defendant VMI as to any period or coverage or occurrence claimed to have been insured by Acadia.

Dated at Newfane, VT this ___ day of March, 2007.

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John P. Wesley
Presiding Judge