

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

J. TRAVIS LASTER
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

March 25, 2010

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RE: Phoenix Equity Group LLC v. BPG Justison P2 LLC, C.A. No. 5008-VCL

Dear Counsel:

This letter decision grants in part the motion for summary judgment filed by defendant BPG Justison Landing P2 LLC (“BPG”). Because my decision eliminates any basis for equity jurisdiction, I dismiss this matter effective sixty days hence unless, prior to that time, plaintiff Phoenix Equity Group LLC (“Phoenix”) elects to transfer the case to Superior Court. *See* 10 *Del. C.* § 1902.

FACTUAL BACKGROUND

Phoenix is a shell entity through which Robert Marshall purchased from BPG a condominium and its assigned parking spaces in a development known as The Garrett/Hollingsworth Condominiums at Justison Landing. The parties entered into a written sales contract governing the transaction (the “Sales Contract”). Phoenix alleges that it purchased the condominium in reliance on representations attributable to BPG to the effect that the unit was “built in compliance with all applicable codes and regulations,” that the building was “a luxury and upscale building that was constructed with superior quality, material and workmanship,” and that the building and unit were soundproof. Upon occupancy, Mr. Marshall discovered that “soundproofing was practically nonexistent [and] the condominium was not superior.” He investigated further and discovered that “substantial mechanics liens were filed against the building” and the “building had been built in a hurry with numerous code violations, with no assurance that all of these had been properly corrected.” Having concluded that BPG made false representations to him in connection with the sale, Mr. Marshall demanded that the Sales Contract be rescinded. BPG refused, and this action ensued.

LEGAL ANALYSIS

Phoenix's complaint is only ten paragraphs long. It does not articulate a particular legal theory and lacks any denominated causes of action. It nevertheless seems clear that Phoenix hopes to proceed on two grounds: fraud and breach of contract. BPG sought summary judgment in terms of those legal theories, and Phoenix did not articulate any different theory in response.

A fraud claim can be based on representations found in a contract or on material statements or omissions outside of the contract. *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1040-45 (Del Ch. 2006). The complaint does not identify any contractual representations on which a fraud claim might be based, and I do not see anything in the Sales Contract that might support a claim for contractual fraud.

To the extent the complaint purports to assert a claim for extra-contractual fraud, that claim is doomed by an anti-reliance provision in the Sales Contract. "To enhance certainty in contracting and eliminate the threat of tort claims based on oral statements or an open-ended universe of information, Delaware permits parties to disclaim reliance on representations outside of the written agreement." *Airborne Health, Inc. v. Squid Soap, L.P.*, 984 A.2d 126, 140 (Del. Ch. 2009). "[F]or a contract to bar a fraud in the inducement claim, the contract must contain language that . . . can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners" *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004).

Paragraph 12 of the Sales Contract sets forth sufficiently clear anti-reliance language:

This Contract sets forth the entire understanding and agreement between the parties, superseding any and all prior understandings and agreements, and *no oral representations or statements shall be considered part hereof*. This Contract may not be subsequently amended or modified except by written agreement signed by Seller and Buyer. *Buyer acknowledges that Buyer has not relied on any representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Seller, the selling agent, or otherwise, except as specifically identified herein.* (Emphasis added).

By agreeing to this language, Phoenix contractually promised, clearly and explicitly, that it was not relying on any representations, warranties, or statements of any nature whatsoever, except those that appear in the written Sales Contract. Phoenix cannot proceed on a claim for extra-contractual fraud in the face of such a provision because as a matter of Delaware law, Phoenix may not claim to have relied on extra-contractual statements after contractually representing that it was not doing so. *See, e.g., Progressive*

International Corp. v. E.I. DuPont de Nemours & Co., 2002 WL 1558382 (Del. Ch. July 9, 2002). I therefore grant summary judgment in favor of BPG to the extent the complaint sounds in fraud.

I reach a different conclusion to the extent the complaint sounds in contract. Although the Sales Contract does not contain any representations pertinent to a fraud claim, it does contain a limited warranty provision. Paragraph 7(b) of the Sales Contract provides as follows:

Seller warrants that [all] construction work performed by Seller in connection with the Unit shall have been, or shall be completed in a good workmanlike manner. All workmanship and materials shall conform to the guidelines found in the publication *Residential Construction Performance Guidelines for Professional Builders and Remodelers*, National Association of Homebuilders 2005. If an item is not covered in that publication, standard industry practice shall govern.

The complaint states a claim for breach of this provision. That claim cannot be resolved on a motion for summary judgment because it will necessitate a factual determination about whether the condominium conforms to the published guidelines or to “standard industry practice.” I therefore deny BPG’s motion for summary judgment to the extent Phoenix asserts a breach of contract claim.

I next consider *sua sponte* whether to dismiss the breach of warranty claim because it falls outside the equitable jurisdiction of this court. *See Clark v. Teeven Holding Co.*, 625 A.2d 869, 883 (Del. Ch. 1992). The subject matter jurisdiction of the Court of Chancery does not extend to “any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction.” 10 *Del. C.* § 342. “[T]his Court will not permit a party to bring a claim in equity when a sufficient legal remedy exists, and ‘where the plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic ‘open sesame’ to the Court of Chancery.’” *Hillsboro Energy, LLC v. Secure Energy, Inc.*, 2008 WL 4561227, at *2 (Del. Ch. Oct. 3, 2008) (quoting *Int’l. Bus. Machs. Corp. v. Comdisco, Inc.*, 602 A.2d 74, 79 (Del. Ch. 1991)). “In deciding whether or not equitable jurisdiction exists, the Court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain by bringing his or her claim.” *Candlewood Timber Group, LLC v. Pan Am Energy, LLC*, 859 A.2d 989, 997 (Del. Ch. 2004).

Phoenix nominally seeks rescission of the Sales Contract. Rescission is an equitable remedy that can support jurisdiction in this Court. *Sanders v. Sanders*, 570 A.2d 1189, 1191 (Del. 1990). Contractually, however, Phoenix waived its right to rescission. The limited warranty provision upon which Plaintiff’s sole surviving claim is based states: “IN NO EVENT SHALL THE SELLER BE LIABLE FOR RESCISSION . . .” In addition, as I have held, Phoenix lacks an action for fraud or misrepresentation. I

cannot perceive any other basis for rescission. Equally important, Phoenix seeks damages and can be made whole by a monetary judgment. Its remaining claim sounds in contract, which is an action at law. Because a legal remedy exists and is adequate, and because there is no equitable cause of action or viable form of equitable relief, there is no basis for this Court to exercise jurisdiction.

I therefore dismiss this action effective sixty days after the date of this ruling unless, prior to that time, Phoenix elects to transfer this matter to Superior Court. *See* 10 *Del. C.* § 1902. IT IS SO ORDERED.

Sincerely yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor