IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL FOGARTY,	)	
and	)	
FOGARTY ENTERPRISES LLC,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**C.A. Number: U408-05-016**
	)	
MATTHEW FIELDON CORPORATION,	)	
	)	
Defendant.	)	

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MEMORANDUM OPINION AND ORDER ON COMPLAINT OF PLAINTIFFS MICHAEL W. FORGARTY AND FOGARTY ENTERPRISES, LLC

Submitted: June 21, 2010
Decided: July 26, 2010

DAVIS, J.

This is an action for breach of contract and unjust enrichment. The action relates to a real property sales agreement between Michael Fogarty and Matthew Fieldon Corporation ("MFC"). On June 21, 2010, the Court of Common Pleas held a civil trial on the complaint (the "Complaint") filed by plaintiffs Mr. Fogarty and Fogarty Enterprises, LLC ("Fogarty"). This is the Court's Memorandum Opinion and Order in connection with the relief sought in the Complaint.

I. General Background

On May 1, 2008, Mr. Fogarty and Fogarty filed a civil action for breach of contract and unjust enrichment against defendant MFC. MFC answered the Complaint on August 15, 2008.

On June 21, 2010, the Court held a trial. At the time of trial, the plaintiffs only sought damages for a purported breach of representation relating to certain unpaid fees in connection with a sewer contract made in an agreement of sale. The Court heard testimony from two witnesses -- Mr. Fogarty on behalf of the plaintiffs and Dr. JoAnn Strickland (president of MFC) on behalf of the defendant. The parties also had admitted into evidence 19 documents at trial. The Court reserved decision after hearing closing arguments.

II. Factual Background

a. The Agreement

Fogarty is a Delaware construction company that focuses on the construction of commercial buildings, custom homes and renovations. Mr. Fogarty owns and operates Fogarty and is a licensed general contractor in New Castle County. MFC is a Delaware corporation engaging in the construction and operation of child care centers.

On June 28, 2005, Mr. Fogarty and MFC entered into an agreement of sale (the "Agreement"). Testimony at trial demonstrated that MFC drafted the Agreement and that Mr. Fogarty was represented by counsel during negotiations over the terms of the Agreement. Under the terms of the Agreement, Mr. Fogarty was to buy the property located at 234 Rickey Boulevard, Bear, Delaware (the "Property") from MFC and then to develop the Property by building a day care center there.

Paragraph 1 of the Agreement defines MFC as the "Seller" and Mr. Fogarty as the "Buyer." The Agreement, in part, also provides:

> Seller represents that this Property is served by public water and public sewer, and Seller warrants that the public sewer hook-up fee and the sewer agreement as currently required by New Castle County prior to breaking ground on the project has been paid at the signing of this Agreement.

Plaintiffs' Exhibit 1, Agreement at ¶ 5A. The Agreement goes on to provide:

> Buyer is advised that all fees prior to "breaking ground" has been fully paid by the Seller, but that any other fees to provide up-dated reviews and permits may not have been paid, but will be paid by Buyer or Seller as in the above indications and will not further interfere with the other commitments of this Agreement.

Id. at ¶ 7H.

MFC and Mr. Fogarty closed the sale on the Property on July 29, 2005.

b. Communications Relating to Sewer Fees and Agreements – On or Prior to Closing

On July 14, 2005, MFC paid New Castle County $2,741.00. *Defendant's Exhibit 4, copy of check dated July 14, 2005.* MFC paid this amount to New Castle County for certain fees owed on the Property, specifically a certificate of occupancy fee, a commercial building permit fee, a zoning permit fee and a connection fee. *Defendant's Exhibit 5, Statement of New Castle County Department of Land Use issue date October 5, 2005.* According to testimony from Dr. Strickland at trial, the connection fee is specifically a sewer connection fee charged by New Castle County.

On July 19, 2005, MFC provided Mr. Fogarty a letter regarding settlement on the Property. In the letter, MFC states that MFC paid the fees for the "building permit, Certificate of Occupancy Fee, Zoning Permit Fee, Sewage Connect Fee, and all other review fees." *Plaintiffs' Ex. 2, Letter dated July 19, 2005 from Dr. JoAnn Strickland to Mike W. Fogarty at 1.* The letter then advises Mr. Fogarty that "[a]dditional outstanding items that should be completed include a waiver from DENREC, the sewer contract for which there will be a fee (MFC will reimburse you

for this)....You should attempt to obtain the sewer contract and to find out the cost, so that we may pay the fee." *Id.*

As stated above, MFC and Mr. Fogarty closed on the sale of the Property on July 29, 2005. MFC then sent a letter on July 29, 2005 to the New Castle County Department of Land Use – Permits relating to the transfer of ownership of the Property. In the letter, MFC provides that it is MFC's understanding that "we are waiting on only two items: 1) the sewer service agreement and 2) additional approval from Steinle of the building plans." *Plaintiffs' Exhibit 4, Letter dated July 29, 2005 from Dr. JoAnn Strickland to New Castle County Department of Land Use – Permits.*

c. Communications Relating to Sewer Fees and Agreements – After Closing

On October 12, 2005, Mr. Fogarty faxed information to Jason Strickland. Mr. Fogarty, on the fax cover sheet, noted that:

> New Castle County released building permit without sewer agreement, however, they will hold C. of O. Dave Thurmon from NCC is putting together Agreement with a cost. I will let you know when they are ready.

Plaintiffs' Exhibit 5, Fax Correspondence dated October 12, 2005 at 1. On October 13, 2005, MFC responded by letter to the fax and a follow-up call from Mr. Fogarty. In this letter, MFC addressed certain claims made by Mr. Fogarty, specifically stating that:

> MFC is not financially responsible for this [architect] contract or any others that may have been entered by you for the development of this property except the Sewer Contract Fee....In summary, there was no understanding other than what was presented in the Sales Agreement dated June 28 and further explained in my letter to you on July 19....Other miscellaneous costs noted in your telephone message today will likely not be paid by MFC, that is if they do not specifically pertain to the Sewer Contract Fee.

Plaintiffs' Exhibit 6, Letter dated October 13, 2005 from Dr. JoAnn Strickland to Michael W. Fogarty.

New Castle County Department of Special Services provided the Sewer Agreement for Land Development Known as Lot 6A1 – Rickey Commerce Center Fox Run Day Care Center (the "NCC Sewer Agreement") to Fogarty on November 9, 2005. *See Plaintiffs' Exhibit 8, Fax Correspondence dated December 1, 2005 from Mike Fogarty to JoAnna.* Mr. Fogarty then provided a copy of the NCC Sewer Agreement to MFC by facsimile on December 1, 2005. *Id.*

Mr. Fogarty testified that he did not receive any immediate response in connection with the December 1, 2005 facsimile. Mr. Fogarty further testified that he attempted to contact MFC by telephone regarding the NCC Sewer Agreement on two occasions in late February, leaving messages in both instances. Mr. Fogarty stated that Jason Strickland returned Mr. Fogarty's calls on February 27, 2006, and that Mr. Strickland said MFC was not paying the fees and that Mr. Fogarty should get legal counsel. *See Plaintiffs' Exhibit 9, Notes of Mr. Fogarty.*

Mr. Fogarty paid New Castle County $19,517.69 on July 20, 2006. *Plaintiffs Exhibit 12, copy of check dated July 20, 2006.* On that same date, New Castle County Department of Special Service recorded the NCC Sewer Agreement. *Plaintiffs' Exhibit 10, Letter dated July 10, 2006 from David G. Thurman to Mike Fogarty.* Mr. Fogarty stated that $17,866.56 of the July 20, 2006 payment constituted the unpaid "sewer agreement" fee referred to in paragraph 5A of the Agreement.

d. Parties Interpretation of Paragraph 5A – "sewer agreement"

Mr. Fogarty testified that he understood the NCC Sewer Agreement to be the same as the "sewer agreement" set out in paragraph 5A of the Agreement. Mr. Fogarty also testified that he

believed that the NCC Sewer Agreement was the same contract referred to by the parties on various occasions as the "Sewer Contract" or "sewer contract" or "sewer service agreement."

Dr. Strickland testified differently. Dr. Strickland testified that the sewer agreement fee constituted only those sewer fees required to be paid prior to "breaking ground" on the project at the Property. Dr. Strickland relied on the language of paragraphs 5A and 7H to support her interpretation of the Agreement. Dr. Strickland testified that those fees had been paid by MFC on July 14, 2005. *See Defendant's Exhibit 4.* Specifically, Dr. Strickland stated that the "sewer agreement" payment referred to in the Agreement is the "connection fee" referenced on the New Castle County Department of Land Use statement issued on October 5, 2005. *See Defendants' Exhibit 5.* Dr. Strickland explained that any promises by MFC to reimburse Mr. Fogarty for unpaid sewer agreement fees after July 14, 2005 were made because MFC was awaiting confirmation that the July 14, 2005 payment had been received and credited by New Castle County.

In addition, Dr. Strickland testified that the term "breaking ground" was used because once MFC sold the Property to Mr. Fogarty then MFC would no longer control the site. Dr. Strickland testified that control was important because Mr. Fogarty could have altered building plans in a way that could substantially impact the amount owed under the NCC Sewer Agreement. MFC, therefore, would limit this risk by restricting fees to only those fees due prior to "breaking ground" on any construction at the Property.

There was no testimony provided that Mr. Fogarty changed the project in a way that would have substantially impacted any sewer fees due on the Property.

III. Applicable Law

In a civil claim for breach of contract, the burden of proof is on the plaintiff to prove a claim by a preponderance of the evidence. *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. 2005). To state a claim for breach of contract, the plaintiff must establish the following: (1) the existence of a contract; (2) the defendant breached an obligation imposed by the contract; and (3) resulting damages to the plaintiff. *VLIW Technology, LLC v. Hewlett-Packard Co. STMicroelectronics, Inc.*, 840 A.2d 606, 612 (Del. 2003).

Any contract concerning the sale of land is required to be in writing under the Delaware statute of frauds, 6 *Del. C.* Sec. 2714(a), which reads in part as follows:

> No action shall be brought to charge any person ... upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them ... unless the contract is reduced to writing, or some memorandum or notes thereof, are signed by the party to be charged therewith....

"The purpose of the statute is explained by its title, namely to afford protection against fraud...." *Taylor v. Savage*, WL 549913, at *2 (Del.Com.Pl.,2007)(citing *Durand v. Snedecker*, 177 A.2d 649, 651 (Del.Ch.1962)). Therefore, any agreement regarding a party obtaining an interest in land from another would be subject to the statute of frauds and would require a written memorandum signed by the party against whom the agreement is being enforced.

If a contract is unambiguous, the Court cannot consider extrinsic evidence to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity. *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). If there is uncertainty in the meaning and application of the contract, however, this Court can consider the evidence offered in order to arrive at a proper interpretation of contractual terms. *Id.* In such cases, "any course of performance accepted or acquiesced in without objection is given great weight to the

interpretation of the contract." *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 398 (Del. Ch. 2008); *see also Viking Pump, Inc. v. Century Indem. Co.*, 2009 WL 3297559 (Del. Ch. 2009) (Delaware law requires the court to look beyond the contract itself in order to ascertain the parties' true intentions in those situations where the meaning of a contract is uncertain).

IV. Discussion

The Court finds that (i) a written contract – the Agreement -- existed between MFC and Mr. Fogarty; (ii) MFC breached the Agreement; and (iii) plaintiffs suffered damages as a result of MFC's breach. In doing so, the Court finds that there is uncertainty in the meaning and application of the Agreement – specifically with respect to paragraph 5A and the term "sewer agreement." The Agreement, drafted by MFC, does not define or otherwise clarify the meaning of the term "sewer agreement." Moreover, MFC, Mr. Fogarty and even New Castle County appear to use different terms at different times for what the parties to the Agreement contend is the "sewer agreement." Because of this uncertainty, the Court looked to the evidence presented by the parties at the trial to ascertain the parties' true intentions in determining whether MFC breached the Agreement.

Mr. Fogarty contends that as part of the Agreement, MFC agreed to reimburse Mr. Fogarty for the "sewer agreement" fees in the amount of $17,866.56 required by New Castle County for the Plaintiff's commercial development on the Property. Relying on the language set forth in paragraph 5A, Mr. Fogarty argues that MFC represented that it had paid all fees relating to the "sewer agreement." Paragraph 5A of the Agreement clearly states, "Seller warrants that the public sewer hook up fee and the sewer agreement as currently required by New Castle County prior to breaking ground on the project has been paid at the signing of this Agreement."

Mr. Fogarty supports his argument by pointing to paragraph 7H which states that, "Buyer is advised that all fees prior to 'breaking ground' [have] been fully paid by Seller ..."

Mr. Fogarty then asserts that when it was clear that such fees had not been paid, MFC, through Dr. Strickland and then Jason Strickland, agreed that MFC would reimburse Mr. Fogarty for the sewer agreement fee in a letter dated July 19, 2005. This letter, delivered to Mr. Fogarty in advance of settlement states in pertinent part, "the sewer contract for which there will be a fee (MFC will reimburse you for this)". Finally, Mr. Fogarty argues that a letter dated October 13, 2005, wherein MFC stated, "MFC is not financially responsible for this contract or any other that may have been entered by you for the development of this property except the Sewer Contract Fee" further bolsters the argument that MFC knew that it was responsible for the sewer contract fee.

MFC asserts that it fulfilled all contractual obligations under the Agreement, and that even if it did not, the Agreement merged into the deed at closing under the doctrine of merger, thus extinguishing its obligations under the agreement. MFC asserts that pursuant to the Agreement it was only ever responsible for the fees assessed by New Castle County 'prior to breaking ground' on the Property. MFC denies making any representations that it would reimburse Mr. Fogarty for the sewer contract fees which are invariably required only after 'breaking ground' on a project. MFC claims that any assurances it made in relation to sewer fees referred to a "connect fee," that is generally paid prior to breaking ground, and was in fact paid by MFC on July 14, 2005.

The evidence presented at the trial supports Mr. Fogarty's interpretation of "sewer agreement" – i.e., that the term sewer agreement in paragraph 5A is in fact the NCC Sewer Agreement. Mr. Fogarty provided a clear course of action and acquiescence by MFC and Mr.

Fogarty between July 19, 2005 and February 27, 2006 which demonstrates that the parties intended the term "sewer agreement" to mean the NCC Sewer Agreement. During that time, MFC repeatedly agreed that it would pay or reimburse Mr. Fogarty for a fee relating to the sewer agreement at the Property which in the end was the $17,866.56 fee owed under the NCC Sewer Agreement.

In contrast, MFC proffers no plausible explanation why its conduct in connection with communications made between July 19, 2005 and February 27, 2006 supports a contrary determination. Dr. Strickland's explanation at trial that the "connection fee" paid on July 14, 2005 by MFC constituted the sewer agreement fee is just not credible given the multiple admissions made by MFC after that date that the fee remained unpaid.

MFC breached its representation in the Agreement that it had paid the sewer agreement fee. Moreover, MFC breached its agreement to reimburse Mr. Fogarty for that fee when it failed honor its obligation after Mr. Fogarty made payment to New Castle County on July 20, 2006. The Court finds that resultant damages were suffered when MFC breached it representation and subsequent reimbursement agreement in the amount of $17,866.56 when it failed to repay plaintiffs after July 20, 2006.

MFC contends that the doctrine of merger applies here to defeat the plaintiffs' claims. The Court disagrees, holding that the doctrine of merger is inapplicable under the facts here. The doctrine of merger arises because a seller's conveyance of property to a purchaser by deed discharges the preceding agreement of sale. *The Reserves Development Corp. v. Esham*, 2009 WL 3765497 at *6 (Del. Super. 2009)(citing *Pryor v. Aviola*, 301 A.2d 306, 308 (Del. Super. 1973) (quoting 6 CORBIN ON CONTRACTS § 319)). Thus, as a general rule, "after a property has been conveyed to a purchaser, the rights of the parties are to be determined by the covenants

of the deed and not by the agreement of sale." *Haase v. Grant,* 2008 WL 372471, at *2 (Del. Ch. 2008); *Carey v. Shellburne, Inc.,* 215 A.2d 450, 504 (Del. Ch.1965) (discussing the "general rule" that an executed and delivered deed of contract of sale of land merges with the contract and contract becomes void).

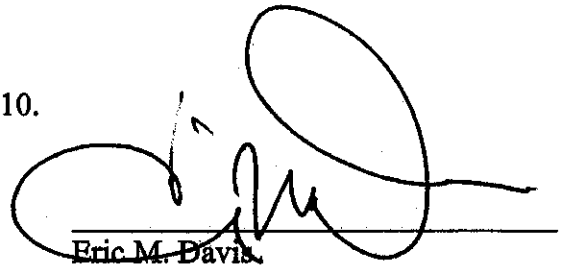
However, merger by deed does not necessarily extinguish all promises contained in an agreement of sale. Under Delaware law, the merger doctrine is limited in scope and applies only to questions of land use, quantity, and title. *The Reserves Development Corp.,* 2009 WL 3765497 at *6; *Allied Builders, Inc. v. Heffron,* 397 A.2d 550, 552-53 (Del. 1979) (citations omitted); *Clarke v. Quist,* 560 A.2d 489, 1989 WL 27737, at *1 (Del. 1989). Merger will not bar the enforcement of a promise that the parties clearly intended to survive the deed. *Wilson v. Pepper,* 1995 WL 562235, at *2 (Del. Super. 1995).

For two separate reasons, the Court concludes that the promise to pay the sewer agreement fees survives the deed. First, the promise pertains to a monetary payment, and is not related to a question of land use, quantity, or title. The merger doctrine is therefore inapplicable. Second, even if a promise of payment were within the scope of the merger doctrine, the actions of the parties both before and after settlement on the sale of the Property demonstrate the intent that the promise survived the deed.

V. Conclusion

For the reasons stated above, the Court finds for the plaintiffs on the Complaint and awards $17,866.56 in damages plus costs and pre-judgment and post-judgment interest at the legal rate until satisfied.

IT IS SO ORDERED this 26th day of July, 2010.



Eric M. Davis
Judge