

January 15, 2004

**Susan J. Durnan**  
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*Pro-se*

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**Re: Susan J. Durnan v. Oliver Manallo and Naomi J. Manallo**  
**Civil Action No. 2002-10-309**

**Date Submitted: January 9, 2004**

**Date Decided: January 15, 2004**

**DECISION FOLLOWING TRIAL**

Dear Ms. Durnan and Mr. Coates:

Trial in the above captioned matter took place on two different dates; December 1, 2003 and January 9, 2004<sup>1</sup>. The instant action is an appeal *de novo* brought from Magistrate's Court pursuant to 10 *Del. C.* §9571 *et seq.*

Plaintiff, Susan J. Durnan ("Durnan") contends in paragraph three of her complaint that she purchased a house ("the residence") from the defendants, Oliver and Naomi Manallo ("defendants"). Durnan alleges "that every time it rains, no matter how little, the water seeps through the cracks and floor running down the walls and mold has started to grow." (¶3, Complaint)

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<sup>1</sup> The trial was bifurcated to allow plaintiff to present testimony of her expert witness, who was not available on the original date. As will be noted below, plaintiff's expert witness failed to appear timely on the second trial date.

Durnan also alleges that the defendants failed to disclose these problems to her as a buyer in the Seller's Disclosure of Real Property Condition Report ("the Real Property Report") as required under Delaware real estate law. (¶3, Complaint). Durnan seeks \$13,609.00 damages in the amount of plus post-judgment interest and costs at the legal rate. 6 *Del. C.* §5301.

Defendants contend in their Answer to the complaint that no misrepresentations were made in The Real Property Report. Defendants also contend that the plaintiff was clearly placed on notice of the water problems in the residence because of the disclosures made in The Real Property Report before settlement. Defendants deny any form of misrepresentation; negligent or intentional, with regards to the allegations contained in the Complaint. This is the Court's Final Order and Decision. For the reasons set forth below, the Court finds that Plaintiff's allegations contained in her Complaint were not proven by a preponderance of evidence. Judgment is therefore entered in the Defendant's favor. Each party shall bear their own costs.

### **THE FACTS**

At trial three (3) sets of documents were stipulated into evidence by plaintiff with no objection by the defendants. Plaintiff's Exhibit 1 was The Real Property Report detailed alone with the relevant portions highlighted. Plaintiff's Exhibit 2 was the Mid-Atlantic Water Proofing, Inc. Report ("Mid-Atlantic Report") which plaintiff paid for and requested to determine what she believed was water damages and the associated costs to correct these basement water problems that defendants allegedly failed to disclose in the real estate

documents. A series of photographs was also marked as plaintiff's Exhibit 3 and received into evidence per stipulation of the parties. These photographs allegedly depicted the water in the basement of the Durnan's residence after the real estate contract was executed between the parties.

At trial, Peter Massotti ("Massotti") testified. Massotti visited the plaintiff's residence after Duran's requested on June 5, 2002 to evaluate the basement waterproofing and leakage problems that are now detailed in party's Complaint. Massotti examined the residence's structure and observed moisture on cement block in the basement, as well as fresh paint on the basement walls. Massotti also turned the lights off and used a flashlight to determine moisture on the basement walls bricks. Massotti observed settlement cracks in the block. Massotti also presented testimony that this was "an old home" and that settlement cracks occur in the blockage due to the age of the house.<sup>2</sup>

Massotti presented testimony at trial that he has studied structural foundations for the past ten years and has been working in construction "all of his life." Massotti presented testimony that the walls were freshly painted; there was plastic sheeting on top of the block; that he saw water damage in the existing wall behind the existing oil tank and there were settlement cracks in the block where the basement was not finished. Massotti also questioned why there was fresh paint on the bricks in the basement.

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<sup>2</sup> Massotti was not qualified at trial as an expert witness but gave an opinion as a Mid-Atlantic employee employed in the industry that he believed believe that defendants knew of a water problem in the basement.

On cross-examination, Massotti testified that he had only been in the Durnan's residence three times and June 5, 2002 was his first visit. Massotti understood that his purpose for being at Durnan's residence on June 5, 2002 was to perform an inspection concerning waterproofing the basement and to give an evaluation to Durnan of the water problems that then existed. Massotti indicated at trial he used a "moisture reader" and observed cracks in the block in the floor and used "effervescence" to determine the moisture protruding through the block. Massotti was present for about forty-five minutes and also observed that the drywall and studs and used a "damp meter". Massotti conceded that there was "no way to tell" exactly how long the moisture was in the cement brick in the basement. Massotti indicated Plaintiff's Exhibit 2 depicted the waterproofing evidence which was received into evidence without objection.

Massotti testified finally that there were several methods to correct the moisture in plaintiff's basement. The best method included excavation at a cost of \$45,000 or a "dual pressure relief system" contained in his estimate wherein a pipeline is used and costs exceed \$13,109; the sum plaintiff seeks in the instant complaint.

Massotti presented testimony that he believed the central problem in Durnan's basement was caused by post-settlement of the house structure after the house was initially built. He believed that water subsequently traveled through capillaries into a stream after the foundation was initially dug Durnan's residence and that because fresh soil was placed next to the concrete

block in the basement, the water seeped through the fresh soil and concrete block in the basement. Massotti testified that the water typically travels then through these capillaries through the fresh soil and causes leakage into the basement. Massotti concluded that there is an “ongoing problem” with water in Durnan’s basement.

Jennifer Durnan (“Jennifer”) presented testimony at trial. Jennifer testified that she observed boxes against the wall approximately “three to four feet stacked high” and that there was also computers against the walls. Jennifer also testified that she observed water leaking in the basement walls “up to three to four feet” and that the floors get moist since she has moved into the residence. Jennifer also testified that water floods through two doors in the basement against the wall into an area where her bed is now located. Jennifer further testified that water also leaks next to the freezer in her room and touches the desk and clothes which have also been damaged by water.

On cross-examination, Jennifer testified that she first observed the water in April, 2002 and that date was “within two to three weeks” of moving into the basement. Jennifer believed that there were signs on the cardboard box which indicated water leakage in the basement.

On re-direct, Jennifer presented testimony that in September, 2002 the watermarks appeared on the basement walls and appeared to be “moist and dripping through the brick.”

Joseph Shivock (“Shivock”) presented testimony at trial. Shivock he has seen “a lot of water” in the basement since he started dating Durnan

approximately two years ago. Shivock also observed water “coming down from the walls” and that every time it rains “water comes through the back door.” A series of photographs were marked Plaintiff’s Exhibits 3A – 3H and received into evidence. Shivock indicated through testimony by identification of each photograph the respective alleged water damage in the basement. These photographs depicted water next to an electrical panel; a picture of water damage through the back door; the right side of the basement where the heater is located and a portion of a drain with water running by it from the brick wall. Shivock also identified through the various photographs of water from the electrical panel which runs from the front of the basement and deposits puddles on the basement floor. Shivock presented testimony that he also observed water damage in the front of the basement. Shivock identified the same in photograph 3G damage which depicted personal belongings near the fuel tank of the house which also has showed a steady stream of water.

On cross-examination Shivock testified that he has dated plaintiff for two years, although there were “periods of separation.” Shivock never spoke with either defendant personally.

Oliver A. Manallo (“Manallo”) was called by Durnan and presented testimony at trial. Manallo presented testimony regarding explaining various photographs which allegedly showed the water damage that existed when he owned the residence. Manallo denied “that there was a water problem” existing except when there was a hurricane. He purchased the home in 1990 and claims he never saw the water damage depicted in photographs 3A – 3H.

Manallo's comments were "wow" when he observed the water depicted in the photographs. Durnan questioned Manallo about the various portions of The Real Property Report and also questioned Manallo about whether his statements were true and accurate. Manallo denied vehemently that he made any form of intentional or negligent representations in The Real Property Report.

On cross-examination, Manallo indicated that he used "a couple of extra cans of paint" and painted three feet up the brick wall in the basement prior to February, 2002 before the residence was advertised for sale. Manallo presented testimony that there were computer desks and a pool table in the basement which sustained no damages. Manallo agreed the computer boxes were placed up against the wall, but denied that he had intent to cover up any water damages in the basement. Manallo also presented testimony that other than during September 1999 flooding as a result of Hurricane Floyd, the only moisture he observed was during the hurricane. Manallo testified that all the representations he made in The Real Property Report were true and accurate and that he did not have the house inspected prior to settlement. Manallo testified that Ms. Durnan had the house inspected and that she never raised any of the issues raised in her complaint against him and his wife.

Manallo also indicated that in the third page of Exhibit 1 that he disclosed in The Real Property Report that there was "moisture, seepage signs present" and fully disclosed the same to Durnan. Manallo also testified upon questioning by his counsel regarding various points covered in plaintiff's

Exhibit 1. He listed problems in the disclosure portions of The Real Property Report which included the electrical, heating, plumbing and exterior which included roof problems in The Real Property Report. In the last page of plaintiff's Exhibit 1, The Real Property Report, Manallo noted in the area "Minor Problems Safety Concerns" that the disclosure he made which indicated "occasional seepage; damp wall".

Manallo also testified that Durnan did not make any further inquiries with him or his wife about the water problems before she purchased the house or after he listed the disclosures in the Real Property Report detailing existing water seepage in the basement walls. Manallo testified Durnan made various phone calls after settlement of the house to his wife but never had questions other than the programmable thermostat. Manallo indicated Durnan never raised any concern with the water in the basement before the instant lawsuit.

With regard to the paint on the walls, Manallo indicated at Court that he used was Sears Easy Living Paint. Manallo "used up" the paint sometime before the house was put on the market. Manallo indicated the existing red paint was already on the floor when he purchased the house. Manallo indicated that during his stay at the residence before he sold the property there was no moisture in the basement that damaged his personal property.

On re-direct examination, Manallo indicated that there were "minor problems" and "minor seepage in the basement residence," (Plaintiff's Exhibit 1, page 4). Manallo also testified that there was a "damp floor" notation in The



Real Property Report. Manallo reiterated his position that only during Hurricane Floyd did he see excess water in the basement.

Durnan presented testimony at trial. Durnan testified that she purchased the residence house for her daughter to live in the basement, as well as her father.

With regard to her allegations in paragraph 3 of her complaint, Durnan testified that the basis of the instant lawsuit is the alleged failure by co-defendants to disclose the water seepage in the basement prior to sale in The Real Property Report. Durnan believes that the water damage in the basement was “covered up” by the defendant with “stacked boxes”, new paint on the wall, “shelving”, and that these materials prohibited her home inspector from looking at subject walls in the basement to uncover the seepage and water problems in the basement. Durnan believes defendants intentionally stacked these materials in the basement and “finds it very hard to believe that no water damage was in the basement intentionally except that which Manallo testified was caused during Hurricane Floyd.

On cross-examination, Durnan testified that she believes that the defendants did not disclose to her the water damage in the basement. With regard to Plaintiff’s Exhibit 1, Durnan conceded that The Real Property Report contains statements by co-defendants that there was water/moisture in the basement and that “effervescence” was “checked” in The Real Property Report. Durnan conceded that she had a *bona fide* inspection report performed before she purchased the house. Durnan also conceded the word “stains” existed in

The Real Property Report and that “rotted decayed wood” was listed in the disclosure portions of The Real Property Report and that “damp/floor walls and mildew” was also listed in the disclosure portions of The Real Property Report.

Durnan also conceded that she never made further inquiries with defendants following a review of these statements by defendants. Durnan believed that a full disclosure was never made in inspection report and this “would have been a deal breaker” had she been informed of the problems.<sup>3</sup>

The defense presented its case in chief. Counsel for the co-defendants indicated that Mr. Manallo’s testimony has already been taken and called Co-defendant Naomi Manallo (“Naomi”). Naomi is Oliver’s wife of thirteen years and purchased the subject residence together. Naomi provided testimony at trial that there was “no other moisture in the basement.” Naomi used the basement for the ten years that she resided at the premises. Naomi testified that she did not see the Inspection Report but that the house was sold on April 15, 2002 on “tax day”. Naomi testified that the residence was sold for \$134,900.00 with “settlement help” and that they gave plaintiff a “radon credit, roof credit and settlement help” to assist her buying the residence.

Naomi testified that Durnan never called her before initiating the lawsuit in Justice of the Peace Court or after the appeal was filed to the Court. 11 *Del. C. §9570 et seq.* Naomi only spoke with Durnan about the thermostat and some other minor matters or concerns with the residence; not the water seepage or problems in the basement. At some point in time she stopped

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<sup>3</sup> At this point in the trial, the Court allowed plaintiff to rest except for the right to recall her expert witness.

speaking with Durnan because she believed Durnan was rude. Naomi testified that she did call Mr. Shivock in February, 2002 who allegedly told her over the phone that he saw absolutely no moisture in the house.

At trial on January 9, 2004, when the case was continued to allow Durnan's expert testify, the parties were present. However, when Court convened to take the testimony of Durnan's expert witness, no fact witness appeared. With no objection by Durnan, or Defendant's counsel, the Court proceeded to closing statements.<sup>4</sup> The Court then reserved decision.

### **THE LAW**

Durnan has not set forth in her *pro-se* complaint a legal theory to substantiate a cause of action against defendants. The Court, however, did review the bill of particulars in the record. 10 *Del. C.* §9570 et. seq. Construing plaintiff's *pro-se* complaint liberally, the Court believes that in paragraph three, Durnan alleges a claim of intentional misrepresentation, negligent misrepresentation, or common law fraud. Case law provides as follows:

. . . In Delaware, the requirements for a successful claim of negligent misrepresentation are (1) a pecuniary duty to provide accurate information, (2) supplying false information, (3) failure to exercise reasonable care in obtaining or communicating information, and (4) a pecuniary loss caused by justifiable reliance upon the false information. *Wolfe v. Magnuss Construction Co.*, Del. Ch., C.A. No.: 13004, 1995 Del. Ch., LEXIS 122, Chandler, V.C. (September 11, 1995). The elements of a claim for common law fraud are the same except the defendant must also know or believe the information was false or proceeded

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<sup>4</sup> The expert witness for Plaintiff apparently appeared in the middle of closing statements of the parties. No application was made by Durnan to re-open the Court record to allow him to testify.

in reckless disregard of the truth. *See: Stevenson v. Capano Development, Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983).

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Under either legal theory, fraudulent misrepresentation or negligent misrepresentation, plaintiff must demonstrate that the justifiably or reasonably relied upon the defendant's statement. *Lock v. Schreppler*, Del. Super., 426 A.2d 856, 863 (1981). Thus, the recipient of a fraudulent misrepresentation is not justified in relying upon his truth if he knows that it is false or it this falsity is obvious to him. *See, Restatement (second) Torts* §541. A party is chargeable with the knowledge of what may be reasonably found if they make an investigation. *Lock v. Schreppler*, Del. Super., 426 A.2d 856, 862 (1981); *Stidham v. Kinnamon*, Del. Super., C.A. No.: 86C-AP-18, 1988, Del. Super., LEXIS 43, Ridgely, P.J. (December 29, 1988) Let. Op. at 7 (finding no duty to disclose defects if plaintiffs could have inspected before settlement).

### **OPINION AND ORDER**

The issue presented to this Court is whether plaintiff has proven by a preponderance of evidence that the co-defendants failed to disclose that there was a water problem in the Durnan residence. See, e.g., *Asset Recovery Services, Inc., LLC v. Process Systems Integration*, Court of Common Pleas, Welch, J. 2002 LEXIS C.P. Lexis 55 (February 6, 2002); *Wirt v. Mathews*, Court of Common Pleas, Welch, J. 2002 LEXIS C.P. 17 (July 17, 2002). The Court construes this claim under multiple theories while giving Durnan the benefit of construing her *pro se* complaint liberally.

The Court has carefully reviewed the trial testimony and the exhibits offered into evidence. Plaintiff's own expert witness failed to appear timely when the Court bifurcated the trial to accommodate Durnan to allow him to present testimony. The Court reviewed the documents offered into evidence by plaintiff, which include plaintiff's Exhibit 1, as well as the photographs which allegedly depict the water damage in the basement floor after purchase of the residence by Durnan.

Construing the case law set forth above, the Court finds by a preponderance of evidence that plaintiff failed to prove the subject action under any of the three theories. While the Court is concerned with the condition of the property of defendants near the walls in the basement prior to sale, defendants did disclose and placed plaintiff on notice of the subject alleged water problems in the Real Property Report. Once on notice, plaintiff did not make further inquiries or discuss with the co-defendants any further water problems that may or may not exist with regards to the alleged water damage. In addition, Durnan paid for and received her own Inspection Report. Clearly the defendants disclosed in their Real Property Report as outlined in the trial testimony listed there was water moisture damage and that during a hurricane there was "excess flooding" in the basement.

In Plaintiff's Exhibit 1, under the heading "Basement and Crawl Space," the co-defendants also disclosed in a handwritten supplement to the Real Property Report that "During hurricane Floyd of 1999, water came in basement through access door to outside. Drain at bottom of steps could not keep up

with the water...". In the "Perspective Summary" in Plaintiff's Exhibit 1, page 4, co-defendants wrote that in the Basement/Crawl Space/Slab there was "moisture/seepage signs present" and the box, although not circled indicated "major/minor repairs needed."

The Court believes the statements presented through testimony of co-defendants at trial, as well as the disclosure statements in the Real Property Report by defendants clearly placed Durnan on notice of water problems in the basement. The Court finds the statements on the Real Property Report were not false and there was no breach to Durnan of a disclosure obligation. Nor were statements in the Real Property Report made with reckless disregard of the truth. Further, Durnan hired a home investigator to make an inspection report and Durnan failed to make further inquiries with co-defendants. Construing the testimony listed, the Court cannot conclude that there was failure to disclose to Durnan as alleged in her Complaint given the disclosure language that was listed in the Real Property Report by the defendants Plaintiff's Exhibit 1.

The Court therefore enters judgment in favor of co-defendants. Each party shall bear their own costs of the proceeding.

**IT IS SO ORDERED** this 15<sup>th</sup> day of January, 2004.

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Honorable John K. Welch  
Associate Judge