

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DELAWARE BUILDING SUPPLY, INC.,)

Plaintiff,)

v.)

C.A. No. 06C-12-035 JTV

W.C. FOSTER & SONS, KENNETH G.)

HAWKINS & ROSALIND M. HAWKINS,)

Defendants /Third-Party Plaintiffs,)

v.)

BAVARI CORP., STAR CONCRETE)

CORP., SUNTRUST MORTGAGE,)

INC., and TRICE VALUATION)

SERVICES,)

Third-Party Defendants.)

Submitted: August 17, 2007

Decided: December 31, 2007

Patrick Scanlon, Esq., Milford, Delaware. Attorney for Plaintiff.

W.C. Foster & Sons, Milford, Delaware. *Pro Se*.

Andre Jones, Wilmington, Delaware. Registered Agent for Bavari Corp., Third-Party Defendant.

Sean M. Lynn, Esq., Hudson, Jones, Jaywork & Fisher, Dover, Delaware. Attorney for Defendants Hawkins.

Gary R. Dodge, Esq., Dover, Delaware. Attorney for Third-Party Defendant Star Concrete Corp.

Daniel F. Wolcott, Jr., Esq. and Kenneth L. Dorsney, Esq., Potter, Anderson & Corroon, Wilmington, Delaware. Attorneys for Third-Party Defendant SunTrust Mortgage Inc.

Thomas S. Bouchel, Esq., Karpinski, Colaresi & Karp, Baltimore, Maryland. Attorney for Third-Party Defendant Trice Valuation Services LLC.

*Upon Consideration of
Defendant SunTrust Mortgage Inc.'s
Motion to Dismiss*

GRANTED

VAUGHN, President Judge

OPINION

This litigation pertains to the construction of a new house at 270 Case Ridge Road, Dover, Delaware. Because of alleged structural defects and building code violations, construction has been stopped with the house only partially completed.

The case started with the filing of a mechanics' lien action by a subcontractor. The owners of the property, Kenneth G. Hawkins and Rosalind M. Hawkins, in turn filed a third-party complaint against SunTrust Mortgage, Inc. ("Sun Trust") and others. SunTrust is the construction mortgage lender on the project. It hired Trice Valuation Services, LLC, ("Trice") which is also a third-party defendant, to inspect the house as construction loan draws were requested to verify that the house had reached the necessary stage of completion for each draw.

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Mr. and Ms. Hawkins, who I will sometimes refer to as the borrowers, contend that Trice was negligent in its inspections, specifically, that it reported that the work was progressing in a "workmanlike manner" when, in fact, that was not the case. They also contend that Trice was an agent of SunTrust and that SunTrust is, therefore, liable for Trice's alleged negligence. They also contend that they were in a special, fiduciary relationship with SunTrust. They also contend that SunTrust negligently passed false information to them, i.e., the inspection reports, when it knew or should have known that they would rely upon the false information.

SunTrust has filed a motion to dismiss the complaint pursuant to Superior Court Civil Rule 12(b)(6). It contends that the parties' relationship was lender-borrower without more and that it did not have any fiduciary duty to the borrowers. It also contends that under the loan documents, there is no legal basis upon which it can be liable to Mr. and Ms. Hawkins for construction defects.

For the reasons which follow, I have concluded that the borrowers' complaint against SunTrust must fail because of the plain terms of the construction loan documents.

STANDARD OF REVIEW

In considering a motion to dismiss a complaint, the court generally considers only the allegations contained in the complaint and exhibits attached thereto.¹ Where the moving party offers materials outside of the complaint, the motion must be treated

¹ *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

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as one for summary judgment.² There is an exception to this rule where the submitted material is integral to the plaintiff's claim and is incorporated into the complaint.³ Superior Court Civil Rule 10(c) permits materials that are attached as exhibits to a defendant's motion to dismiss to become part of the pleadings if the plaintiff's complaint is based on same documents.⁴ SunTrust's motion includes exhibits which are outside of the third-party complaint and require it to be deemed a motion for summary judgment.

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.⁵ The moving party bears the initial burden of establishing the nonexistence of material issues of fact.⁶ If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.⁷ In considering the motion,

² Super. Ct. Crim. R. 12(b); *see also Willis v. City of Rehoboth Beach*, 2004 Del. Super. LEXIS 224, at *4.

³ *Willis*, 2004 Del. Super. LEXIS 224, at *4; *see also Pension Benefit Guar. Corp.*, 998 F.2d at 1196 (holding that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document").

⁴ *Willis*, 2004 Del. Super. LEXIS 224, at *4.

⁵ Super. Ct. Civ. R. 56(c).

⁶ *Gray v. Allstate Ins. Co.*, 2007 Del. Super. LEXIS 124, at *3.

⁷ *Id.*

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the facts must be viewed in the light most favorable to the non-moving party.⁸ Summary judgment is inappropriate “when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.”⁹

FACTS

The construction loan Commitment Letter, signed by SunTrust and Mr. and Mrs. Hawkins, provides in pertinent part as follows:

Inspections. Lender shall have the right, but not the obligation to make periodic inspections of the Property. Such inspections do not relate to the quality of the work or compliance with plans and specifications or applicable zoning and building code requirements, all of which are the sole responsibility of Borrower. Borrower is solely responsible for selecting the builder and for making sure, through Borrower's own inspections, that the improvements are properly constructed. Notwithstanding any inspection, Lender will not be liable for (I) the performance or default of Builder or any subcontractor, artisans, laborers and materialmen; (ii) any failure to construct, complete, protect or insure the improvements or materials used or to be used in connection therewith; (iii) the payment of any cost or expense incurred in connection with the construction of the improvements; or (iv) the performance or non-performance of any obligation of Borrower or Builder. SunTrust's inspections are intended

⁸ *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

⁹ *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 Del. Super. LEXIS 22, at *4.

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to ascertain the percentage of work completed for the purpose of making advances of the Loan. Lender will have no liability or obligation to Borrower or any other party arising out of any inspection. No inspection or any failure by Lender to make objections after any inspection will constitute a representation to any party by Lender that the improvements are being constructed or have been constructed in accordance with the Plans and Specifications or any other requirement related to the construction of the improvements or a waiver by Lender of its right to thereafter insist that the improvements be constructed in accordance therewith. Borrower further expressly acknowledges that the Lender has no obligation to monitor or control the construction of the improvements for Borrower.

NO ACTION BY LENDER, INCLUDING BUT NOT LIMITED TO LENDER'S APPROVAL OF ANY PLANS AND SPECIFICATIONS OR WORK, DISBURSEMENT HEREUNDER OR DEPOSIT OR ACCEPTANCE OF ANY DOCUMENT OR INSTRUMENT, MAY BE CONSTRUED AS LENDER'S REPRESENTATION, WARRANTY OR WAIVER, EXPRESS OR IMPLIED, AS TO KIND, QUALITY, VALUE, MARKETABILITY OR FITNESS FOR ANY PURPOSE OF THE IMPROVEMENTS.

It appears that five draws were made between January 2006 and February 2007, although the exact number and their dates are not material. Each time, Trice did an inspection and issued a report. Copies of the inspection reports and related SunTrust documents were sent to Mr. and Ms. Hawkins. Among them is a memorandum dated

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October 25, 2006 from Phil McDonagh, a SunTrust representative, addressed to another SunTrust representative, requesting that a draw be issued and referring to the inspection report pertinent to that draw. Mr. McDonagh handwrote the following note at the bottom of the memorandum:

Kenny and Ros,

Everything looks like its finally moving forward at a good pace.

Call w/ any questions.

Phil.

The inspection report form used by Trice was titled "Satisfactory Completion Certificate." It was in part preprinted form and in part specific information filled in for the particular draw. Two of the reports are attached to the complaint. One for a December 2005 inspection reads, in pertinent part, as follows:

On 12/20/2005, the property situated at 270 Case Ridge Road, Dover, DE 19901 was appraised by me or William Thomas. The appraisal report was subject to: satisfactory completion.

I certify that I have reinspected subject property, the requirements or conditions set forth in the appraisal report have been met, and any required repairs or completion items have been done in a workmanlike manner.

Itemized below are substantial changes from the data in the appraisal report, and these changes do not adversely affect any property ratings or final estimate of value in the report:

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See attached addendum

Itemize Changes Field

Draw inspection: On Friday December 22nd, 2006 a limited draw inspection; draw #3 was found to have been completed with the following exceptions:

1) The remaining windows and exterior doors have been installed. However, the garage doors have not been installed and are to be installed after the garage floor has been poured at a later date.

2) The HVAC rough-ins were found to have been completed and the electrical and plumbing rough-ins were found to have been approximately 95% completed. All rough-ins are to be 100% completed by 12/26/2006 as per the builder's representative.

It is also noted that an appraisal nor an opinion of value was completed or has been offered for this property and this draw inspection is for "state of completion" and for the client's file use only.

A report for a January 17, 2007 inspection is similar in form to the foregoing report. I infer that the inspection reports for other draws follow the same format. It appears that each time Trice performed an inspection, it also sent an invoice to SunTrust for \$100 for that inspection.

The record also contains a copy of an email, dated February 6, 2007, which Mr. and Ms. Hawkins sent to Mr. McDonagh, which reads as follows:

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Phil,

Upon appropriate inspection we authorize SUN TRUST to give Class Custom Homes a \$25,000 draw for the dryvit installation. Also, we authorize these funds to be wired directly to Class Custom Homes. Please contact us if you have any questions pertaining to this request.

Thank you,
Kenneth and Rosalind Hawkins

Within two months of the email, the alleged structural defects and building code violations were discovered and construction had stopped. It appears that approximately \$200,000 of construction loan proceeds were disbursed. An architect who inspected the property in April 2007 recommends that the structure be demolished and rebuilt.

DISCUSSION

Ordinarily, a lender does not have a fiduciary duty to a borrower.¹⁰ Nor does it have any responsibility to a borrower for construction defects, absent a clear promise to the contrary.¹¹ Where a lender chooses to have inspections done prior to

¹⁰ *State St. Bank & Trust Co. v. Inversiones Errazuris Limitada*, 246 F. Supp. 2d 231, 256-57 (S.D.N.Y. 2002).

¹¹ *See, e.g., Sobi v. First S. Bank, Inc.*, 946 So.2d 615, 617 (Fla. Dist. Ct. App. 2007); *Decoudreaux v. Mut. Fed. Sav. & Loan Ass'n*, 455 S.E.2d 88, 90 (Ga. Ct. App. 1995) (“The lender is not an insurer of the work of the contractor, unless clear promises appear to the contrary.”); *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 321 S.E.2d 46, 50 (S.C. 1984); Jeffrey T. Walter, *Financing Agency's Liability to Purchaser of New Home or Structure for Consequences of Construction Defects*, 20 A.L.R.5th 499 (1994).

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each draw on a construction loan, such inspections are normally done for the benefit and protection of the lender, not the borrower.¹² The loan documents in this case, including the above-quoted section on inspections, are consistent with these principles.

In support of their contention that a special, fiduciary relationship existed between them and SunTrust, the borrowers point to Trice's representations that work was progressing in a "workmanlike manner,"¹³ Mr. McDonagh's note that everything "looks like its finally moving forward at a good pace," and SunTrust's transmittal of the inspection reports to them. This special, fiduciary relationship and the agency relationship between SunTrust and Trice, they contend, make SunTrust liable to them for false statements in the inspection reports that work was progressing in a workmanlike manner. These circumstances, they contend, overcome the language in the Commitment Letter.

An exception to the general principle that a lender has no responsibility for construction defects has been recognized in special circumstances where the lender's conduct goes beyond a debtor-creditor relationship.¹⁴ Such liability, however, must "be based on some clear promise of the lender to perform certain protective functions,

¹² *Decoudreaux*, 455 S.E.2d at 90; *Butts v. Atlanta Fed. Sav. & Loan Ass'n*, 262 S.E.2d 230, 232 (Ga. Ct. App. 1979).

¹³ It should be noted that the actual wording of the report states that "any required repairs or completion items have been done in a workmanlike manner." The report also states that it is for "stage of completion and the client's file use only."

¹⁴ *Jordan v. Atlanta Neighborhood Housing Svcs., Inc.*, 320 S.E. 2d 215, 216 (Ga. Ct. App. 1984).

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and upon a clear and distinct participation in the activity which resulted in the damage.”¹⁵

The borrowers rely upon two cases which have recognized this exception. In one, *Rudolph v. First Southern Federal Savings & Loan Association*,¹⁶ the lender insisted that the borrowers execute a construction contract which superceded their original contract with their contractor and deleted a requirement that an architect approve construction loan draws. The borrowers informed the lender they were worried about the dangers of advancing funds to a construction contractor because of a previous bad experience. The lender assured them, however, that they need not worry because the lender employed an inspector who would not approve a draw unless the work had been properly performed. Under these circumstances, the court concluded that the lender had voluntarily and affirmatively assumed the undertaking of inspecting the property for the benefit of the borrowers as well as the lender.

In the other, *Lippy v. Society National Bank*,¹⁷ a lender’s representative cultivated a close business relationship with the borrower. When the borrower desired to purchase a gas station property, he approached the loan representative for advice concerning environmental issues. The loan representative said “Trust me, I will solve the problem for you.” He advised the borrower he needed an environmental site assessment and recommended that he have it performed by a

¹⁵ *Decoudreaux*, 455 S.E.2d at 90.

¹⁶ 414 So.2d 64 (Ala. 1982).

¹⁷ 651 N.E.2d 1364 (Ohio Ct. App. 1995).

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particular company. The borrower did use the recommended company. It turned out that the company was unqualified and negligently failed to discover contamination. The court there found that the evidence supported a conclusion that the lender's conduct created a relationship of special confidence or trust between the parties.

Both of these cases are distinguishable from this one. Here, the evidence does not support a finding that SunTrust affirmatively assumed an undertaking to inspect the subject property for the borrowers' benefit. Mr. McDonagh's note to the borrowers that everything "looks like its finally moving forward at a good pace," is nothing more than his observation at the time. Trice's use of the words "workmanlike manner" does not alter the contractual provision in the Commitment Letter that inspections were for the purpose of confirming that the stage of completion for the next draw had been attained and did not relate to the quality of the work. This evidence and the attendant circumstances relied upon by the borrowers are insufficient to support a finding that inspections were done for the borrowers' benefit, or that any relationship of special trust or confidence existed between the parties, or that the relationship between the parties went beyond that of debtor-creditor.

The borrowers also contend that they have a negligence claim against SunTrust based on Restatement (Second) of Torts § 522 (1977) which provides, in pertinent part, that one who supplies false information to another is subject to liability for loss suffered by the other by his justifiable reliance upon the information, if the one imparting the information fails to exercise reasonable care in obtaining or communicating the information. However, this claim must fail because under the inspection provision in the Commitment Letter, SunTrust owed the borrowers no duty

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with regard to the contents of the reports and the borrowers could not justifiably rely upon them.

In conclusion, I find there is no genuine issue as to any material fact, and the evidence is insufficient to establish the facts necessary for any of the borrowers' theories of liability. SunTrust is, therefore, entitled to judgment as a matter of law. SunTrust's motion for summary judgment is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File