IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SMYRNA HOSPITALITY, LLC, Plaintiff,	)	
v.	)	C.A. No. N10C-01-061 CLS
PETRUCON CONSTRUCTION, INC. Defendant/Third-Party Plaintiff.	)	
v.	)	
FRAMEMASTERS, DIAMOND STATE WALL SYSTEMS, and DESIGN COLLABORATIVE, INC. Third-Party Defendants.	)	

Date Submitted: September 23, 2013
Date Decided: September 27, 2013

On Defendant Petrucon Construction, Inc.'s Motion for Partial Summary Judgment. **GRANTED.**

ORDER

Donald Gouge, Jr., Esq., Donald L. Gouge, Jr., LLC, Wilmington, Delaware. Attorney for Plaintiff.

Joseph S. Naylor, Esq., Swartz Campbell, LLC, Wilmington, Delaware. Attorneys for Defendant Petrucon Construction, Inc.

Scott, J.

Introduction

Before the Court is Petrucon Construction, Inc.'s ("Petrucon") Motion for Partial Summary Judgment on Smyrna Hospitality, LLC's ("Smyrna") Amended Complaint. The Court has reviewed the parties' submissions and heard argument on September 23, 2013. For the following reasons, Petrucon's Motion for Partial Summary Judgment is **GRANTED.**

Background

On June 15, 2005, Smyrna entered into a written agreement with Design Collaborative, Inc. ("DCI") in which DCI was to be the architect for the construction of a Best Western Hotel ("the Hotel") in Smyrna, Delaware. On May 15, 2006, Smyrna contracted with Petrucon for the construction of the Hotel by signing a standard form agreement ("the Agreement").[1] The Agreement identified Smyrna as the "Owner," Petrucon as the "Contractor," and DCI as the "Architect" for the project; however, DCI was not a party to the Agreement between Petrucon and Smyrna.

The final Certificate of Occupancy was issued for the Hotel in September 2007. Sometime after, the Hotel began experiencing water intrusion issues particularly around the windows, causing damages to the

[1] AIA Document A101-1997, "Standard Form of Agreement between Owner and Contractor", Petrucon Mot., Ex. B., at p.1; the Agreement also incorporated the General Conditions contained in AIA Document A201-1997, Petrucon Mot., Ex. C.

carpet, ceiling tiles windows, wall coverings, and furniture.[2] In June 2011, Smyrna sold the Hotel to a non-party.

Smyrna filed suit against Petrucon asserting breach of contract, fraudulent misrepresentation, breach of the covenant of good faith and fair dealing, and negligence. Smyrna seeks compensatory, consequential, and special damages, pre- and post- judgment interest, costs and fees. Petrucon has moved for partial judgment.

Standard of Review

A motion for summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part is entitled to summary judgment as a matter of law."[3] First, the moving party must show that there are no issues of material fact present.[4] Then, the burden shifts to the nonmoving party to show that issues of material fact exist.[5] In considering a motion for summary judgment, "judges may only determine whether or not there is a genuine issue as to a material fact; they may not try that issue."[6] Further,

[2] Amended Complaint, at ¶9; Smyrna Resp. to Petrucon Mot., at ¶ 5.
[3] Super. Ct. R. 56; *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[4] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[5] *Hurtt v. Goleburn*, 330 A.2d 134, 135 (Del. 1974).
[6] *Izquierdo v. Sills*, 2004 WL 2290811,*2 (Del. Ch. June 29, 2004).

the Court must view the facts in the light most favorable to the nonmoving party.[7]

Discussion

a. Intentional Misrepresentation

Petrucon argues that summary judgment is appropriate because Smyrna has not offered evidence of any fraudulent statement to support its claim for intentional misrepresentation. In response, Smyrna argues that Petrucon knew or should have known about the construction deficiencies for which it was responsible for and that "Petrucon failed to disclose to [Smyrna] the lack of oversight at the project, which was made with a reckless indifference to the truth, intending to induce plaintiff not to act."[8]

In an action for "'common law fraud, or intentional misrepresentation, a party is required to show "that (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose, (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth, (3) the defendant intended to induce the plaintiff to act or refrain from acting, (4) the plaintiff acted in justifiable reliance on the representation, and (5) the plaintiff was injured by its reliance.'"[9] In Delaware,

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[7] *Austin ex rel. Austin v. Happy Harry's Inc.*, 2006 WL 3844076, *1 (Del. Super. Nov. 27, 2006).
[8] Smyrna Resp., at ¶ 6.
[9] *Iacono v. Barici*, 2006 WL 3844208, at *2 (Del. Super. Dec. 29, 2006)(quoting *DCV Holdings, Inc. v. ConAgra, Inc.,* 889 A.2d 954, 958 (Del.2005)).

"one is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading."[10] A party is under a duty to speak in certain circumstances, such as where a fiduciary relationship exists, where customs of the trade would so require or when there is a contractual relationship between the parties.[11]

Even assuming that Petrucon had a duty to disclose a lack of oversight or any other related fact, Smyrna has not produced any facts suggesting that Petrucon made any statements or omitted any information with reckless indifference or with the intent to defraud. Therefore, summary judgment is granted in favor of Petrucon on Smyrna's claim for intentional misrepresentation.

b. Implied Covenant of Good Faith & Fair Dealing

A party will be liable for breaching the implied covenant of good faith and fair dealing when it engages in "conduct frustrates the 'overarching purpose' of the contract by taking advantage of their position to control implementation of the agreement's terms."[12] Petrucon argues that Smyrna's claim for breach of the implied covenant of good faith and fair dealing fails because Smyrna has failed to identify a specific implied contractual obligation. Smyrna made no rebuttal argument in response to Petrucon's implied covenant argument. Thus, summary

[10] *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).
[11] *See Matthews Office Designs, Inc. v. Taub Investments*, 647 A.2d 382 (Del. 1994); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992).
[12] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).

judgment is granted in favor of Petrucon as to the breach of implied covenant claim.[13]

c. Negligence, Breach of Contract, and Consequential/Economic Damages

Petrucon has conceded that "it is potentially liable for some or all of Plaintiff's direct damages (i.e. repair costs stemming from the allegedly defective and nonconforming construction work);"[14] however, Petrucon seeks partial summary judgment for Smyrna's breach of contract and negligence claims to the extent that Smyrna seeks consequential damages or economic damages, such as lost profits and diminution in business value, based on the parties' express agreement and the economic loss doctrine.

Although actions in tort and in contract may coexist in certain circumstances, "'where an action is based entirely on a breach of terms of a contract and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort.'"[15] When considering whether to apply the economic loss doctrine, which bars recovery for purely economic losses where there has been "no harm to person or property other

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[13] *See Hurtt v. Goleburn*, 330 A.2d 134, 135 (Del. 1974)(once moving party shows no genuine issue of material fact exists, the burden shifts to the non-moving party); *see also Boulden v. Albiorix, Inc.*, 2013 WL 396254, at *5 (Del. Ch. Jan. 31, 2013), as revised (Feb. 7, 2013) (a party waived its claim by failing to respond to argument in response to motion to dismiss).

[14] Petrucon Mot., at p. 3.

[15] *McKenna v. Terminex Int'l Co.,* 2006 WL 1229674, at *2 (Del. Super. Mar. 13, 2006)(quoting *Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey & Co., Inc.,* 2005 WL 445710, at *3 (Del.Super.)).

than the bargained for item,"[16] "the threshold issue for determining whether the economic loss doctrine applies is whether defendant breached a duty independent of contract obligations."[17] Only if a plaintiff shows that the defendant breached a duty independent of duties owed by contract will the Court consider whether the damages at issue were economic losses.[18]

In its breach of contract claim against Petrucon, Smyrna alleged that "Petrucon breached The Agreement due to its failure to perform its obligations under The Agreement in a good and workmanlike manner"[19] and that "Smyrna contracted for a fit and habitable hotel. Due to the failure of Petrucon to construct the hotel consistent with accepted codes and standards in the industry, including but not limited to the Kent County Building Code and other applicable codes, it is in breach of the Agreement with Smyrna."[20] In its negligence claim, Smyrna asserts that "Petrucon was negligent in the construction of the Hotel, as evidenced by the persistent and ongoing water penetration problems with The Hotel"[21] and that "Petrucon failed to use such care as a reasonably prudent contractor would in the construction of the

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[16] *Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Mktg.*, 2002 WL 1335360, at *5 (Del. Super. June 13, 2002); *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1195 (Del. 1992).
[17] *McKenna,* 2006 WL 1229674 at *4; *See Edelstein v. Goldstein*, 2011 WL 721490, at *7 (Del. Super. Mar. 1, 2011); *J.W. Walker & Sons, Inc. v. Constr. Mgmt. Serv., Inc.*, 2008 WL 1891385, at *1 (Del. Super. Feb. 28, 2008).
[18] *McKenna,* 2006 WL 1229674 at *3.
[19] Amended Compl., at ¶ 12
[20] *Id.* at ¶ 13.
[21] *Id.* at ¶ 22.

Hotel as set forth in this complaint…"[22] Despite the differing language used in the contract and negligence claims, Smyrna has not alleged or presented facts showing that Petrucon breached a duty independent of its duties arising under the contract.[23] Therefore, summary judgment is granted in favor of Petrucon as to Smyrna's claim for negligence.

Smyrna is not entitled to consequential damages from Petrucon based on a breach of contract. Article 12.2.1 of the Agreement requires Petrucon to "promptly correct" rejected or nonconforming work and to be responsible for the costs associated with such work.[24] Article 12.2.4 provided that Petrucon would "bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of [Smyrna] or separate contractors caused by the [Petrucon's] correction or removal of Work which is not in accordance with the requirements of the Contract Documents."[25] Article 4.3.10 governs the parties' claims for consequential damages and it states that

> The Contractor and Owner waive claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:
>
> 1. Damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing business and reputation, and for loss of management or employee productivity or in the services of such persons; and

[22] *Id.* at ¶ 23.
[23] *Cf. Midland Red Oak Realty, Inc.,* 2005 WL 445710, at *3.
[24] Petrucon Mot., Ex. C.
[25] *Id.*

2. Damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for the loss of profit except anticipated profit arising directly from the Work.

Where contractual language is clear and unambiguous, the Court must interpret its terms according to their ordinary and usual meaning.[26] The language of a contract is not considered ambiguous unless the terms are inconsistent or if "'the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings.'"[27] Here, the language of the Agreement is susceptible to but one meaning: Petrucon is responsible for the costs of repair under the Agreement, but not consequential damages, as defined by the Agreement.

Conclusion

For the aforementioned reasons, Petrucon's Motion for Partial Summary Judgment is **GRANTED**.

IT IS SO ORDERD.

/s/Calvin L. Scott
Judge Calvin L. Scott, Jr.

[26] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012).
[27] *Id.* (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).