IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CAPANO HOMES, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07C-07-004 JAP
	)	
IBRAHIM SYED AND	)	
NADIA SYED,	)	
	)	
Defendants.	)	

Submitted: August 8, 2008
Decided: September 8, 2008

On Plaintiff's Motion for Partial Summary Judgment
Upon the Complaint and Counterclaim.
GRANTED.

MEMORANDUM OPINION

Jeffrey M. Weiner, Esquire, Wilmington, Delaware, Attorney for the Plaintiff.

William L. O'Day, Jr., Esquire, Wilmington, Delaware, Attorney for the Defendants.

Plaintiff has filed a motion for partial summary judgment, seeking a determination that defendants breached an agreement to purchase a home constructed by plaintiff. For the reasons stated below, plaintiff's motion is **GRANTED.** Plaintiff also seeks dismissal of defendants' counterclaims against it. That motion is also **GRANTED**.

A. *The Standard for Summary Judgment*

Summary judgment is appropriate only where "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 party is entitled to a judgment as a matter of law."[1] If, however, material issues of fact exist or if a court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, the court will not grant summary judgment.[2]

The moving party bears the initial burden of demonstrating that the undisputed facts support its claims or defenses.[3] If the moving party meets its burden, the burden shifts to the nonmoving party to establish the existence of material issues of fact that must be resolved at trial.[4] Although the court must view the evidence in the light most favorable to the

[1] Super. Ct. Civ. R. 56(c)
[2] Motorola, Inc. v. Amkor Tech., Inc., 849 A.2d 931, 936 (Del. 2004).
[3] Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).
[4] Sierra Club v. Del. Dept. of Natural Res. and Envtl. Control, 919 A.2d 547, 554 (Del. 2007).

nonmoving party, the nonmoving party may not "safely stand mute" in the face of a summary judgment motion.[5] Rather, "where the moving party supports its motion with admissible evidence and points to the absence of proof bolstering the nonmoving party's claims, the nonmoving party must come forward with admissible evidence creating a triable issue of material fact or suffer an adverse judgment."[6]

Here defendants have relied upon denials of plaintiff's claims and have offered no record evidence to support their contentions. It is a fundamental precept, however, that the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading."[7] Defense counsel's approach is perhaps understandable because there appears to be a dearth of evidence supporting defendants' arguments. The Court also notes that defense counsel has sought to withdraw because, among other things, the Syeds have allegedly failed to communicate with him. This alleged failure to communicate no doubt contributed to the difficulties facing counsel.[8]

[5] Id.
[6] Id.
[7] Super. Ct. Civ. R. 56(e).
[8] Capano Homes has included materials in its motion relating to settlement discussions. Citing D.R.E. 408, defendants argue that it is improper to bring this material to the Court's attention. The Court agrees and has not considered any of it in reaching its decision.

B. *The Defendants are Liable to Capano Homes*

Plaintiff is the developer of a residential community known as "The Preserve at Presidential Estates." The defendants (the "Syeds") decided to purchase a home offered by Capano Homes known as the Centreville "B" model. According to the Syeds, they wanted their home to look exactly like a modified Centreville "B" model they had seen at another Capano Homes development. In August, 2006 defendants entered into a written agreement with plaintiff to purchase a Centreville "B" model to be constructed on Lot 10 at the Estates. The agreement is silent about the Syed's desire to purchase a home identical to the modified Centerville "B" model they had seen elsewhere.

The agreement specified that settlement was to take place on or before May 31, 2007. The Syeds, however, refused to proceed to settlement as required by their agreement. They offer two justifications for their refusal to do so: (1) the width of the garage entrance was reduced from 20 feet to 19 feet when, at defendants' request the garage was reoriented to open on the side of the house rather than the front; and (2) the stone veneer installed on the exterior of the building was not the specific veneer defendants ordered. Neither suffices to excuse the Syeds from settling on the home they agreed to purchase.

(1) The width of the garage opening

In October, 2006 Capano Homes prepared a schematic drawing showing a front-entry two car garage with a 20 foot wide opening which is a standard feature on the home model the defendants purchased. The Syeds told plaintiff they wanted a side entry garage (which appeared on the modified Centreville "B" model the Syeds had seen), whereupon Capano Homes prepared a revised schematic showing a side-entry two car garage.[9] The following month Capano Homes prepared a change order for certain changes in the plans, including the construction of a side entry garage. Notably, the change order specifically recited "Decrease size of Garage to 20'-4" deep to 19'-0" wide. Turn garage." The change order was signed by Alexis Watson, the Syeds' realtor, who agreed to pay the cost of reorienting the garage out of her commission.

Capano Homes contends that the change order constitutes a binding novation to the August, 2006 agreement because it was signed by the Syeds' real estate agent, Alexis Watson. Usually "[q]uestions of apparent authority are questions of fact and are, therefore, for the jury to determine."[10]

[9] At oral argument defendants' counsel asserted that defendants first learned that Capano Homes planned to construct a front opening garage when defendants observed the foundation being poured. Capano Homes asserts that the Syeds learned of the planned orientation of the garage when it submitted the first schematics to the Syeds. This dispute does not require denial of summary judgment because the manner in which defendants learned that Capano Homes originally intended to construct a home with a front opening garage is immaterial.

[10] Billops v. Magness Construction Co., 391 A.2d 196, 199 (Del. 1978).

Defendants conceded, however, in their response to plaintiff's motion that Ms. Watson was acting as their realtor at the time she signed the change order,[11] and they agreed at oral argument that Ms. Watson had apparent authority to bind the defendants. They contend nonetheless that the realtor exceeded the scope of her actual authority. This argument fails because, as they conceded at oral argument, defendants have no evidence that Capano Homes knew, or should have known, that Ms. Watson exceeded the scope of her authority when she signed the change order. Thus Capano Homes was entitled to rely upon Ms. Watson's apparent authority.

Even if Ms. Watson lacked apparent and actual authority to bind the Syeds, defendants would still be bound by the change order because they later ratified it. On December 11, 2006 Mrs. Syed signed a schematic drawing of the home which shows a 19 foot garage opening.[12] The drawing contains the notation "Plans Approved As Drawn" followed by Mrs. Syed's signature. It is settled law that a "person ratifies an act by manifesting assent that the act shall affect the person's legal relations or *conduct that justifies a reasonable assumption that the person so consents.*[13] Mrs. Syed's written acknowledgement that she "approved" the drawings showing the 19 foot

[11] Defendants' Response, at ¶5(b).
[12] The Court's copy of the schematic drawing is difficult to read because of the copying process. The defendants agreed at oral argument, however, that the original clearly shows a 19 foot wide garage.
[13] Restatement (Third) of Agency § 4.04 (2006) (emphasis added).

wide garage opening leaves no doubt that Capano Homes reasonably assumed she consented to the change order signed by Ms. Watson.

Mrs. Syed seeks to avoid the consequences of her signature by arguing that she did not understand the significance of what she was doing. This contention is of questionable legal significance because the test is not whether Mrs. Syed understood what she was signing, but rather whether her conduct justified Capano Homes' assumption that she consented to the change order. It is a basic principle of contract law that a signator to an agreement cannot, in the absence of fraud, avoid an agreement simply because he or she did not read or understand the document when he or she signed it. The Syeds have not pleaded fraud, mutual mistake or coercion as an affirmative defense. They are therefore bound by Mrs. Syed's written approval "as drawn" of the revised plans showing the garage with a 19 foot wide opening. Therefore, irrespective of whether Ms. Watson had authority to bind the Syeds when she signed the change order, the undisputed evidence shows that Mrs. Syed ratified the change order and defendants are now bound by it. It necessarily follows that the Syeds' contention that the narrower garage opening justifies their refusal to close on the house purchase is without merit.

(2) The change in the stone veneer

The Syeds wanted a stone veneer on part of the front of their home known as "Mesta Field Ledge." When Capano Homes ordered the Mesta Field Ledge from the manufacturer, it was told that the style had been discontinued. Capano Homes installed instead the manufacturer's recommended substitute, which has the same hue as Mesta Field Ledge but has a different shape. The Syeds contend that this substitution amounts to a breach of contract by Capano Homes.

The Syeds' contention fails because the agreement expressly reserved to Capano Homes the right to make "changes and modifications in the plans and specifications" subject only to the limitation that those changes do not materially reduce the square footage of the home or result in a building "which *in the seller's opinion* is less structurally sound or aesthetically pleasing."[14] The Syeds contend that the replacement veneer chosen by Capano Homes is less aesthetically pleasing. The difficultly with this contention is that under the contract it is Capano Homes' opinion -- not the Syeds' -- which is determinative whether the substitution is appropriate. There is no claim that Capano Homes' opinion that the home is aesthetically

[14] Contract, at ¶6 (emphasis added). The pertinent portion of the contract provides as follows:
"Seller reserves the right to make such changes and modifications in the plans and specifications and model homes as it may from time to time deem necessary and appropriate, provided such changes shall not substantially affect the physical location or design of the unit designated herein, or materially reduce the square footage thereof, or result in a building which in Seller's opinion is less structurally sound or aesthetically pleasing than shown on the plans and specification at the time this contract is entered."

less appealing is a pretext.[15] As a matter of law, therefore, the Capano Homes' installation of the substitution stone does not violate the express terms of the agreement.

Apparently realizing that Capano Homes was permitted by the express terms of the contract to substitute stone veneer, the Syeds argue that there is an implied covenant of good faith and fair dealing which required Capano Homes to discuss the substitution with them. Although there is an implied covenant of good faith and fair dealing in every contract, the courts of this state have been reluctant to impose obligations under that implied covenant.[16] Certainly it is not the proper role of a court to rewrite an agreement under the guise of applying the implied convenant.[17] The purpose of the implied covenant is to supply terms which the parties overlooked while negotiating an agreement. A court can do so, however, only when "it is clear from the contract that the parties would have agreed to that term had they thought to negotiate the matter."[18] It goes without saying

[15] It would have been surprising if defendants had such evidence given that Capano Homes used the manufacturer's recommended substitute.
[16] Homan v. Turoczy, 2005 Del. LEXIS 121, at *63 (Del. Ch. Ct. August 12, 2005) ("the Delaware Supreme Court has consistently held that obligations under the covenant of good faith and fair dealing should be implied only in rare cases").
[17] Cincinnati SMSA Ltd. Pshp. v. Cincinnati Bell Cellular Sys. Co., 708 A.2d 989, 991 (Del. 1998).
[18] Corporate Prop. Associates 14 Inc. v. CHR Holding Corp., 2008 Del. LEXIS 45, at *19 (Del. Ch. Ct. April 10, 2008).

therefore that the implied terms cannot override the written terms of a contract.[19]

The Syeds concede that there are no contract terms which would allow the Court to conclude that the parties would have negotiated a consultation provision had they thought to do so. Indeed, an implied covenant to confer about changes seems inconsistent with the express contractual provision which allows Capano Homes almost unfettered discretion in making changes to the plans and specifications. Having given Capano Homes such broad authority which is not in any way dependent upon the approval of the Syeds, there is no reason to believe that the parties would have negotiated a consultation requirement.

C. *Defendant's Counterclaim Must Be Dismissed*

The Syeds made a $50,000 deposit when they signed their agreement with Capano Homes. In a counterclaim they seek return of the deposit because Capano Homes allegedly failed to construct the home in accordance with the Plans and Specifications. Curiously, the claims advanced in support of their counterclaim vary somewhat from those they advanced in opposition to Capano Homes' motion. They allege that Capano Homes breached that agreement by (1) constructing the garage in a reduced size; (2) substituting

[19] Gilbert v. El Paso Corp., 575 A.2d 1131, 1134 (Del. 1990).

the stone veneer; (3) "failing to move a fireplace"; (4) "failing to add columns"; (5) finishing a set of stairs with carpeting rather than hardwood flooring; and (6) "closing the railing rather than the agreed-upon open railing finish.[20]

The Syeds have the burden of proof with respect to their counterclaim. Capano Homes having moved for summary judgment dismissing these claims, the Syeds are now obligated to come forward with some evidence upon which a trier of fact could base a finding in their favor. However, they have failed to point to any evidence to support their claims and the Court will grant Capano Homes summary judgment dismissing them.

(1) The larger garage

The saga of the turned garage was discussed earlier in this opinion and that discussion need not be repeated here. Suffice it to say that the Change Order signed by Ms. Watson expressly states "Decrease size of garage" and the Plans signed by Mrs. Syed show the smaller dimensions of the garage.

(2) The stone veneer

For the reasons stated earlier, there is no merit to this claim.

(3 – 4) Relocating the fireplace and additional columns

[20] Counterclaim, at ¶19.

The contract between Capano Homes and the Syeds provides that "[n]o changes in construction … ordered by Buyer will be made unless approved by Seller and a separate written agreement for said work is signed by Buyer and Seller."[21] It is apparent from the phrases in the Counterclaim "move a fireplace" and "add columns" that these are changes in construction desired by the Syeds. Yet they have failed to provide the Court with any change orders or other written agreements reflecting these modifications. These claims are therefore meritless.

(5 – 6) Stairs finished in carpet and "open railings"

It is unclear from the Counterclaim whether these items were called for in the original contract between Capano Homes and the Syeds or whether they were a later change requested by the Syeds. In either event, the Syeds failed to bring to the Court's attention any document which obligated Capano Homes to install hardwood stairs or "open railings." These claims, too, are therefore without merit.

IT IS SO ORDERED.

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John A. Parkins, Jr.

oc: Prothonotary

[21] Contract at ¶7