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

RHA CONSTRUCTION, INC., a Delaware Corporation, and BEECHWOOD RETREAT, LLC, a Delaware Limited Liability Company Plaintiffs, v. SCOTT ENGINEERING, INC., a Delaware Corporation and GREGORY R. SCOTT, P.E., a resident of the State of Delaware, Defendants.	)	C.A. N11C-03-013 JRJ CCLD

Date Submitted: May 24, 2013
Date Decided: July 24, 2013

OPINION

Upon Defendant's Motion for Summary Judgment:
GRANTED in Part and DENIED in Part.

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Jurden, J.

I. INTRODUCTION

Defendants Scott Engineering, Inc. ("SEI") and Gregory R. Scott ("Scott") move this Court for summary judgment as to all claims and counterclaims. For the reasons state below, Defendants' motion for summary judgment is **GRANTED in part and DENIED in part**.

II. BACKGROUND

On June 20, 2011, RHA Construction Inc. ("RHA") and Beechwood Retreat, LLC ("Beechwood") (together, the "Plaintiffs") filed an amended complaint (the "Amended Complaint") in the Superior Court of the State of Delaware against SEI and Scott (together, "the Defendants").[1] The Amended Complaint stated three causes of action: (I) Breach of Contract,[2] (II) Breach of Implied Covenant of Good Faith and Fair Dealing,[3] and (III) Consumer Fraud (Negligent Misrepresentation).[4]

Each of the Plaintiffs' three claims arises from two contracts entered into by RHA and Scott in May 2007 and August 2008 respectively. RHA, a construction manager jointly owned by Randall H. Amos ("Mr. Amos") and his wife, Tammy Amos ("Mrs. Amos") was engaged by TASH Corporation ("TASH"), a corporation jointly owned by Mrs. Amos and Signe Murray ("Mrs. Murray"), to

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1 First Amended Complaint at pp. 1-4.
2 *Id*. at pp. 47-66.
3 *Id*. at pp. 67-71.
4 *Id*. at pp. 72-83. Plaintiffs' original complaint articulated two additional causes of action: Negligence and Engineering malpractice.

manage the acquisition, planning, and development of two adjoining parcels of land in Kent County.[5] One parcel was owned by the Yoder family ("Yoder") and the other was owned by the Parag family ("Parag"). On behalf of TASH, RHA hired SEI to conduct, among other tasks, a feasibility study to determine whether the Yoder and Parag properties were suitable for Mr. and Mrs. Amos and Mrs. Murray's intended purpose: to build a comprehensive "green" community, consisting of one major and two minor subdivisions.[6]

In April 2007, the TASH Corporation entered into agreements to purchase the Yoder and Parag parcels.[7] While the approximately 34-acre Parag property abutted a major road, the approximately 105-acre Yoder property was accessible only by a 30-foot wide strip of land known as "Percheron Road."

Shortly following the contract for sale, RHA hired SEI for engineering services related to the planned development of the two properties. The May 11, 2007 agreement between RHA and SEI consisted of a ten-page document and a one-page addendum entitled "Terms and Conditions of Agreement for Professional

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5 R. Amos Dep. at 34.

6 *Id*. at 35.

7 *Id*. at 43; T. Amos Dep. at 76-77. The original purchase price for the Yoder property was $2.3 million, and the original purchase price for the Parag property was $800.000, each in cash. Def. Op. Brf. in Favor of Summary Judgment at 4 [hereinafter Def. Op. Brf.].

Services" ("Terms and Conditions").[8] Mr. Amos disputes that the Terms and Conditions page was attached to this contract between the parties.[9]

The May 2007 contract describes the work to be completed by SEI as "services [SEI] understand are necessary to provide [RHA] with a complete set of approved Construction Drawings and a recorded Record Plan."[10] The various services are divided into twelve separate "Tasks,"[11] which SEI estimated would cost RHA $287,500.[12] The May 2007 agreement also includes a clear reference to the Terms and Conditions addendum: "The attached Terms and Conditions of Agreement for Professional Services shall be considered an integral part of this proposal/agreement."[13] Within the Terms and Conditions page, is a clause entitled "Risk Allocation" which specifically limits SEI's liability on the contract to the total fees paid.[14] Whereas the ten-page "proposal/agreement" primarily addresses the RHA's goals for the properties and the nature of the work to be completed by SEI, it is the Terms and Conditions page that addresses the legal and financial implications of the agreement.[15]

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8 Def. Ex. F.
9 R. Amos Dep. at 57-58; Pltf. Ex. 9 at 1.
10 Def. Ex. F at 1.
11 *Id*. at 1-7.
12 *Id*. at 8-9.
13 *Id*. at 9.
14 *Id*. at SEI00675. *See also* Sec. IV.D infra.
15 Def. Ex. F.

Following RHA and SEI's contract in May 2007, Mr. Amos put SEI's surveying work on hold while the financing for the project was finalized.[16] Soil tests were also placed on hold while RHA and TASH secured financing for the project.[17] As a result, the Yoder property became subject to an agricultural lease through November 2008.[18] As part of the financing agreement, the financing company required Mr. and Mrs. Amos and Ms. Murray to create a new holding company so that separate entities would own and develop the land, respectively.[19] That new holding company created to secure financing was Beechwood Retreat, LLC ("Beechwood").[20] Beechwood closed on the two properties in July 2008.[21]

After Beechwood closed on the two properties, RHA entered into a second agreement with SEI in August 2008. The August 2008 agreement covered services described by SEI as "necessary to provide [RHA] with a complete set of approved Construction Drawings and recorded Minor Subdivision Plans for each parcel."[22] That agreement was eight pages long and included a Terms and Conditions addendum identical to the one SEI claims was attached to the May 2007

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16 R. Amos Dep. at 110-15.
17 *Id*.
18 *Id*. at 117-18. Because soil tests must be completed in wet winter months, the delay in soil testing necessarily delayed the finalization of project plans until late 2008 or early 2009.
19 T. Amos Dep. at 43-44.
20 *Id*. at 43.
21 *See* Pltf. Ex. 11.
22 Def. Ex. I at 1.

agreement.[23] The body of the proposal/agreement also contained the same direct reference to the Terms and Conditions page, which state that the attached Terms and Conditions, "shall be considered an integral part of this proposal/agreement."[24] Again, the contract described each element of SEI's expected work as a "Task" and estimated the total cost of the seven separate Tasks as $165,000.[25]

Following the acquisition of the two properties, and after entering into the second agreement with SEI, Mr. Amos was told that the subdivision plans would not be approved by Kent County (the "County") because the 30-foot strip of land known as "Percheron Road" was not actually a road, but an easement over property owned in fee simple by abutting land owners.[26] The County would not allow Beechwood to use the 30-foot easement as a main access point because County regulations require any access point to be at least 50-feet wide.[27] In addition, the County would not permit Beechwood to lay ground lines for necessary utilities because Beechwood did not own the strip of land in fee simple. Attempts to negotiate a purchase of Percheron Road were unsuccessful.[28]

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[23] *See Id*. at RHA000537. Mr. Amos does not dispute that the Terms and Conditions page was attached to the August 2008 agreement.
[24] *Id*. at 7.
[25] *Id*. at 6.
[26] *See* Ex. A to Deft. Supp. Brf. for Summary Judgment.
[27] The owners of Percheron Road were unwilling to extend to scope of the easement. R. Amos Dep. at 117.
[28] *See* R. Amos Dep. at 181.

III. STANDARD OF REVIEW

Summary judgment is appropriate only if, after reviewing the record in the light most favorable to the non-moving party, the court finds there are no remaining issues of material fact related to a claim.[29] In determining whether a material issue of fact exists, the court should consider all pleadings, depositions, answers to interrogatories, admissions, and affidavits.[30] "Even where there are disputed facts, summary judgment is warranted if the undisputed facts and the non-movant's version of the disputed facts entitle the moving party to judgment as a matter of law."[31]

IV. DISCUSSION

A. Introduction

Defendants move for summary judgment on several grounds. First, Defendants argue that no errors or omissions by SEI caused Plaintiffs to suffer any damages.[32] Second, Defendants assert Plaintiffs have not suffered any damages, or in the alternative, that any damages claimed by Plaintiffs are speculative.[33] Third, Defendants seek summary judgment on the consumer fraud claim, arguing Plaintiffs have no evidence to support a claim under the Delaware Consumer Fraud

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29 Super. Ct. Civ. R. 56(c); *Merrill v. Crothall-American, Inc.*, 6060 A.2d 96, 97 (Del. 1992).

30 Super. Ct. Civ. R. 56(c); *see Phillips v. Delaware Power & Light Co.*, 216 A.2d 281, 284 (Del. 1966) ("Any consideration by a Court of a motion for summary judgment is limited to the types of matters included within Superior Court Rule 56 . . . .").

31 *Palmer v. Moffat*, 2004 WL 397051, at *2 (Del. Super. Ct. Feb. 27, 2004).

32 Def. Op. Brf. at 13.

33 *Id*. at 15.

Act ("DCFA"). Finally Defendants seek summary judgment limiting liability, if any, to an amount equal to fees paid.[34] For the reasons stated below, summary judgment is **GRANTED** with respect to Plaintiff Beechwood on all claims, while Plaintiff RHA's damages, if any, will be limited to the fees paid to Defendants. Thus, Defendants' motion is **GRANTED in part and DENIED in part**.

B. The Delaware Consumer Fraud Act Claim.

Defendants make several contentions with respect to Plaintiffs' DCFA claim. First, Defendants argue Plaintiffs fail to state a misrepresentation of material fact in connection with the sale or lease of merchandise.[35] Second, Defendants assert Plaintiffs have not pled their fraud action with sufficient particularity.[36] Finally Defendants argue that private consumer fraud actions under the DCFA require proof of damages, which Plaintiffs have failed to present.[37]

In response, Plaintiffs point to two specific misrepresentations that serve as the basis of their claim. With respect to the May 2007 agreement, Plaintiffs cite a statement on SEI's website which reads, "Mr. Scott is extremely familiar with the City of Dover and Kent County having lived and worked in Kent County for the

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[34] *Id*. at 16.
[35] *Id*.; *see* 6 *Del. C.* § 2513(a).
[36] Def. Op. Brf. at 17; *see* Del. R. Super. Ct. 9(b).
[37] Reply Brief of Defendants in Favor of Summary Judgment at 13 [hereinafter Def. Rep. Brf.]; *see* 6 Del. C. § 2525(a).

last 22 years."[38] As a basis for consumer fraud related to the August 2008 agreement, Plaintiffs suggest Mr. Scott either intentionally or negligently misstated the feasibility of using Percheron Road to lay utilities and to access the planned minor subdivision.[39] Plaintiffs further claim these actions have been pled with particularity, and that the DCFA does not require them to prove reliance – only the existence of a material misstatement intended to mislead.[40]

i. Whether the statement from SEI's website may be grounds for a violation of the DCFA?

In support of a consumer fraud claim related to the May 2007 agreement, Plaintiffs identify language used on SEI's website as evidence SEI either intentionally or negligently induced RHA to hire the surveying firm to assess the Yoder and Parag properties.[41] Defendants claim the language is "mere puffing" and not actionable.[42]

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[38] Plaintiffs' Answering Brief in Opposition of Defendants' Motion for Summary Judgment at 22 [hereinafter Pltf. Ans. Brf.]; *see* Pltf. Ex. 7 at 14.

[39] Pltf. Ans. Brf. at 23-24. In their Complaint, Plaintiffs also allege that Mr. Scott misrepresented that "Plaintiffs would be able to develop the parcels at one unit per acre." First Amended Complaint at ¶ 79. This statement appears to stem from Plaintiffs' allegation that Mr. Scott did not inform them of impending changes in the County regulations that would foreclose Plaintiffs' preferred development scheme of one unit per acre, First Amended Complaint at ¶ 14-16, but the issue is not raised in Plaintiffs Answering Brief. Nevertheless, nothing in the record indicates that Mr. Scott's alleged omission could serve as a basis for a fraud action under the DCFA, as no party alleged it was made in conjunction with a sale of goods or services. *See* DEL. CODE ANN. tit. 6, § 2513.

[40] Pltf. Ans. Brf. at 20-22.

[41] *Id*. at 22-23.

[42] Def. Rep. Brf. at 17 (citing *Bridgestone/Firestone, Inc.*, 2002 WL 1042089, at *5 (Del. Super. Ct. May 23, 2002).

"Generally, fraud cannot be predicated upon the mere expression of opinion . . . nor upon mere representations of matters of estimate or judgment."[43] Whether a statement constitutes an opinion, however, or is a material misstatement of fact is usually a question for the trier of fact.[44] SEI's website displayed numerous claims regarding the capabilities of Mr. Scott and its employees, and the one claim on which Plaintiffs base their consumer fraud claim appears to be a description of Mr. Scott's general qualifications.[45] There is no indication in the record that Mr. Scott has not lived in Kent County for at least 22 years.[46] Therefore, the sole question is whether SEI's statement that Mr. Scott is "extremely familiar with the City of Dover and Kent County," is actionable under the DCFA.

SEI's claim that Scott was familiar with the city and county cannot, in and of itself, be a basis for Plaintiffs' claim here. Even viewing the statement in the light most favorable to the Plaintiff, the statement contains no substance on which to state a claim. As opposed to *Mentis v. Delaware American Life Ins. Co.*, where Defendant's sales representatives made specific representations regarding the cost of investments in order to induce new customers to leave their existing life

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[43] *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504, 511 (1931) ("The mere fact that a statement takes the form of an opinion does not necessarily remove from it its actionable status. . . .").

[44] *Knapp v. McCleary*, 1987 WL 14864, at *2 (Del. Supr. July 9, 1987); *Mentis v. Delaware American Life Ins. Co.*, 1999 WL 744430, at *7 (Del. Super. Ct. July 28, 1999) ("Whether or not [Defendants'] sales agents expressed 'opinions' or outright misleading facts is a question of fact, and cannot be determined on a Motion to Dismiss.").

[45] *See* Pltf. Ex. 7.

[46] G. Scott Depo. at 47.

insurance provider, SEI merely posted a general description of Mr. Scott's professional background and experience on the company's website.[47] The record is also silent on how the statement on the website was material to the May 2007 agreement. Previously this Court denied Defendants' motion to dismiss Plaintiffs' consumer fraud claim, however, looking beyond the pleadings, Defendant's Motion for Summary Judgment on the Consumer Fraud claim is **GRANTED** with respect to the May 2007 agreement.

ii. Whether Defendants' representation that Percheron Road could serve as an access point for the subdivision may serve as grounds for a claim under the DCFA?

In support of their claim under the DCFA related to the August 2008 agreement, Plaintiffs allege two separate grounds for damages: (1) that Mr. Scott negligently misrepresented to Mr. Amos that it was possible to secure a waiver for the length and width of Percheron Road that would allow Plaintiffs' to use Percheron Road to access the minor subdivision;[48] and (2) that Mr. Amos failed to advise Plaintiffs that utilities for the minor subdivision could not be run under Plaintiffs' easement over adjoining property.[49] Plaintiffs argue Defendants are liable both because Defendants failed to inform Plaintiffs of the underlying facts, and because Defendants failed to inform Plaintiffs of the implications of those

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47 *Mentis*, 1999 WL 744430, at *1-2.
48 Pltf. Ans. Brf. at 13.
49 *Id*. at 13.

facts for the project at hand.[50] Because Plaintiffs were aware of the underlying facts, and because Defendants' statements of opinion cannot serve as the basis for a fraud action, Plaintiffs' DCFA claim cannot stand.

As previously stated, a statement of opinion cannot generally be the basis for an action in fraud.[51] Still, "the mere fact that a material statement is in the form of an opinion, or of an estimate, is not necessarily conclusive as to whether it must be treated as such, or whether it can be regarded as a representation of fact,"[52] because an opinion may carry with it the implication that the maker is aware of facts that support or justify that opinion.[53] "Where a recipient does not know the facts, he may justifiability rely upon [the] implied assertions and recover on the basis of a misrepresentation of implied fact."[54] It then follows that where, as here, Plaintiffs were aware of the underlying facts, there can be no misrepresentation of implied fact, and therefore no grounds for fraud.

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50 *Id*.

51 *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 554 (Del. Ch. 2001) ("Predictions about the future cannot give rise to actionable common law fraud."); *E. States Petroleum Co. v. Universal Oil Products Co.*, 2 A.2d 138, 140 (Del. Ch. 1938) ("It is a general proposition of law that in order for a false representation to be such as to warrant rescission, it must be of a fact as distinguished from a mere expression of opinion."); *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504, 511 (Del. Super. 1931) ("Generally, fraud cannot be predicated upon the mere expression of opinion which is understood to be only as such nor upon mere representations of matters of estimate or judgment.");

52 *E. States Petroleum*, 3 A.2d at 775.

53 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 115 (Del. 2006); Restatement (Second) Torts § 545 (1977).

54 *Wal-Mart*, 901 A.2d at 115.

Mr. Amos was deposed for a second time in the course of this litigation on April 23, 2013. Defendants' counsel first questioned Amos about his knowledge of the length and width of Percheron Road, and the implications for the minor subdivision:

> Q: Okay. Prior to closing, who at Scott Engineering told you the Yoders owned that road?
>
> A: When we were talking about the minor subdivision, Greg [Scott] said the only thing we would have to do with that road . . . is get a variance for the length.
>
> Q: So when you were talking about the minor subdivision, when was that?
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> A: We were doing all this at the same time. So it was sometime in April, May [2008] time period when they were putting together preliminaries for both sides, Parag and Yoder.
>
> [. . .]
>
> Q: And who else was in this discussion?
>
> A: Greg [Scott], Art [Weldin]. I'm not sure it Mark Pugh was there with me or not. It was in their office.
>
> [. . .]
>
> Q: It was at that time in that office in that discussion that Greg [Scott] said you needed to get a variance for the length of Percheron Road?
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> A: Correct.
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> Q: Did he explain why?
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> A: Because of the length of it, it going to a minor subdivision.[55]

[55] R. Amos 2nd Depo. at 48-49. In his own deposition, Mr. Scott corroborated Mr. Amos' statement regarding the size of Percheron Road:

Mr. Amos' second deposition establishes that prior to the August 2008 contract between RHA and SEI, Defendants made Mr. Amos aware that he would need to secure a waiver from the County in order to use Percheron Road as an access point for the minor subdivision. Mr. Scott admitted that he told Mr. Amos that he believed the waiver was a possibility.[56] In support of their DCFA claim, Plaintiffs offer two expert opinions which both state that securing the waiver in order to use the road was highly unlikely.[57] Mr. Scott's opinion as to the possibility of securing a waiver, however, cannot be the basis of a fraud claim.[58]

Defendants' counsel then questioned Mr. Amos regarding the ownership of Percheron Road. Mr. Amos stated that prior to the August 2008 contract, in addition to understanding the need for a waiver from the County, he also knew he did not own the entire length of the road, and that a portion of Percheron Road was only an easement over adjoining land:

Q: This issue regarding the 30-foot wide easement we have been talking about throughout the date when was it first realized that that would be an impediment to recording the minor subdivision plans?

A: Well it was realized as a potential impediment at the beginning before we started with the minor subdivision plan. We told Randy here is your minimum requirement for minor sub. You have to have a private road. It has to be 50-foot wide and it can't exceed 60-foot in length, and he wanted to go in for waivers on those. We felt in conversation with the County that that was something they would potentially consider and perhaps we could get a waiver for the 30-foot width – the 50-foot down to a 30-foot and the length." G. Scott Depo. at 185-86.

56 G. Scott Depo. at 185-86.

57 R. Sutton Dep. at 147-48; D. Braun Dep. at 52.

58 *See* n.51, *supra.*

Q: So you believed, at that time, and this is prior to settlement, that [the] portion through the Miller property, or at least a portion of the Miller property, was an easement?

A: Correct.[59]

As a matter of law, Mr. Amos is "presumed to know the law and therefore cannot be deceived by erroneous statements of law."[60] This includes knowledge of local zoning regulations, which are considered legislative actions of the County government.[61] Therefore, while Mr. Scott's statements of opinion regarding the County zoning regulations may have been erroneous, they "cannot serve as a basis for a fraud action."[62] Defendants were hired to perform engineering tasks related to the feasibility of developing the Yoder and Parag properties, not to advise

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[59] R. Amos 2nd Depo. at 5.

[60] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611 (Del. Ch. 2005) (citing *Lakeside Invs. Group, Inc. v. Allen*, 559 S.E.2d 491, 493 (Ga. Ct. App. 2002)), *rev'd on other grounds*, 901 A.2d 106 (Del. 2006); *Miller v. Bd. of Adjustment of Town of Dewey Beach*, 521 A.2d 642, 647 (Del. Super. 1986) ("The underlying principle which supports this rule is that every person is presumed to know the extent of power of the municipal authorities.").

[61] DEL. CODE ANN. tit. 9, § 4902 ("[T]he county government may divide the territory of Kent County into districts or zones of such number, shape, or area as it may determine, and within such districts . . . may regulate . . . the uses of land."); *Lakeside*, 559 S.E.2d at 493 ("[Z]oning is a legislative function of the county . . . ."); *see also City of Colorado Springs v. Securcare Self Storage*, 10 P.3d 1244, 1248 (Colo. 2000) ("Courts interpret the ordinances of local government, including zoning ordinances, as they would any other form of legislation."); *Armstrong v. Mayor and City Council of Baltimore*, 906 A.2d 415, 426 (Md. 2006) ("Ordinarily, the adoption of zoning texts and zoning text amendments are legislative actions."); *Leonard v. City of Bothell*, 557 P.2d 1306, 1309 (Wash. 1976) ("Generally, when a municipality adopts a zoning code and a comprehensive plan, it acts in a legislative policy-making capacity."); *Andrews v. Board of Sup'rs of Loudoun County*, 107 S.E.2d 445, 447 (Va. 1959) ("It is well settled in Virginia and elsewhere that zoning is a legislative power residing in the State, which may be delegated to cities, towns and counties.").

[62] *Lakeside*, 559 S.E.2d at 493-94 ("Zoning status, whether concealed or misrepresented, is discoverable by a diligent review of the county zoning ordinance and records and therefore cannot serve as a basis for a fraud action.").

Plaintiffs on the legal implications of their ownership stake in said properties.[63] Plaintiffs' may have a justified grievance with the quality of Defendants' work, but under the facts presented here, Plaintiffs' complaints are not properly litigated under the DCFA.

Thus, Defendants' Motion for Summary Judgment on the Consumer Fraud claim is **GRANTED** with respect to the August 2008 agreement. The Court need not consider whether Plaintiffs must prove reliance as a part of their DCFA claim.

C. Adequacy of Causation Evidence

Defendants contend that Plaintiffs have failed to demonstrate the causal relationship between their damages and Defendants' errors or omissions. Delaware unequivocally adheres to the "but for" proximate cause standard, such that, in Delaware, proximate cause is defined as "that direct cause without which the accident would not have occurred."[64] For a contract claim, however, Plaintiffs need only "take[] the causation of damages out of the area of speculation."[65] Plaintiffs have demonstrated that there is a genuine issue of material fact by providing the report and expert testimony of Ronald Sutton, a professional engineer who opined that, at a minimum, in exchange for payment for professional

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[63] Ostensibly, Plaintiffs hired Attorney Stephen Spence to conduct a title search, negotiate the property settlement, and advise Plaintiffs on the legal consequences of acquiring a portion of the property in easement only.

[64] *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991).

[65] *LaPoint v. AmerisourceBergen Corp.*, 2007 WL 1309398, at *7 (Del. Ch. Ct. May 1, 2007).

services, SEI provided RHA with incomplete studies and overbilled RHA for SEI's own errors or omissions.[66]

D. Limitation of Liability Clause

Defendants claim that any award of damages arising from this litigation should be limited to the fees paid to SEI in accordance with a limitation of liability clause contained in the Terms and Conditions addendum to SEI's standard contract.[67] Plaintiffs contend that the Terms and Conditions were in fact not attached to the First Contract in May 2007, and are therefore not enforceable with respect to that agreement. Plaintiffs also contend that even if the Terms and Conditions were not attached to either agreement, the limitation of liability clause is unenforceable because the fixed damages amount is grossly inadequate and because damages arising out of the agreement are easily ascertainable.[68] Finally, Plaintiffs contend that the limitation of liability clause contained in the Terms and Conditions is not enforceable with respect to Beechwood, who RHA claims was an intended third-party beneficiary of both contracts.[69]

i. Whether the limitation of liability clause was incorporated by reference into the May 2007 agreement?

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66 R. Sutton Dep. at 158-165; *see also LaPoint*, 2007 WL 1309398 at *7 (denying defendant's motion for summary judgment even after plaintiff's expert witness on damages withdrew).

67 Def. Op. Brf. at 18; Pltf. Ans. Brf. at 25-26.

68 Pltf. Ans. Brf. at 25-27. Plaintiffs concede the Terms and Conditions were attached to the Second Agreement.

69 *Id*. at 28-29.

Mr. Amos, who executed the May 2007 agreement with SEI on behalf of RHA, submitted an affidavit on May 23rd, 2011 in which he swore the Terms and Conditions page was not attached to the 2007 agreement.[70] Under Delaware law, however, RHA will still be held to the Terms and Conditions which were clearly referenced on page 9 of the May 2007 agreement.[71]

"The obligation of a contracting party to read any contract it signs extends to documents incorporated by reference, which become part of the terms of the parties' agreement at the time of execution."[72] This Court addressed a similar contract in *Rose Heart, Inc. v. Ramesh C. Batta Associates, P.A.*, where the Plaintiff argued it was not bound by an arbitration clause contained in a document entitled "General Terms and Conditions," because the document was not properly incorporated into the contract between the parties.[73] The Court disagreed. As in the instant case, the General Terms and Conditions document was not only incorporated by reference in the contract, but the contract language itself described the General Terms and Conditions as "an integral part of the agreement."[74] In

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70 Pltf. Ex. 9 at 1.

71 *McAnulla Elect. Const., Inc. c. Radius Technologies, LLC*, 2010 WL 3792129, at *4 (Del. Super. Ct. Sept. 10, 2010) ("A party's failure to read a contract does not render the contract invalid or relieve that party of its terms." (citing *Healy v. Silverhill Constr. Co.,* 2007 WL 2769799, at *2 (Del. Com. Pl. Sept. 19, 2007) ("[S]uch a sophisticated party to a construction contract at the least should have read the contract and sought out the incorporated terms.")).

72 *McAnulla*, 2010 WL 3792129, at *4.

73 1994 WL 164581, at *2-3 (Del. Super. Ct. Apr. 12, 1994).

74 *Id*. *3.

Rose Heart, there was no language addressing arbitration contained in the contract itself that would lead Plaintiff to believe the contract was controlling on that issue.[75] Similarly here, there is no language in SEI's proposal/agreement addressing risk allocation or limitation of liability, which could lead RHA to believe the contract, rather than the Terms and Conditions, were controlling on that issue.[76] Therefore, as a matter of law, the Terms and Conditions, including the Risk Allocation clause, were incorporated into the May 2007 agreement.[77]

ii. Whether the limitation of liability clause is enforceable against RHA?

Limitation of liability clauses that relieve a party of liability for its own negligence are generally disfavored under Delaware law,[78] but are "enforceable where damages are uncertain and the amount agreed upon is reasonable."[79] Such clauses will not be enforced, "unless the contract language makes it crystal clear and unequivocal that the parties specifically contemplated that the contracting

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75 *Id*.

76 *See* Def. Ex. F.

77 *Pellaton v. Bank of New York*, 592 A.2d 473, 477 (Del. 1991) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it . . . . If this were permitted, contracts would not be worth the paper on which they are written." (quoting *Upson, Assignee v. Tribilcock*, 91 U.S. 45, 50 (1875))); *Rose Heart*, 1994 WL 164581, at *4 ("[Plaintiff] is presumed to have read the . . . agreement and, by signing it, agreed to be bound by the terms set forth in the agreement and those incorporated by reference.").

78 *Delmarva Power & Light Co., v. ABB Power T & D Co., Inc.*, 2002 WL840564, at *6 (Del. Super. Ct. Apr. 30, 2002); *J.A. Jones Const. Co. v. City of Dover*, 372 A.2d 540, 546 (Del. Super. 1977).

79 *Rob-Win, Inc. v. Lydia Sec. Monitoring, Inc.*, 2007 WL 3360036, at *6 (Del. Super. Ct. Apr. 30, 2007) (quoting *Donegal Mut. Ins. Co. v. Tri-Plex Sec. Alarm Systems*, 622 A.2d 1086, 1089-90 (Del. Super. 1992)).

party would be relieved of its own defaults."[80] "It is not the reference to 'negligence' generally, but a reference to the negligent wrongdoing of party protected by the limitation which is required."[81] In upholding limitation of liability clauses, this Court has looked to factors including the length of the contract, the clarity of language, the clarity of disclaimed liability, and whether the clause was in boldface type.[82]

SEI's limitation of liability clause, entitled "Risk Allocation" was contained in a Terms & Conditions addendum.[83] Both the May 2007 and the August 2008 agreements refer to the Terms and Conditions addendum as "an integral part of this proposal/agreement".[84] While the Terms and Conditions are separate from the contract itself, both the reference to the Terms and Conditions within the contract, and the limitation clause itself are clear.[85] The limitation clause specifically references the type of negligent action being disclaimed, and demonstrates the parties' intent to relieve SEI of its own defaults:

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80 *J.A. Jones*, 372 A.2d at 553.

81 *Id*.

82 *Rob-Win* 2007 WL 3360036, at *6 (citing *Donegal Mut. Ins. Co. v. Tri-Plex Sec. Alarm Systems*, 622 A.2d 1086, 1089-90 (Del. Super. 1992)).

83 *See* Def. Exhibit F; Def. Exhibit I.

84 Def. Exhibit F at 9 ("The attached Terms and Conditions of Agreement for Professional Services shall be considered an integral part of this proposal/agreement"); Def. Exhibit I at 7 (same).

85 Def. Exhibit F at 9, SEI00674; Def. Exhibit I at 7, RHA000537.

> Owner and Engineer have discussed the risk, rewards and benefits of the project and the Engineer's total fee for services. The risks have been allocated such that the Owner agrees that to the fullest extent permitted by law, Engineer's total liability to Owner for any and all injuries, claims, losses, expenses, damages or claims expenses arising out of this agreement from any cause or causes, shall not exceed the total fee. Such causes include but are not limited to design professional's negligence, errors, omissions, strict liability, breach of contract or breach of warranty.[86]

Still, the limitation clause will not be enforced if possible damages are easy to ascertain or if the terms of the contract are found to be unreasonable.[87] Defendants argue that the terms of the limitation of liability clause "are not confusing or misleading and the cap is not so low as the be unconscionable."[88] Plaintiffs counter that the limitation is "unreasonable especially in light of the scope of the engineering services that Defendants were supposed to provide."[89]

The purpose of both contracts was for SEI to provide RHA with construction drawings and a record plan.[90] All the work was to be completed in contemplation of subdividing the land.[91] While SEI's engineering services were an integral part

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[86] Def. Exhibit F at SEI00675; Def. Exhibit I at RHA 000537 (same); *see Rob-Win* 2007 WL 3360036, at *6; *Delmarva Power & Light Co., v. ABB Power T & D Co., Inc.*, 2002 WL840564, at *5 (Del. Super. Ct. Apr. 30, 2002).
[87] *Rob-Win* 2007 WL 3360036, at *6; *Donegal*, 622 A.2d at 1089.
[88] Def. Op. Brf. at 19.
[89] Pltf. Ans. Brf. at 28.
[90] Def. Exhibit F at 1; Def. Exhibit I at 1.
[91] Def. Exhibit F at 1; Def. Exhibit I at 1.

of the Plaintiffs' plans to develop the Yoder and Parag properties, a multitude of factors contribute to the success of a project the size of the community planned by the Plaintiffs; this project alone involved three construction or holding companies, real estate agents, lawyers, engineers, the County government, and the unpredictable nature of the housing market. At the time SEI and RHA contracted for engineering services, the project was still only in its infancy. The purpose of the two agreements between SEI and RHA was to determine whether the land could be used for a specific purpose, and if so, to record the plan for development. It would appear the potential outcomes of that study are boundless and it follows that damages would have been difficult to contemplate. Considering the fact that these contracts were not made in a vacuum, it is untenable to assert the parties would have been able to easily ascertain the damages as a result of any alleged breach at the time of contracting. Moreover, limiting Plaintiff's recovery to fees paid would not be unconscionable; although the parties dispute which fees have been paid, the estimated total value of the two contracts is $452,500.[92] Thus Defendant's Motion for Summary Judgment to Limit Liability to fees paid to SEI is **GRANTED** with respect to RHA.

[92] *See* Def. Exhibit F at 7-8 (total estimated fees for the May 2007 contract are $287,500); Def. Exhibit I at 6 (total estimated fees for the August 2008 contract are $165,000). Plaintiffs, however, have only claimed they paid SEI a total of $71,608.15, and Plaintiffs dispute another $10,189.34 which has been invoiced by SEI, but never paid. Amended Complaint at 9.

iii. Whether the limitation of liability clause is enforceable against Beechwood?

Plaintiffs contend that even if RHA is subject to the limitation of liability clause, Beechwood, as a third party beneficiary, cannot be held to the contract terms. In support of their position, Plaintiffs offer *Rob-Win, Inc. v. Lydia Sec. Monitoring, Inc.*, in which this Court adopted the United States District Court for the District of Delaware's conclusion that no rule of Delaware law imposes liability on a third party beneficiary who was not a party to the contract.[93]

First, however, the Court must determine whether Beechwood was in fact an intended third-party beneficiary to either contract between RHA and SEI.[94] Beechwood was formed in April 2008, and is owned by Ms. Amos and Ms. Murray, who also share ownership in TASH.[95] While there is some indication in the record that at least one party intended TASH to be a third-party beneficiary of the May 2007 agreement, Beechwood was not formed until nearly one year later.[96] Therefore, while TASH and Beechwood may be intended third-party beneficiaries

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[93] 2007 WL 3360036, at *4 (Del. Super. Ct. Apr. 30, 2007) ("Delaware law generally does not address whether a contract may be 'enforced against a third-party beneficiary.'" (citing *Harper, Jr. v. Del. Valley Broadcasters, Inc., et al.*, 741 F. Supp. 1076, 1084 (D. Del. 1990))). The Court, without deciding, recognizes the better view was likely expressed by the Chancery Court in *Nama Holdings, LLC v. Related World Market Center, LLC*: "A third-party beneficiary's rights are measured by the terms of the contract. When the beneficiary accepts the benefits of a contract, it also must accept the burdens expressed in that document." 922 A.2d 417, 431 (Del. Ch. Ct. 2007).

[94] *Brown v. Robb*, 583 A.2d 949, 954 (Del. 1990) ("The Delaware courts clearly recognize that a third party "beneficiary" may sue to collect damages for breach of contract.").

[95] R. Amos Dep. at 32.

[96] *Id*. at 45.

of the August 2008 agreement, RHA and SEI could not have intended for Beechwood to benefit from the May 2007 agreement.[97]

Under Delaware law, a non-signatory party has standing to sue on a contract where the parties intended the contract to benefit the third party and intended the benefit as a gift or to satisfy a pre-existing obligation.[98] In addition, the benefit must also have been the primary purpose of the parties entering into the contract.[99] "Thus, if it was not the promisee's intention to confer direct benefits upon a third party, but rather such third party happens to benefit from the performance of the promise either coincidentally or indirectly, then the third party will have no enforceable rights under the contract."[100]

An intended third-party beneficiary may be a donee beneficiary or a creditor beneficiary.[101] In the current case, Beechwood cannot claim to be either a donee or creditor beneficiary of the August 2008 agreement. Mr. Amos, as representative

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97 A corporation not in existence cannot be an intended third-party beneficiary of a contract. Moreover, Beechwood is not a successor in interest to TASH. *Delaware Ins. Guar. Ass'n v. Christiana Care Health Servs., Inc.*, 892 A.2d 1073, 1077 (Del. 2006) ("[A] successor in interest follows in ownership or control of property retaining the same rights as the original owner, with no change in substance." (quotation omitted)). TASH entered into a contract for sale of the Yoder and Parag properties, but did not acquire the properties; thus Beechwood did not follow TASH in ownership.

98 *E.I. DuPont Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 196 (3rd Cir. 2001).

99 *Id*.

100 *Id.*

101 *Brown v. Robb*, 583 A.2d 949, 954 (Del. 1990) ("A donee beneficiary has someone else's performance donated to him as a gift secured by the promisee's consideration. A person becomes a creditor beneficiary when the promise owes a duty or liability to the beneficiary and the promise secures a contract with another party whose performance satisfies the obligation to the beneficiary."); *see also* Restatement (First) of Contracts, § 133 (2012).

for RHA, never intended to gift SEI's services to Beechwood. Rather, Mr. Amos indicated that if he "entered into a contract with anybody under RHA or Randall Amos, it was for TASH."[102] Beechwood was similarly not a creditor beneficiary to the August 2008 agreement. RHA did not have a legal obligation to Beechwood that would have been satisfied by the contract with SEI. There is no contract between RHA and Beechwood, nor has Beechwood pled any facts that would lead the Court to find there was a pre-existing statutory or other legal obligation between the two corporations. Finally, the Terms and Conditions addendum to the August 2008 agreement specifically prohibits either party from assigning or transferring any interest in the contract without the written consent of the other party, rendering any unilateral attempt by RHA to confer rights arising from the contract to Beechwood invalid.[103]

Because Beechwood is not a party or a third party beneficiary to either the May 2007 or August 2008 agreement between RHA and SEI, Beechwood lacks the requisite standing to make a claim based on either agreement. For that reason, the Court need not decide whether SEI may invoke contract defenses, including the limitation of liability clause, against a third-party beneficiary to the agreements. Because summary judgment on the DCFA is granted and damages will be limited

[102] R. Amos. Dep. at 45. Mr. Amos likely did not intend to gift SEI's services to TASH either. RHA was paid $50,000 total for its work on behalf of TASH. There is no record of Beechwood making payments to RHA or Mr. Amos.

[103] Def. Ex. I at RHA000537.

to fees paid, the Court also need not address Defendants' allegation that Plaintiffs' damages are speculative.

V. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is **GRANTED in Part and DENIED in Part**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge