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Paul G. Enterline, Esquire
18 Chestnut Street
Post Office Box 826
Georgetown, Delaware 19947

John W. Paradee, Esquire
Prickett, Jones & Elliott
11 North State Street
Dover, Delaware 19901

Steven J. Rosenberg, Esquire
Steven J. Rosenberg, P.C.
53 West Jackson Boulevard
Suite 224
Chicago, Illinois 60604

RE: Fulkerson v. MHC Operating Ltd., et al.
C.A. No. 01C-07-020

Date Submitted: June 18, 2002

Dear Counsel:

This is the Court's decision on Defendants' Motions for Summary Judgment and to Dismiss for Failure to State a Claim. The Defendants' Motion for Summary Judgment is denied and their Motion to Dismiss for Failure to State a Claim is denied in part and granted in part for the reasons set forth herein.

This lawsuit arose out of a dispute between the landlords and tenants of a manufactured home park concerning the provision of water to individual home sites.

Tenants Charlene A. Fulkerson, Shirley M. Johnson, Edward A. Dalecki, Donna L. Dalecki, Kevin McHugh, Robert Foxx, Debra Foxx, Howard E. America, and Reta C. America ("Plaintiffs") filed a class action suit on behalf of the tenants of Whispering Pines Manufactured Home Community ("Whispering Pines"), a manufactured home park, against MHC Operating Limited Partnership, MHC Management Limited Partnership, Manufactured Home Communities, Inc., and Corpland Vistas ("Defendants"), doing business as Whispering Pines.[1] Plaintiffs amended their complaint, deleting Plaintiffs Shirley M. Johnson, Donna L. Dalecki, Robert Foxx, and Debra Foxx.

FACTUAL BACKGROUND

Defendants required all Whispering Pines tenants to sign a Manufactured Home Site Rental Agreement (the "Lease"). The Lease stipulated that each tenant was responsible for paying his or her home site's "utility services." Also, tenants were provided with Whispering Pines' Rules and Regulations (the "Rules"). In the section entitled "Utility and Water Regulations," the Rules provided that individual tenants were responsible for connecting utility services to their home sites and maintaining their water connections. Also, Defendants gave tenants a third document, a flyer written on Manufactured Home Communities, Inc. and Whispering Pines' letterhead (the "Flyer"), that stated "ground rent includes . . . use of water." The Flyer was distributed to the tenants from February 1996 until 1999.

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[1]MHC Operating Limited Partnership is the beneficial owner of Whispering Pines and Manufactured Home Communities, Inc. is the general partner of MHC Operating Limited Partnership. Whispering Pines is located on real estate owned by Corpland Vistas, Inc. Lastly, MHC Management Limited Partnership manages Whispering Pines.

Defendants maintained Whispering Pines' water system and provided the tenants with, according to the Defendants, "free" and unlimited use of the water.[2] Defendants never billed the tenants separately for their water use nor did the rent include an itemized charge for water. Defendants entered into an agreement with Tidewater Utilities, Inc. ("Tidewater") to sell Whispering Pines' water rights to Tidewater on January 17, 2000. Defendants notified tenants of this sale in a letter dated March 30, 2000 (the "Letter"). The Letter stated that cost increases associated with changing government regulations had forced Defendants to seek the sale of the water system. The Letter added that Tidewater had purchased the system and would install water meters on individual residences. Also, tenants were informed that until Tidewater completed meter installations, residents would pay a flat fee of forty dollars. The tenants received their first bill from Tidewater on May 16, 2000.

Plaintiffs are Whispering Pines tenants who received water bills from Tidewater. Plaintiffs, as alleged[3] representatives for Whispering Pines' tenants, allege the right to declaratory relief or compensatory and punitive damages under six legal theories: (1) Declaratory Judgment; (2) Breach of Lease; (3) Violations of the Mobile Home Lots and Leases Act; (4) Violation of the Consumer Fraud Act; (5) Common Law Fraud; and (6) Negligent Misrepresentation. Defendants assert that they are entitled to summary judgment on Plaintiffs' claims of common law fraud and violation of the Consumer Fraud

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[2]The tenants, of course, allege that the water was not "free," but included in their rent.

[3]The Court has not yet certified this matter as a class action.

Act and dismissal for failure to state claims of declaratory judgment, breach of contract, violations of the Mobile Home Lots and Leases Act, and negligent misrepresentation.

DISCUSSION

A. *Motion for Summary Judgment*

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the nonexistence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970). Once the moving party meets its burden, the burden shifts to the nonmoving party to establish the existence of material issues of fact. *Id.* at 681. Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the nonmoving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If, after discovery, the nonmoving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 504 U.S. 912 (1992); *Celotex Corp. v. Catrett, supra.* If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962). This Court now will determine if summary judgment is appropriate on the claims of common law fraud and violation of the Consumer Fraud Act.

1. Consumer Fraud

In Count IV Plaintiffs allege that Defendants violated the Delaware Consumer Fraud Act ("DCFA"), 6 *Del. C.* § 2511-2536, by providing tenants with misleading and ambiguous documents concerning water service. Specifically, Plaintiffs contend that Defendants fraudulently misled Whispering Pines tenants to believe that water was provided as a part of their ground rent. Plaintiffs contend that the misrepresentation continued while Defendants negotiated the sale of Whispering Pines' water rights to Tidewater.

Defendants' Motion for Summary Judgment argues that Plaintiffs' claim must fail because Defendants never represented to the tenants that water would be provided without charge. First, Defendants maintain that Section 4 of the Lease, which states that utilities are the tenant's responsibility, requires tenants to pay for their own water. Second, Defendants claim that the Flyer was not a false representation because distribution of the Flyer coincided with Defendants' provision of allegedly "free" water to the tenants. Defendants ask this Court to grant summary judgment on Count IV of Plaintiffs' claim.

According to 6 *Del. C.* § 2513(a) consumer fraud includes:

> the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby.[4]

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[4]The lease of manufactured home lots falls within the DCFA, as "merchandise" has been defined to include real estate. 6 *Del. C.* § 2511(4).

Following this statutory language, the courts have interpreted the DCFA to require neither "[s]cienter, intent to induce action, reliance, [nor] damages." *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111, 116 (Del.Ch. 2001); *accord Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Claims made under the DCFA must relate to communications made before or during the contested transaction, as "post-sale representations which are not connected to the sale or advertisement . . . do not constitute consumer fraud under the Act." *Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of North America, Inc.*, 558 A.2d 1066, 1074 (Del. Super. 1989). However, a successful negligent misrepresentation claim also will provide a prima facie violation of the DCFA. *Stephenson*, 462 A.2d at 1074; *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 28-29 (Del. Super.), *aff'd sub nom.*, *Brandywine Volkswagen, Ltd. v. State*, 312 A.2d 632 (Del. 1973).

This record suggests that there are material factual issues regarding the nature and content of the communications between Plaintiffs and Defendants. Viewing the record in the light most favorable to Plaintiffs, Defendants communicated to the tenants of Whispering Pines that water was included in the ground rent while engaged in negotiations to sell water rights to Tidewater. There are genuine issues as to whether Defendants intended to conceal and suppress information to induce the tenants to renew their leases. Because these facts require further development, summary judgment is inappropriate at this time.

2. Common Law Fraud

Plaintiffs' Count V alleges Defendants used the Flyer and the Letter to

communicate false information concerning water service to the tenants. For a successful claim of common law fraud, Plaintiffs must prove: (1) Defendants falsely represented the state of the water system; (2) Defendants made the representation with the knowledge or belief that the representation was false, or made the representation with a reckless indifference to the truth; (3) Defendants had the intent to induce Plaintiffs to renew their Leases; (4) Plaintiffs justifiably relied upon Defendants' representations concerning the water; and (5) Plaintiffs were damaged by the representation. *Stephenson*, 462 A.2d at 1074; *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504, 510-511 (Del. Super. 1931). Plaintiffs contend that Defendants knowingly distributed false information to induce the tenants to renew their Leases, this deception induced the tenants to renew their Leases, and this reliance economically damaged the tenants. Also, Plaintiffs contend that the misleading and ambiguous Lease failed to properly alert the tenants to the true state of water services, a situation that led the tenants to be deceived and economically harmed. However, Plaintiffs concede that they have not sufficiently developed the facts to state a claim for common law fraud.

In their Motion for Summary Judgment, Defendants contend, for three reasons, that Plaintiffs' claims of fraud must fail. First, Section 4 of the Lease states that utilities are the tenant's responsibility, not the landlord's. Second, Defendants allegedly provided "free" water to the tenants while the Flyer was distributed. Therefore, according to the Defendants, the Flyer's claim that water was included with ground rent was not a misrepresentation. Third, Plaintiffs failed to show justifiable reliance on the contested representations because Plaintiffs either read the Lease, would have signed the Lease

regardless of the sale of the water system to Tidewater, or did not rely on the Flyer.

Regardless of Defendants' claims, this is not the proper time to grant summary judgment on Count V. This Court finds it "desirable to inquire thoroughly into [the facts] in order to clarify the application of the law to the circumstances," *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962). Therefore, summary judgment is not appropriate at this time. If, after discovery, the evidence does not establish all elements of the claim, this Court will grant summary judgment. *Marcucilli v. Boardwalk Builders, Inc.*, Del. Super., No. 99C-02-007, Graves, J. (May 16, 2002), at 5-6 (citing *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992) and *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986)).

B. Motion to Dismiss

In considering a motion to dismiss, the Court must accept as true all allegations contained in a plaintiff's complaint. *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super.), *aff'd sub. nom, Laborers' International Union of North America Local 1999*, 297 A.2d 37 (Del. 1972). The test of sufficiency is whether the plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). A complaint cannot be dismissed unless the plaintiff has either failed to plead facts supporting an element of the claim, or under no reasonable interpretation of the facts alleged in the complaint (including all reasonable inferences) could the plaintiff state a claim for which relief might be granted. *Id.*

1. Breach of Contract

Plaintiffs allege Defendants breached the Lease by failing to provide water service to the tenants as part of their rent. Based on the underlying Lease and the alleged breach, Plaintiffs seek a declaratory judgment determining the rights and obligations of the parties as well as compensatory damages for breach of contract. In *Goodrich v. E.F. Hutton Group, Inc.*, 542 A.2d 1200, 1203-04 (Del.Ch. 1988), the Court of Chancery stated "to survive a motion to dismiss, a complaint for breach of contract must identify a contractual obligation, whether express or implied, a breach of that obligation, and resulting damages to the plaintiff."

Defendants' Motion to Dismiss challenges the existence of a contractual obligation. Defendants claim that the Lease neither obligated them to provide water services to Whispering Pines' tenants, nor required them to provide at least 60 days' notice to the tenants before changing their water service.

The Lease contains two clauses relevant to this case. In the first, the Lease provides:

> **4.** Utilities: MANAGEMENT will provide RESIDENT with normal trash removal service at no extra charge. RESIDENT is responsible for arranging and paying for all other utility service provided to the home site and the manufactured home.

If Plaintiffs' argument is to survive the motion to dismiss, the Lease's use of "utility" must be susceptible to multiple interpretations. An ambiguity exists when the contractual provisions are "reasonably or fairly susceptible" to different interpretations or two different meanings. *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del. 1992). When a contract is unambiguous, the Court may not consider

extrinsic evidence but must rely on the terms' plain meaning. *City Investing Co. Liquidating Trust v. Continental Casualty Co.,* 624 A.2d 1191, 1198 (Del. 1993); *E.I. du Pont de Nemours and Co. v. Admiral Ins. Co.,* 711 A.2d 45, 56-57 (Del. Super. 1995).

Plaintiffs, in the Answering Brief Opposing Defendants' Motion to Dismiss, contend that Paragraph "P" of the Rules shows the ambiguous use of "utility." Paragraph "P" states:

> **P. UTILITY AND WATER REGULATIONS** RESIDENTS shall make arrangements with local utilities serving the COMMUNITY for connection of services. RESIDENT is solely responsible for keeping RESIDENT'S water and sewer connection from freezing and shall make arrangements for necessary repairs.

Contract headings do not constitute controlling evidence of a contract's substantive meaning, however, the court may examine the heading "as additional evidence tending to support the contract's substantive provisions." *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 582 n.35 (Del.Ch. 1998). According to Plaintiffs, the heading's separate treatment of "utility" and "water" demonstrates that they are not synonymous. Additionally, Plaintiffs contend that "utility" is susceptible to multiple definitions, not all of which include water. Therefore, Plaintiffs argue that extrinsic evidence can be used to show the Lease's use of "utility." Plaintiffs use the Flyer, which states water is included in the ground rent, and the prior dealings between tenants and Defendants to argue that utilities and water service received separate treatment under the Lease and water service is not a responsibility of the tenant. The Court concludes that "utility," as used in the Lease, is ambiguous and extrinsic evidence is necessary to ascertain the Lease's intent.

Alternatively, Plaintiffs argue that Defendants failed to provide 60 days' written

notice of a change to the Lease. Plaintiffs contend that the bills from Tidewater constituted new charges to the tenants and an alteration to the Lease, which requires proper notice. Given the general pleading requirements by which a complaint is reviewed, the Court finds that the Complaint alleges a contractual obligation, breach of that obligation and damages resulting from that breach. Therefore, Count I, relating to the breach of lease claim, and Count II will not be dismissed.

2. Violations of the Mobile Home Lots and Leases Act

Plaintiffs allege seven violations of the Mobile Homes Lots and Leases Act, 25 *Del. C.* § 7001-7020 ("MHLLA"). Plaintiffs allege Defendants violated the MHLLA by: (1) unilaterally and impermissibly changing the Lease terms; (2) instituting a rent increase without the requisite notice; (3) imposing an invalid rent increase by increasing rent more than once in a year; (4) failing to provide 60 days' notice of an increase in rent or fees; (5) failing to give 60 days' notice of a rule change; (6) failing to provide a Lease with the statutorily required information; and (7) failing to provide notice of the change in water delivery. Plaintiffs seek a declaratory judgment on the improper notification allegation and compensatory and punitive damages.

Plaintiffs contend that requiring tenants to pay the same rent while decreasing services constitutes a de facto rent increase. According to § 7003(1), a landlord is

> the owner of a mobile home lot to whom a tenant pays rent in exchange for placing and residing in a mobile home owned by the tenant on such lot, and in addition any person authorized to exercise any aspect of the management of the premises, including any person who, directly or indirectly, receives rents, and who has no obligation to deliver the whole of such receipts to another person.

§ 7003(8) defines rent as "[a]ny money or consideration given for the right of use, possession and occupation of property." Plaintiffs argue that the charges from Tidewater constituted a rent increase. Therefore, according to the Plaintiffs, Defendants should have preceded this rent increase with at least 60 days' written notice. 25 *Del. C.* § 7016. Proper notification requires delivery to the tenant's "dwelling place with an adult person residing therein or with an agent or other person in the employ of the landlord whose responsibility it is to accept such notice . . . [or by] registered or certified mail." 25 *Del. C.* § 7019(a),(b). Plaintiffs contend that Defendants' delivery of notice through First Class mail failed to meet these standards. Lastly, Plaintiffs contend that because the charge for water constituted an increase in rent, the tenants' rent was raised more than once in a year in violation of § 7016. Plaintiffs have sufficiently stated their claims of violations of the MHLLA's rent provisions. Defendants' motion to dismiss is denied as to this claim.

Plaintiffs argue that the payment to Tidewater constitutes a new fee. Under § 7008(a) "[a] landlord may increase a fee only if he delivers to the tenant a written notice describing the increase at least 60 days prior to the effective date of the fee increase." Failure to provide notice bars the landlord from collecting fee increases. 25 *Del. C.* § 7008(b). The tenants maintain that Defendants failed to properly notify them of the charge because the letter was sent via regular mail, not by registered or certified mail as required by § 7019(b).[5] The Court finds that the Defendants did not institute a fee increase with respect to this particular claim. While the tenants have been billed for their water usage,

[5]Defendants' Motion to Dismiss is silent on Plaintiffs' claims that the Tidewater bill constituted an invalid rule change under § 7015(e) and Defendants failed to provide a lease with the information required by § 7004(a)(3)(g).

this bill did not originate with the Defendants. Tidewater, not the Defendants, imposed this additional fee and as a result the Plaintiffs cannot prevail under this claim. The Defendants' Motion to Dismiss is granted as to this claim.

Plaintiffs have sufficiently alleged facts to support their claim that Defendants violated the MHLLA's rent provisions. Therefore, Defendants' Motion to Dismiss for Failure to State a Claim will be denied as to the rent claim and sustained as to the fee claim.

3. *Negligent Misrepresentation*

In Count VI Plaintiffs allege Defendants negligently misrepresented to the tenants of Whispering Pines that water was to be provided to the tenants free of charge. To survive a motion to dismiss, the Plaintiffs must provide evidence of:

> (1) a pecuniary duty to provide accurate information;
> (2) the supplying of false information;
> (3) the failure to exercise reasonable care in obtaining or communicating information;
> (4) a pecuniary loss caused by justifiable reliance upon the false information.

Outdoor Technologies Inc. v. Allfirst Fin. Inc., Del. Super., C.A. No. 99C-09-151, Quillen, J. (Jan. 24, 2000), at 6, *cited in Dial v. AstroPower, Inc*., Del. Super., C.A. No. 98C-08-150, Quillen, J. (June 20, 2000), at 9. Plaintiffs contend that Defendants violated the DCFA, a claim Plaintiffs allege is synonymous with negligent misrepresentation. Plaintiffs argue that Defendants negligently misrepresented the nature of Whispering

Pines' water service because there was a duty of care to provide complete and accurate information to the tenants concerning their rights and responsibilities as tenants, Defendants supplied false information concerning water services, Defendants failed to exercise reasonable care to avoid misleading and ambiguous content in the Lease, Flyer and Rules, and Plaintiffs suffered monetary loss due to Defendants' misrepresentations.[6] The Plaintiffs' allegations of negligent misrepresentation are sufficient to survive a Motion to Dismiss. Therefore, Defendants' Motion to Dismiss for failure to state a claim of negligent misrepresentation must be denied.

SUMMARY AND CONCLUSION

In summary, Defendants' Motion for Summary Judgment is denied and their Motion to Dismiss for Failure to State a Claim is denied in part and granted in part.

IT IS SO ORDERED.

Very Truly Yours,

E. Scott Bradley

cc: Prothonotary's Office

[6]According to Defendants, Plaintiffs allege a purely economic loss in a negligence claim and they must seek recovery under *Restatement (Second) of Torts § 552* (1977). § 552 is not the appropriate vehicle for the claim. The information provided by Defendants was not used by Plaintiffs in business transactions, nor was there a lack of contractual privity between Defendants and tenants on the issue of water supply.