

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

RADIUS SERVICES, LLC., a )  
Delaware limited liability company, ) C.A. No. 09L-02-046 (JTV)  
)  
Plaintiff, )  
)  
v. )  
)  
JACK CORROZI CONSTRUCTION,) )  
INC., a Delaware corporation, ) )  
DOVERVIEW, LLC, a Delaware ) )  
limited liability company, FRANK ) )  
ROBINO COMPANIES, LLC, a ) )  
Delaware limited liability company, ) )  
JOHN CORROZI, an individual, ) )  
MICHAEL STORTINI, an individual,) )  
PAUL ROBINO, an individual, ) )  
) )  
Defendants. ) )

*Submitted: June 12, 2009*

*Decided: September 30, 2009*

Donald L. Logan, Esq., Logan & Associates, LLC., New Castle, Delaware.  
Attorney for Plaintiff.

Scott G. Wilcox, Esq., Bayard, P.A., Wilmington, Delaware. Attorney for  
Defendants Frank Robino Companies, John Corrozi, Michael Stortini, and Paul  
Robino.

*Upon Consideration of Defendants’  
Motion To Dismiss*

**DENIED**

**VAUGHN, President Judge**

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## **OPINION**

This is a mechanic's lien action which includes counts seeking *in personam* judgments. Count V alleges a cause of action which is entitled "negligent misrepresentation." Several defendants have moved to dismiss this count on two grounds; first, that this Court lacks subject matter jurisdiction over the claim, and second, that the claim fails to state a claim upon which relief can be granted.

## **FACTS**

Defendant Doverview, LLC is the owner of new structures built on a parcel of land in Dover, Delaware. Defendant Jack Corrozi Construction, Inc. was the general contractor for construction of the structures. Plaintiff Radius Services, LLC was a subcontractor which furnished labor and material for the installation of fire suppression systems at the structures.

Doverview took out a construction loan for the project. Defendants Frank Robino Companies, LLC, John Corrozi, Michael Sortini, and Paul Robino guaranteed the construction loan.

In Count V, the plaintiff alleges that prior to August 2008, the plaintiff requested and received assurances that funding was in place for the project so that it could be sure that it would be paid for its labor and materials. The plaintiff relied upon this representation. The plaintiff further alleges that on or about August 11, 2008, defendants Robino Companies, Corrozi, Sortini, and Robino learned that the lender would not be advancing any further construction loan funds for the project because a default had occurred. The plaintiff further alleges that these defendants just named, then knew, or should have known, that there would be insufficient funds

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available to pay the plaintiff for its labor and materials; that they failed to disclose such fact to the plaintiff; and that they nonetheless allowed and encouraged the plaintiff to continue with its work. The plaintiff further alleges that the deliberate concealment of the loss of financing was intended to induce the plaintiff to continue with its work; that the loss of financing was a material fact as the plaintiff would have ceased performance if it had known payment funds would not be available; and that it relied upon the availability of financing for payment of its work. Finally, the plaintiff alleges that it suffered damages because \$343,572 remains outstanding for its labor and materials.

The movants are Robino Companies, Corrozi, Sortini, and Robino. Count V is the only count holding them in the case.

The plaintiff contends that this Court does have jurisdiction to hear a claim for negligent misrepresentation, and that it has stated a claim upon which relief can be granted.

**STANDARD OF REVIEW**

In determining the merits of a motion to dismiss a complaint, or in this case a count thereof, the court must accept all allegations within the complaint as true.<sup>1</sup> If a plaintiff may recover under any reasonably conceivable set of circumstances, a motion to dismiss must be denied.<sup>2</sup> Only if a plaintiff could not recover under any set

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<sup>1</sup> *State Use of Certain-Teed Products Corp. v. United Pacific Ins. Co.*, 389 A.2d 777, 778 (Del. Super. 1983).

<sup>2</sup> *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 227 (Del. 1982).

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of facts inferred from the pleadings may the court dismiss the complaint.<sup>3</sup>

**DISCUSSION**

In order to explain my analysis of the motion, I begin with a discussion of an action for common law fraud. Common law fraud consists of five elements, as follows:

- (1) a false representation, usually one of fact, made by the defendant;
- (2) the defendant's knowledge or belief that the representation was false, or was made with reckless disregard of the truth;
- (3) an intent to induce the plaintiff to act or to refrain from acting;
- (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
- (5) damage to the plaintiff as a result of such reliance.<sup>4</sup>

Equity developed equitable fraud.<sup>5</sup> The only difference between common law fraud and equitable fraud is that equitable fraud does not include element (2). Under the theory of equitable fraud, a remedy is provided for innocent or negligent misrepresentations.<sup>6</sup> The plaintiff is not required to prove that the misrepresentation was knowing or reckless. Equitable fraud is also known as negligent or innocent

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<sup>3</sup> *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. Super. 1970).

<sup>4</sup> *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

<sup>5</sup> *Id.*; *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Services, Inc.*, 2007 WL 1207106, at \*4 (Del. Ch.); *Mark Fox Group, Inc. v. E.I. DuPont De Nemours & Co.*, 2003 WL 21524886, at \*5 (Del. Ch.).

<sup>6</sup> *Mark Fox Group*, at \*5.

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misrepresentation.<sup>7</sup>

The exclusive jurisdiction of the Court of Chancery over claims of equitable fraud, or negligent or innocent misrepresentation, has been set forth by that court in language worthy of quotation:

In addition to developing the concept of claims for negligent or innocent misrepresentation, the Court of Chancery has retained exclusive, rather than concurrent, jurisdiction over such causes of action. In *Pepsi-Cola Bottling Co. Of Salisbury v. Handy* the court stated that equitable fraud must be pursued exclusively in the Court of Chancery. In reaching that decision, then-Vice Chancellor (now Justice) Jacobs expressly approved of *Snyder v. Butcher & Co.*, wherein the court “held that ‘in no event may the equitable [fraud] theory be pursued in the legal forum.’” [sic] “The *Snyder* court found that because a claim for equitable fraud has elements different from a claim for common law fraud, an equitable fraud claim may proceed only in this Court. Then-Vice Chancellor Jacobs also rejected the defendant’s argument “that because the only relief sought by plaintiffs was money damages, those counts could be adequately adjudicated at law.” Such an argument could not succeed because “equitable jurisdiction will also lie where monetary damages are wholly adequate *if the claim or theory of prosecution itself is not legal but equitable in nature.*”<sup>8</sup>

I accept the Court of Chancery’s analysis of its jurisdiction over actions for

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (alteration in original) (citations omitted).

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equitable fraud as an accurate statement of Delaware law. I conclude therefrom that the Superior Court does not have jurisdiction over actions for negligent misrepresentation. However, this conclusion does not decide the motion.

The averment in Count V, that the defendants “knew or should have known” that without lender financing there would be insufficient funds to pay for the project has the effect, it seems, of alleging both common law fraud and equitable fraud in the alternative. If it can be established that the defendants knew that the construction loan financing had been terminated but stood by silently while the plaintiff continued to work, knowing that the plaintiff would not be paid, it is possible that a claim for common law fraud can be made. If, however, the defendants merely should have known, then a claim for negligent misrepresentation only is made out, which must be heard in the Court of Chancery.

Thus, the plaintiff must decide how it wishes to proceed. If the plaintiff wishes to proceed with a claim in this Court, that the defendants knowingly permitted the plaintiff to believe a false representation, it may do so, but it cannot present a claim that the defendants “should have known.” If, however, it wishes to include in its claim that the defendants “should have known,” Count V should be dismissed in this Court in whole, subject to transfer to the Court of Chancery under 10 *Del. C.* § 1902. In due course, the plaintiff should inform counsel for the defendants and this Court how it wishes to proceed.

Finally, the defendants question whether they made any representation, since the allegation against them is that they stayed quiet when circumstances changed. However, this Court has previously ruled that an action for fraud may exist not only

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when there is an overt representation, but also when there is a deliberate concealment of facts when there is a duty to speak.<sup>9</sup> Whether the defendants had a duty to speak is beyond the scope of this motion to dismiss.

Since the averments of Count V are sufficient to allege one cause of action which is within the jurisdiction of this Court and to state a claim upon which relief can be granted, the motion to dismiss is ***denied***.<sup>10</sup>

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary  
cc: Order Distribution  
File

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<sup>9</sup> *Chaplake Holdings, LTD., v. Chrysler Corporation*, 1999 WL 167834, at \*23 (Del. Super.); *See also* Del. Super. P.J.I. Civ. § 16.3 (2000).

<sup>10</sup> The plaintiff has cited a number of cases in which it contends that the Superior Court has exercised jurisdiction over a claim for negligent misrepresentation. *Estate of Buonamici v. Morici*, 2009 WL 792390 (Del. Super.); *Lee v. Linnere Homes, Inc.*, 2008 WL 4444552 (Del. Super.); *Transched Sys. Ltd. v. Versyss Transit Solutions, LLC*, 2008 WL 948307 (Del. Super.); *Block Fin. Corp. v. Inisoft Corp.* 2006 WL 3240010 (Del. Super.); *Outdoor Technologies, Inc. v. Allfirst Fin., Inc.*, 2001 WL 541472 (Del. Super.). However, the jurisdictional issue which the defendants raise in this case was not raised in any of these cases.

Finally, I add two notes. The first is that it does not necessarily follow from the labeling of a claim as negligent misrepresentation that the claim does not contain facts which do give rise to a claim within the jurisdiction of this Court. The substance of the claim must be examined to determine its nature. Secondly, this Court does have jurisdiction over a negligent misrepresentation when asserted in the context of the Consumer Fraud Act. *Iacono v. Barici*, 2006 WL 3844208 (Del. Super.).