SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

July 1, 2010

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Re: ***Bromwich et al v. Hanby*** **et al.**
C.A. No. S08C-07-008

Date Submitted: June 1, 2010
Date Decided: July 1, 2010

Defendant Lockwood Design and Construction, Inc.'s
Motion for Partial Summary Judgment:
GRANTED IN PART and DENIED IN PART

Dear Counsel:

Pending before the Court is Defendant Lockwood Design and Construction, Inc.'s Motion for Partial Summary Judgment. For the reasons set forth herein, that Motion is granted in part and denied in part.

Nature of Proceedings and Factual Background

On or about January 23, 2003, Defendants Wayne Hanby and Sam Blake (hereafter, collectively, "Sellers") contracted with Defendant Lockwood Design and Construction, Inc. (hereinafter, "Lockwood") for the construction of a two-story dwelling on a vacant lot located in the North Shores area of Rehoboth Beach, Delaware, for the sum of $385,000.00 (the "Lockwood-Hanby Contract"). On or about June 9, 2003, Sellers and Plaintiffs Michael R. Bromwich and Felice B. Friedman (hereinafter, collectively, "Plaintiffs") entered into a Residential Contract of Sale for the purchase of the aforementioned lot and the two-story dwelling (hereinafter, the "Contract"). Closing took place in August of 2003. Construction of the dwelling was completed and a Certificate of Compliance issued on August 21, 2003.

In May of 2007, Plaintiffs allege they discovered structural problems that indicated the construction of the home was inherently defective, the repair of these problems costing approximately $154,000 in repair expenses. Plaintiffs filed the Complaint on July 3, 2008. Lockwood has filed a Motion for Partial Summary Judgment. The Motion has been fully briefed and is ripe for decision.

Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore,* 405 A.2d 679, 680 (Del. 1979). Once the moving party has met its burden, the burden shifts to the non-moving 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 Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving 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, 322-323 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted. *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991), *cert. denied,* 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. 317. 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, summary judgment is inappropriate. *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

Merits

1. Count I - Breach of Contract

Count I of the Complaint alleges Lockwood constructed part of Plaintiff's dwelling on a slab-on-grade foundation in violation of the Lockwood-Hanby Contract, which specified the foundation was to be comprised of pressure-treated pilings. Lockwood argues Plaintiffs' breach of contract claim must be dismissed because Plaintiffs have confirmed via discovery that "Plaintiffs had no contract with Defendant Lockwood and Plaintiffs do not contend that Lockwood breached any express contract with Plaintiffs." To the extent Plaintiffs alleged for the first time in their Answering Brief that they were third party beneficiaries to the Lockwood-Hanby Contract, Lockwood argues this claim must fail because the time for amending the Complaint has long since passed. Moreover, Lockwood contends that, even if the Court were to consider a third party beneficiary allegation, Plaintiffs' claim does not state a cause of action because there is no evidence that the elements of a third party beneficiary were pled, much less supported. In particular, Lockwood notes that the subject of the Complaint is the Contract, not the Lockwood-Hanby Contract.

Plaintiffs assert via their Answering Brief that they are third party beneficiaries to the Lockwood-Hanby Contract and they are therefore entitled to the same rights and remedies available to Sellers under the Lockwood-Hanby Contract.

The Court agrees with Lockwood that Plaintiffs' alleged third party beneficiary status as to the Lockwood-Hanby Contract was not appropriately pled and is not properly before the Court. Nevertheless, in an effort to eliminate any last minute efforts to reframe the case as the trial date approaches, the Court will address Plaintiffs' assertion of third party beneficiary status on the merits.

It is undisputed that there does not exist an express contract between Lockwood and Plaintiffs. Plaintiff's Answers to Defendant Lockwood's Interrogatories, at ¶s 19, 20.[1] Under Delaware law, only parties to a contract and intended third party beneficiaries may enforce the contract terms. *Smith v. Mattia*, 2010 WL 412030 (Del. Ch. Feb. 1, 2010). Therefore, Plaintiffs' breach of contract claim hinges on their alleged third party beneficiary status.

Plaintiffs insist they are entitled to third party beneficiary status because Lockwood was in the process of building the house when Plaintiffs contracted to purchase it and because Plaintiffs approved the specifications incorporated into the Lockwood-Hanby Contract. These facts are immaterial to the Court's analysis.

The Court must look to the contract language when determining whether a stranger to the contract is a third party beneficiary. The relevant contract, the Lockwood-Hanby Contract, does not mention Plaintiffs, either by name or by general reference. Although it is not necessary that a third party beneficiary be specifically named and identified in the contract, "[i]n order for third-party

[1] Hereinafter, references to the Answers to Interrogatories will be cited, "Ans. to Interrogatories, at ¶ ___".

beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon a third person that was intended, but the conferring of the beneficial effect on such third-party, whether it be creditor or donee, should be a material part of the contract's purpose." *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386-87 (Del. Super. 1990). In other words, the contract language must clearly contemplate a third party. The Lockwood-Hanby Contract not only does not specifically mention Plaintiffs, it makes no mention of a subsequent purchaser of the property. Moreover, the Lockwood-Hanby Contract contains no language indicating any intent to confer a benefit upon anyone other than the Sellers and Lockwood. A third party may benefit from the performance of the contract without acquiring third party beneficiary status. *Insituform of North America, Inc. v. Chandler*, 534 A.2d 257, 269 (Del. Ch. 1987). Such is the case here. Lockwood's Motion for Summary Judgment is granted as to Count I.

2. Count II - Breach of Implied Warranties of Habitability and Workmanlike Construction

Count II of the Complaint alleges the manner in which Lockwood constructed Plaintiffs' home (i.e., constructing it "on unsuitable soil which was contaminated with unsuitable fill material") constitutes a breach of the implied warranties of habitability and workmanlike construction. Lockwood asserts the Plaintiffs' claim is time-barred. However, Lockwood alleges that, even if the Court held the claim had been timely filed, Lockwood would still prevail as a matter of law because the implied warranties do not apply to the parties' relationship due to the absence of privity of contract between Lockwood and Plaintiffs. Plaintiffs argue the time of discovery rule tolls the statute of limitations until May 2007 because the buried foundation constituted a "latent defect".

The Court finds Plaintiffs' breach of implied warranties claim to be time-barred. Delaware law recognizes an implied warranty of good quality and workmanship. *Council of Unit Owners of Breakwater House Condo. v. Simpler*, 603 A.2d 792, 792 (Del. 1992). Subsumed therein is the so-called implied warranty of habitability. *Id.* Pursuant to Delaware law, however, the time of discovery rule does not apply to implied warranties, which arise as a matter of law. *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818 (Del. Super. May 16, 2002). In *Marcucilli*, this Court held:

> The time of discovery rule does not apply to the claim for breach of implied warranty of good quality and workmanship. This implied warranty arises by operation of law. ... Any breach of this warranty is deemed to occur on the date of settlement and the applicable statute of limitation is 10 *Del. C.* § 8106, which requires suit to be filed within three years of when a cause of action arises.

2002 WL 1038818, at *4. In this case, the Certificate of Occupancy was issued on August 21, 2003, and settlement occurred on August 25, 2003. Assuming, *arguendo*, that the implied warranties ran with the property and not with the Lockwood-Hanby contract, the three year statute of limitations ran in August of 2006. Lockwood's Motion for Summary Judgment as to Count II is granted.

3. Count III - Negligence

Plaintiffs claim Lockwood was negligent in constructing their home for a variety of reasons. Lockwood contends he did not owe a duty to a remote purchaser and, therefore, a necessary element of the negligence claim for economic damages is lacking and Plaintiffs' negligence action must fail as a matter of law. Plaintiffs assert Delaware law permits them to seek compensation from Lockwood under a negligence theory.

The Court is satisfied that privity of contract is not required and Plaintiffs may pursue their negligence claim for economic damages against Lockwood. Moreover, as discussed below, the

statute of limitations was tolled until the time of discovery.

A. Privity of Contract

The parties discuss at length the history of the economic loss doctrine in Delaware. Pursuant to that doctrine, a party was not permitted to recover damages under a negligence theory for purely economic damages. By way of statute, the Delaware Legislature has specifically provided for tort actions seeking to recover damages resulting from negligent construction of residential property to go forward. 6 *Del. C.* § 3652.[2] As Lockwood points out in its Reply Brief, economic loss and privity of contract are distinct legal concepts. The adoption of § 3652, permitting negligent constructions actions based solely on economic loss, does not address whether privity of contract is required. Obviously, the parties have taken different positions on the requirement of privity: Lockwood argues privity is still required under Delaware law and Plaintiffs assert the opposite. After reading the applicable case law and considering the parties' arguments, the Court is convinced privity of contract is not required under Delaware law. In particular, I find the following language employed by the Delaware Supreme Court in *Danforth v. Acorn Structures, Inc.* helpful:

> We recognize that one benefit of a privity of contract standing requirement is that it acts as a limitation on the potential tort liability of a commercial seller. The number of persons to whom a commercial seller would owe a duty to protect against the risk that its product, if defective, might damage itself, is reduced from a class of all foreseeable users of its products to a limited and knowable class of those users with whom the seller is in contractual privity. We are more persuaded, however, by the view that contract notions of privity are irrelevant to the question whether a

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[2] Section 3652 of Title 6 of the Delaware Code reads:

> No action based in tort to recover damages resulting from negligence in the construction or manner of construction of an improvement to residential real property and/or in the designing, planning, supervision and/or observation of any such construction or manner of construction shall be barred solely on the ground that the only losses suffered are economic in nature.

> commercial seller owes a duty to foreseeable users of its products, under tort law, to protect against the risk that its product, if defective, might damage only itself.

608 A.2d 1194, 1200 (Del. 1992). In *Danforth*, the plaintiff and the defendant had a contractual relationship. Nevertheless, the Supreme Court's dicta is illuminating, particularly when the Court takes into consideration that the recent federal case *Gilbane Building Co. v. Nemours Foundation*, 606 F. Supp. 995 (D. Del. 1985), had been decided and subsequently reversed by *Pierce Associates, Inc. v. Nemours Foundation*, 865 F.2d 530 (3rd Cir. 1989). In *Gilbane*, Chief Judge Stapleton of the United States District Court concluded, "I am convinced that the Delaware Supreme Court would adopt the position ... that in a construction dispute, privity of contract or third-party beneficiary status is not a prerequisite in all cases for bringing an action sounding in negligence." 606 F. Supp. at 1004. The Third Circuit reversed, finding that the Delaware Supreme Court *would* continue to require privity of contract in a negligent construction case. This Court is persuaded that the Delaware Supreme Court was well aware of these two decisions when it adopted the dicta included in the *Danforth* decision. One case cited with approval by the Delaware Supreme Court in *Danforth* embraces the theory that a privity of contract requirement muddles the field of negligence law, where the traditional emphasis is, of course, on the actor's duty and the foreseeability of injury. *See Clark v. International Harvester Co.*, 581 P.2d 784, 794 (Id. 1978) ("Rather than obscure fundamental tort concepts with contract notions of privity, we believe that it is analytically more useful to focus on the precise duty of care that the law of negligence, not the law of contract or an agreement of the parties, has imposed on the defendant. ... If the defendant fails to exercise [] due care it is of course liable...."). The same rationale was used in earlier lower court Delaware cases. In *Guardian Construction Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378 (Del. Super. 1990), Judge Barron

considered the requirement of privity as opposed to the Restatement of Torts' position that liability should be *foreseeable*. Judge Barron ultimately decided that "privity of contract is not an indispensable prerequisite to the recovery of economic damages in negligence cases ... which fall within the parameters of ... the Restatement (Second) of Torts." *Id*. at 1386. *See also Travis v. Taralia*, 1986 WL 4856, at *4 (Del. Super. Apr. 23, 1986) ("The defendant contractor's liability is premised upon the basic rule of negligence and is not dependent on the existence of privity."). In light of the foregoing, the Court concludes privity of contract is not required in order to sustain an action for negligent construction. Whether Lockwood had a duty to Plaintiff, whether any such duty was breached, and whether the injury suffered was foreseeable are all questions for the fact-finder.

As with all of Plaintiffs' claims, however, there remains the issue of the statute of limitations. In this regard, I next consider the applicability of the time of discovery rule.

B. Time of Discovery

Generally, a negligence action where damages for personal injuries are not sought must be brought within three years. 10 *Del. C.* § 8106. "The statute may be tolled, however, under the 'time of discovery rule,' also known as the 'doctrine of inherently unknowable injuries," if the cause of action is inherently unknowable and the plaintiff was blamelessly ignorant of the cause of action, or if the defendants fraudulently concealed the cause of action. For the doctrine to be applicable, a plaintiff must establish that there were no observable or objective factors to alert her to the injury and that she was blamelessly ignorant." *Lee v. Linmere Homes, Inc.*, 2008 WL 4444552, at * 3 (Del. Super. Oct. 1, 2008). The cause of action will not accrue until Plaintiffs "had notice there was something wrong [with the foundation] or until, by the exercise of reasonable diligence and care, they could have discovered the defect." *Travis v. Taralia*, 1986 WL 4856, at *3. Plaintiffs allege

they could not have discovered the buried foundation defects until May of 2007. When Plaintiffs knew or should have known of the alleged wrong is a question of fact that precludes the granting of summary judgment on Count III. *Id*.

4. Count IV - Fraudulent Misrepresentation

Plaintiffs claim "Defendants represented to Plaintiffs that the Home was new and free of any material defects" and that Defendants failed to reveal the true nature of the Home's foundation. Lockwood argues Plaintiffs are not entitled to pursue their fraud claim because Plaintiffs' acknowledge that Lockwood made no express representations to them and, further, Plaintiffs admit that they were not induced to purchase the property by any representations by Lockwood.

Plaintiffs argue that common law fraud includes lies by omission. Moreover, Plaintiffs assert that, procedurally, it defies logic to retain the cross-claim asserted by Sellers against Lockwood for fraudulent misrepresentation and to dismiss Plaintiffs' fraud claims.

Plaintiffs are, of course, correct in that representations may include lies of omission. Nevertheless, Plaintiffs have not established evidence of the elements of common law fraud. The elements of fraudulent misrepresentation or common law fraud are: (1) defendant's false representation, usually one of fact; (2) defendant's knowledge or belief that the representation was false, or defendant made the representation with indifference to the truth; (3) the defendant had the intent to induce the plaintiff to act, or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the plaintiff suffered damages as a result of such reliance. *Snyder v. Jehovah's Witnesses, Inc.*, 2005 WL 2840285, at *3 (Del. Super. Oct. 28, 2005).

Plaintiffs' complaint alleges "Defendants" represented to Plaintiffs that the new home was free of any material defects. By way of answers to interrogatories, however, Plaintiffs admit

Lockwood made no express representations to Plaintiffs. Moreover, Plaintiffs do not define any manner in which a representation, either express or implied, made by Lockwood induced Plaintiffs into purchasing the property. Ans. to Interrogatories, ¶ 31. There has been, in fact, no allegation that Plaintiffs met or had any communication with Lockwood prior to deciding to purchase the property.[3] Plaintiffs claim against Lockwood simply cannot stand on the facts before the Court.

With regard to Plaintiffs' procedural argument, if there are flaws in the manner in which the other defendants have presented their claims to the Court, those complaints will be addressed at another time. To the extent there are any such issues, they are not properly addressed in the context of Lockwood's pending motion.

Lockwood's Motion for Partial Summary Judgment as to Count IV of the Complaint is granted.

5. Count V - Fraudulent Concealment

Lockwood asserts Plaintiffs' fraudulent concealment claim is very similar in nature to their fraudulent misrepresentation claim in that fraudulent concealment requires a direct relationship between the parties before the opportunity to conceal even arises. Because the parties did not have a direct relationship, Lockwood argues there can be no claim for intentional concealment. To further bolster its argument, Lockwood points to the fact that Plaintiffs failed to identify any instance of concealment on behalf of Lockwood in their answers to interrogatories. Plaintiffs respond in the same manner as they did with respect to the fraudulent misrepresentation claim.

For the same reasons the Court granted Lockwood's Motion for Partial Summary Judgment

[3] Indeed, a review of the pleadings shows that even the one-year punch list compiled by Plaintiffs was delivered to Sellers, who then, presumably, passed along the same to Lockwood.

as to Count IV, the Court grants Lockwood's Motion for Partial Summary Judgment as to Count V. There is simply no evidence before the Court to support the notion that Lockwood concealed any information from Plaintiffs or that any such concealment induced Plaintiffs to purchase the property. A key component of both claims is the relationship between the party attempting to induce action and the party who so acts in reliance upon the first party's representations. It is difficult to conceive of a situation in which the parties have no interaction or relationship and, yet, one party is able to persuade another. In any event, the facts at bar do not establish such a situation. Lockwood's Motion for Partial Summary Judgment as to Count V is granted.

6. Count VI - Violation of Buyer Property Protection Act, 6 *Del. C.* § 2570, *et seq*.

Count VI is based upon the Buyer Property Protection Act, 6 *Del. C.* § 2570, *et seq.*, which requires sellers of real property to execute a disclosure form in conjunction with their sales contract. The disclosure then becomes part of the purchase agreement. 6 *Del. C.* § 2573 ("This written disclosure form, signed by buyer and seller, shall become a part of the purchase agreement."). Lockwood argues it had no such obligation with respect to the Contract because it was not the seller of the property. Plaintiffs do not address this argument in their Answering Brief.

In any event, it is not immediately clear whether the Act creates a private right of action. However, "[e]ven if a private right of action did exist, there would be a complete overlap between the breach of contract claim and the alleged violation of the statutory provisions found in the Buyer Property Protection Act." *Iacono v. Barici*, 2006 WL 3844208, at * 4 (Del. Super. Dec. 29, 2006). For this reason, Count VI of the Complaint must be dismissed.

7. Count VII - Violation of the Consumer Fraud Act, 6 *Del. C.* § 2511, *et seq*.

Lockwood asserts that the Consumer Fraud Act, 6 Del. C. § 2511, *et seq*., is a codification

of common law fraud and, therefore, Plaintiffs' claim Lockwood violated the CFA should be dismissed for the same reasons that their claims based upon common law fraud were dismissed. Plaintiffs point out the Consumer Fraud Act also codifies negligent misrepresentation.

The Consumer Fraud Act parallels common law fraud but does *not* require proof of (1) intent to make a deceptive or untrue statement, (2) actual reliance by the plaintiff, or (3) intent to induce reliance. *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 658 (Del. Super. 1985). Nevertheless, the Court remains convinced that, absent any evidence that Lockwood misrepresented or lied by omission regarding a material fact *in a communication directed to Plaintiffs*, Plaintiffs' claim must fail. Lockwood's Motion for Partial Summary Judgment is granted as to Count VII.

Conclusion

For the reasons set forth herein, Defendant Lockwood's Motion for Partial Summary Judgment is granted as to Counts I, II, IV, V, VI, and VII; and denied as to Count III.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

oc: Prothonotary