

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

RAY'S PLUMBING & HEATING	:	
SERVICE, INC., a Delaware corp.,	:	C.A. No. K10C-02-022 WLW
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
STOVER HOMES, L.L.C., a	:	
Delaware limited liability company	:	
and GARY L. STOVER, JR.,	:	
individually,	:	
	:	
Defendants.	:	

Submitted: September 3, 2010
Decided: December 15, 2010

ORDER

Upon Defendant Gary L. Stover, Jr.'s
Motion to Dismiss.
Denied in part; Deferred in part.

Scott E. Chambers, Esquire of Schmittinger & Rodriguez, Dover, Delaware; attorneys for the Plaintiff.

Stephen W. Spence, Esquire of Phillips, Goldman & Spence, P.A., Wilmington, Delaware; attorneys for Defendant Gary L. Stover, Jr.

WITHAM, R.J.

ISSUES

The motion before the Court presents two issues: the first, whether the third party plaintiff's fraud claim should be dismissed for failure to comply with the heightened pleading requirements of Rule 9 of the Delaware Superior Court Rules of Civil Procedure, and the second, whether there is a private right of action for subcontractors to seek damages from a contractor's agent under Title 6, Chapter 35 of the Delaware Code.

FACTS

Stover Homes, L.L.C. ("Stover Homes") is a general contractor in Kent County. Stover Homes hired Ray's Plumbing & Heating ("Ray's Plumbing" or "Plaintiff"), a subcontractor, to install plumbing and heating in newly constructed homes. Pursuant to that agreement, Plaintiff performed work from March of 2007 to March of 2008. According to the complaint, Stover Homes received payments covering the heating and plumbing work. Under 6 *Del. C.* §3501 *et. sec.* ("Chapter 35"), a general contractor holds payments received for subcontracting work only as a trustee for the subcontractor and may not use the funds for its own purposes.¹ According to the complaint, Stover Homes appropriated funds (totaling \$68,863.73) for its own use. Gary Stover ("Gary") was a managing member of Stover Homes throughout the time relevant to this lawsuit. Plaintiff alleges that Gary personally directed the wrongful appropriation and facilitated it by falsely assuring homeowners

¹6 *Del. C.* §§ 3502-3503.

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that subcontractors such as Plaintiff had already been paid.

The contract between Ray's Plumbing and Stover Homes has not yet been submitted to the Court. It has not been alleged that Gary was personally a party to the contract, and Gary denies that he was a party to the contract.

PROCEDURAL HISTORY

Plaintiff has sued Gary and Stover Homes. Plaintiff has two theories for holding Gary personally liable. First, Plaintiff argues that Gary has committed fraud by lying to homeowners in order to facilitate the wrongful taking of funds. Second, Plaintiff contends that Gary is liable to civil suit under Chapter 35.

Gary filed a motion to dismiss both claims. He argues that the fraud claim was not pleaded with the requisite particularity under Rule 9 of the Delaware Superior Court Rules of Civil Procedure. Gary further contends that there is no private right of action against contractor's agents under Chapter 35.

Standard of Review

The standard of review on a motion to dismiss is well-settled. When deciding a motion to dismiss, all factual allegations in the complaint are accepted as true.² If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.³ That is, a motion to dismiss is decided on "whether a plaintiff may recover under any conceivable set of

² *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

³ *Id.*

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circumstances susceptible to proof under the complaint.”⁴ Consequently, dismissal will only be warranted when “under no reasonable interpretation of the facts could the complaint state a claim for which relief might be granted.”⁵

DISCUSSION

A. Fraud

Defendant argues that the fraud claim should be dismissed because Plaintiff has failed to plead it with particularity as required by Rule 9 of the Delaware Superior Court Rules of Civil Procedure (“Rule 9”). Rule 9 requires that the circumstances constituting fraud be pleaded with particularity.⁶ In order to meet that requirement, a fraud claim must provide the time, place and contents of the false representations as well as the identity of the person making the misrepresentation and what he obtained thereby.⁷ The purpose of the heightened pleading requirement is to ensure that the opposing party has notice of the claim and is able to prepare an adequate defense.⁸

In this case, Plaintiff has alleged that Gary directly or indirectly: “executed various general release of liens falsely representing that the subcontractors of Stover Homes had been paid in full,” while knowing the representation was not true. The

⁴ *Id.*

⁵ *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super.).

⁶ Del. Super. Ct. Civ. R. 9(b).

⁷ *Nutt v. A.C. & S. Inc.*, 466 A.2d 18, 23 (Del. Super 1983).

⁸ *C&P Tel. Co. V. Chesapeake Utils. Corp.*, 436 A.2d 314 (Del. 1981).

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complaint further avers that Gary knew that the misrepresentation would induce third parties to deliver money to him rather than to plaintiff. The pleading suggests, but does not outright allege, that Gary's misrepresentations were done with the intent to facilitate the wrongful appropriation of funds owed to Plaintiff.

The pleadings are relatively specific about the contents of the false representations and the identity of the person responsible for them (Gary). It is clear from the complaint that Plaintiff is alleging that Gary, directly or indirectly through his agents, falsely informed homeowners that subcontractors like Plaintiff had been paid. There is less specificity as to the alleged time and place of the misrepresentations. It is implied that the misrepresentations occurred sometime after the money was due to Plaintiff, but the specific time is not given. In summary, the Court finds that the complaint clearly makes out a fraud claim, but fails to meet the technical pleading requirements of Rule 9.

Nonetheless, it appears that the underlying purpose of Rule 9 is satisfied because the allegations should have been sufficient to put Gary on notice of exactly the sort of Fraud he is alleged to have committed. He is on notice that he is alleged to have directly or indirectly lied to home-buyers in order to facilitate his appropriation of building trust funds. Thus, Gary would not be unfairly prejudiced or surprised by a decision to permit Plaintiff to amend its pleadings to comply with Rule 9.

The Court may permit a party to amend its pleadings at any time if justice so

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requires.⁹ It is just to permit Plaintiff to amend its pleadings because such amendment saves an otherwise valid cause of action without unfairly prejudicing Gary. Therefore, the Court holds that Plaintiff may amend its pleadings to comply with Rule 9.

B. Chapter 35

This claim is more difficult to resolve. Chapter 35 clearly provides a civil cause of action against contractors who appropriate building trust money.¹⁰ It also clearly provides criminal penalties for both contractors and “agents of contractors” who appropriate trust money. The difficulty lies in the fact that the chapter does not create an express private right of action against “agents of contractors.” This raises two issues. First, it must be determined whether Gary qualifies as a “contractor” under Chapter 35. If so, he is clearly a proper defendant. If not, the claim against Gary can only go forward if there is an implied private right of action for aggrieved subcontractors to sue “agents of contractors” for damages under Chapter 35. This appears to be a matter of first impression in Delaware.

1. The Definition of a “Contractor” Under Chapter 35

Plaintiff argues that Gary, as a managing member of a general contracting company, is himself a “contractor” under 6 Del Code §3501. The term “contractor” is defined in Section 3501 as follows:

(2) “Contractor” includes, but is not limited to, an architect, engineer,

⁹ Del. Super. Ct. Civ. R. 15(a).

¹⁰ 6 Del. C. §§ 3507-3509.

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real estate broker or agent, subcontractor or other person, ***who enters into any contract*** with another person to furnish labor and/or materials in connection with the erection, construction, completion, alteration, or repair of any building or for additions to a building, by such contractor, or for the sale to such other person of any lands and premises, whether owned by such contractor or another, upon which such contractor undertakes to erect, construct, complete, alter or repair any building or addition to a building.¹¹ (emphasis added).

In short, a contractor is a person or entity (such as those in the illustrative list) who ***enters into*** a specific type of construction contract. The bolded language emphasizes the problem with the theory that Gary is a contractor. Plaintiff's pleadings aver that it contracted with Stover Homes, not Gary. Unless Gary entered into a construction contract, he cannot be a contractor under the statute. There is nothing in the limited record to suggest that Gary was personally a party to any contract with Plaintiff. Therefore, the Court finds that he is not a contractor under Chapter 35.

2. Implied Private Right of Action Against Agents Under Chapter 35

The more difficult issue is whether there is an implied private right of action against "agents of contractors" under Chapter 35. It is clear that the Legislature intended Chapter 35 to address the problem of malfeasant "agents of contractors." Section 3505 provides criminal penalties for agents who pilfer building trust funds. Section 3504 provides that the wrongful actions of agents are *prima facie* evidence of wrongdoing by the contractor that employs them. Yet, the two sections providing

¹¹ 6 Del. Code § 3501.

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for civil actions against contractors do not expressly authorize suit against agents of contractors.

The absence of an express private right of action is not determinative. Delaware Courts have found that an implied private right of action may exist in certain circumstances.¹² A three-factor analysis is used in order to determine whether an implied private right of action exists: (1) whether the plaintiff is a member of a class for whose special benefit the statute was enacted; (2) whether there is any indication of legislative intent to grant or deny a private right of action; and (3) whether recognition of an implied private right of action would advance the statute's purpose.¹³ Ultimately, Courts find an implied private right of action when it appears consistent with the legislative intent of the statute in question.¹⁴

In this case, Plaintiff has broadly cited to "6 Del. C. 3501 *et sec*" to support its Chapter 35 claim. The claim only makes out a cause of action (and survives a motion to dismiss) if Chapter 35 provides an implied private right of action for

¹²*See Young v. Joyce*, 351 A.2d 857, 859 (Del. 1975) (finding an implied private right of action for aggrieved consumers under a criminal consumer fraud statute); *Heller v. Dover Warehouse Market*, 515 A.2d 178, 180-81 (Del. Super. 1986) (finding implied private right of action for employees under a statute making it a crime for employers to compel employees to submit to a polygraph); *Callaway v. N.B. Downing Co.*, 172 A.2d 260, 263 (Del. Super. 1961) (finding that there is an implied private right of action for employees to sue under a law making it a crime for employers to pay less than the minimum wage).

¹³*O'Neill v. Middletown*, 2006 WL 205071, at *16 (Del. Ch. Jan. 2006) (providing a helpful analysis of a complex doctrine).

¹⁴*Id.* at 19.

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subcontractors to seek damages against “agents of contractors” such as Gary. The parties have not specifically briefed this issue, which appears to be a matter of first impression. Therefore, the Court will reserve decision on Gary’s motion to dismiss the Chapter 35 claim until the parties have had an opportunity to brief and argue the issue.

CONCLUSION

The motion to dismiss Plaintiff’s fraud claim is denied. Plaintiff is granted leave to amend its complaint in order to comply with Rule 9.

The Court will reserve judgment on the motion to dismiss the Chapter 35 claim until the parties have had an opportunity to fully brief and argue the specific issue of whether there is an implied private right of action for subcontractors to sue “agents of contractors” under that chapter.

The parties will agree to a brief schedule to be submitted to the Court for approval.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Counsel