IN THE SUPERIOR COURT FOR 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.	)	C.A. N11C-03-013 JRJ CCLD
SCOTT ENGINEERING, INC., a Delaware Corporation and GREGORY R. SCOTT, P.E., a resident of the State of Delaware,	)	
Defendants.	)	

Date Submitted: June 30, 2011
Date Decided: September 1, 2011

Upon Defendants Scott Engineering, Inc. and Gregory R. Scott's Motion to Dismiss: **DENIED**

OPINION

Richard H. Cross, Jr., Esquire, Tara M. Dirocco, Esquire, Cross & Simon, LLC, 913 North Market Street, 11th Floor, Wilmington, Delaware, 19801, RHA Construction, Inc., A Delaware Corporation, Beechwood Retreat, LLC, A Delaware Limited Liability Company.

Patrick M. McGrory, Esquire, Tighe & Cottrell, P.A., 709 N. King Street, P.O. Box 1031, Wilmington, Delaware, 19899, attorney for Scott Engineering, Inc., and Gregory R. Scott, P.E.

Jurden, J.

I. Introduction

Scott Engineering, Inc. ("SEI") and Gregory R. Scott, P.E. ("Scott") (collectively "Defendants") move this Court to dismiss plaintiffs' third party beneficiary and consumer fraud claims pursuant to Super. Ct. Civ. R. 12(b)(6) and 9(b), (c) or (g). For the reasons that follow, the defendants' motion is **DENIED**.

II. Facts

The following factual allegations taken from the First Amended Complaint are accepted as true.[1] In 2007, the principals of Beechwood Retreat LLC ("Beechwood") were considering the purchase of two adjacent parcels of land in Clayton, Delaware with a combined 140.7 +/- acres to subdivide and develop.[2] The first parcel, owned by Leroy J. Yoder and Mary S. Yoder, is located along the southerly side of 7 Hickory's Road, Tax Parcel #KH-00-055.00-01-32.00-00 (the "Yoder Property"). The second parcel, owned by Andrew Parag, III, is located along the easterly side of Seeney Town Road, Tax Parcel #KH-00-045.00-01-46.28-000 (the "Parag Property") (collectively referred to as the "Properties").[3] According to plaintiffs, Beechwood's analysis as to whether it should purchase the Properties was contingent upon Beechwood being able to comply with a certain development strategy which consisted of two phases. The first phase would entail

[1] *See Al O. Plant v. Catalytic Const. Co*., 287 A.2d 682, 686 (Del. Super. 1972) (when deciding a motion to dismiss pursuant to Delaware Super. Ct. Civ. R. 12(b)(6), "all factual allegations of the complaint are accepted as true.").
[2] *See* First Amended Complaint ("FAC") ¶ 6 (Trans. ID 38237314).
[3] *Id*.

developing a minor subdivision on each of the Properties. Beechwood would then sell the houses in the Yoder and Parag minor subdivisions to pay off the high-interest second mortgage on the Properties. The second phase would consist of combining the remaining acreage in the Yoder and Parag Properties to develop a major subdivision. The second phase was to commence only after the first phase was complete.[4] To determine whether this proposed development strategy was plausible, given Kent County and Delaware Department of Transportation regulations, RHA Construction, Inc. ("RHA"), the anticipated builder, engaged defendants to perform a feasibility study and boundary survey.[5] By agreement dated May 11, 2011 (the "Agreement"), RHA contracted with the defendants to provide the necessary engineering and surveying services to prepare subdivision plans and construction drawings, as well as to obtain the corresponding approvals necessary for the development of the Properties.[6] Pursuant to the Agreement, the defendants agreed to perform services, including but not limited to: feasibility study, boundary survey, topographic study, wetland delineation, wetlands plan preparation, community wastewater system analysis, conceptual plans, traffic impact study, preliminary plan, lot consolidation plan, record plan, and construction drawings.[7] Plaintiffs and defendants agreed that the major

[4] *Id.* at ¶ 7.
[5] *Id*.
[6] *Id*. at ¶ 9. A copy of the Agreement at issue is attached to the FAC as Exhibit A.
[7] *Id.* at ¶ 10.

subdivision would be developed pursuant to a village development scenario which permitted community septic as well as a density of one dwelling unit per acre.[8]

On March 28, 2008, unbeknownst to plaintiffs, the Kent County regulations were changed.[9] The new regulations changed the permissible density, allowing for only one dwelling unit per three acres, instead of the one-to-one ratio under the village scenario,[10] and eliminated the community septic option.[11] Relying on the representations made by defendants that the Properties could be developed in two phases, *i.e.*, two simultaneous subdivisions followed by a major subdivision, and that the major subdivision would be developed under the village scenario with community septic, Beechwood purchased the Yoder and Parag Properties for $2.125 million and $800,000.00, respectively, on July 23, 2008.[12] At the time of the closing, the village development scenario was no longer permitted pursuant to Kent County regulations unless preliminary plan approval had been obtained prior to March 28, 2008. Defendants never informed plaintiffs that the village development scenario was not permissible after March 28, 2008, nor did defendants inform plaintiffs that to be able to utilize the village development scenario they needed to have preliminary plan approval prior to March 28, 2008.[13]

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[8] *Id*. at ¶ 12.
[9] *Id*. at ¶ 13.
[10] *Id*. at ¶ 14.
[11] *Id*.
[12] *Id.* at ¶ 15. The closing of the Yoder and Parag Properties occurred almost four months after the regulations had changed.
[13] *Id.* at ¶ 16.

And, despite an agreement to do so, defendants never provided plaintiffs with a feasibility study prior to closing.[14] Plaintiffs made multiple requests to defendants for a feasibility study. It was not until November, 2010 that defendants provided a draft feasibility study dated June 21, 2007.[15]

On August 12, 2008, approximately one month after the closing, RHA entered into a Supplemental Agreement ("Supplemental Agreement") with defendants. Although defendants did not provide plaintiffs with a final feasibility study report, they represented to plaintiffs that the Properties were developable and the plaintiffs' development strategy was feasible.[16] The Supplemental Agreement updated the tasks that were necessary for defendants to complete an approved construction drawing and recorded subdivision plans for the Properties.[17] As in the original Agreement, pursuant to the terms of the Supplemental Agreement, the defendants promised to first obtain approved and recorded plans for a minor subdivision on each of the two Properties, and next to obtain recorded plans for the major subdivision under the village development scenario.[18] Also, pursuant to the Supplemental Agreement, defendants agreed to perform services, including but not

[14] *Id.* at ¶ 17. *See* page 1 of the Agreement attached as Exhibit A to the FAC, "[w]e will perform a feasibility study to determine the requirements and conditions for creating a subdivision of lands for the two Properties…a final report will be issued outlining the results of the study." Plaintiffs allege in their complaint that defendants have never provided them with the final feasibility study report. *See* FAC at ¶¶ 17-19.
[15] *Id.* at ¶ 19. A copy of the draft feasibility study is attached to the FAC as Exhibit C. Plaintiffs never received a final feasibility study. *Id.*
[16] *Id.* at ¶ 20.
[17] *Id.*
[18] *Id.* at ¶ 21; Exhibit D attached to the FAC at p. 1.

limited to the following: topographic study, conceptual plans, minor subdivision plans for each parcel, lot consolidation plan, preliminary major subdivision plan, major subdivision record plan, and construction drawings.[19]

Plaintiffs allege that the defendants breached the Supplemental Agreement by failing to complete conceptual plans, minor subdivision plans for the Yoder Property, lot consolidation plan, preliminary major subdivision plan, major subdivision record plan, and construction drawings.[20] In addition to these claims, plaintiffs assert a claim in connection with a 30 foot wide permanent access easement that had been used to provide access to the Yoder Property.[21] The boundary survey performed by defendants on the Yoder Property showed that the Yoder Property did not have frontage along 7 Hickories Road, however, there was an existing 30 foot wide permanent access easement which allowed access to the Yoder Property from 7 Hickories Road. This 30 foot wide permanent access easement was indicated on the boundary survey dated November 29, 2007 performed by defendants.[22] In December, 2008, when defendants took steps to obtain approval of the Yoder minor subdivision plans from the Kent County

[19] *Id.* at ¶ 22.
[20] *Id.* at ¶ 23.
[21] *See id.* at ¶¶ 25-33.
[22] *Id.* at ¶ 25.

Regional Planning Commission, problems regarding the permanent access easement were brought to the plaintiffs' attention for the very first time.[23]

In December, 2008, defendants informed plaintiffs of a never before disclosed issue with regard to the ownership of that easement. Specifically, according to the Kent County regulations, primary access to a subdivision cannot be via a "road" in which the property owner (here Beechwood) does not have fee simple title. In addition, the access "road" is required to be at least 50 feet wide. The access easement at issue here is only 30 feet wide and by its very nature is not owned in fee simple title by Beechwood.[24] Prior to closing, plaintiffs allege that defendants knew the 30 foot wide permanent access easement was being used to provide access to the Yoder Property and therefore knew or should have known that this did not meet the applicable criteria for access to a subdivision in width, length or title.[25] In an attempt to comply with the Kent County regulations and mitigate their damages, plaintiffs offered to purchase the 20 feet adjacent to the permanent access easement, however, the adjoining property owners would not agree to sell.[26] As a result, in order to develop and have plans approved for the Yoder minor subdivision, access would have to be gained to the Yoder Property through the middle of the Parag Property. Plaintiffs would have to pay additional

[23] *Id.* at ¶ 26.
[24] *Id.* at ¶ 27.
[25] *Id.* at ¶ 28.
[26] *Id.* at ¶ 29.

costs, including but not limited to constructing the road, clearing the land, and running the utilities. In addition, the Yoder minor subdivision would have to be incorporated into the proposed major subdivision, and this could not take place until the major subdivision was completed, thereby causing further delay.[27] Plans for the Yoder minor subdivision have never been approved or recorded, and today the Yoder Property remains largely unchanged from the time of closing.[28]

Since July, 2008, Beechwood has been carrying costs for this property, a property it cannot develop or sell. Moreover, Beechwood has missed key opportunities to sell the lots in the Yoder minor subdivision.[29] In addition to these claims, the plaintiffs allege that defendants regularly overbilled RHA for "additional services" which actually fell within the scope of the basic services defendants were obligated to provide pursuant to the Agreement and the Supplemental Agreement.[30] Plaintiffs further argue that to the extent the additional services were not anticipated, many of these services were a direct result of the errors, mistakes or overall incompetence of the defendants.[31] Plaintiffs assert claims for breach of contract (Count I), breach of implied covenant of good faith and fair dealing (Count II), and consumer fraud (negligent misrepresentation) (Count III). The Court held oral argument on the motion to dismiss on May 31,

[27] *Id.* at ¶ 30.
[28] *Id.* ¶¶ 28-29.
[29] *Id.* at ¶¶ 32-33.
[30] *See id.* at ¶ 43.
[31] *Id.*

2011. As a result of negotiations between the parties prior to that hearing and discussions with the Court following the hearing, the issues have been narrowed to the following: (1) whether Beechwood, as the purchaser and current owner of the Yoder and Parag Properties, can enforce the contracts against defendants as a third party beneficiary, and (2) whether the Delaware Consumer Fraud Act applies to professionals and, if so, whether that cause of action must meet the particularity standard of Superior Court Civil Rule 9(b). The Court requested supplemental briefing on the Delaware Consumer Fraud Act issue and that briefing has been completed. This matter is therefore ripe for decision.

III. Discussion

A. Does the Delaware Consumer Fraud Act Apply to Professional Engineers?

There are very few Delaware decisions addressing the issue of whether 6 *Del. C.* § 2511 *et seq*, the Delaware Consumer Fraud Act (DCFA), applies to professionals. Defendants rely on *Humphrey v. Board of Professional Counselors of Mental Health*.[32] In *Humphrey* the Court held that the DCFA applies only to the sale or advertising of merchandise and not to the advertisement or furnishing of professional mental health counseling services. It is important to note, however, that the DCFA was not directly at issue in that case, only the definition of

[32] *Humphrey v. Board of Professional Counselors of Mental Health*, 1998 WL 733791, at *7 (Del. Super. Sept. 25, 1998); The Board of Professional Counselors of Mental Health will hereinafter be referred to as "the Board."

consumer fraud as found within the Board's enabling statute of 24 *Del. C.* § 3014(a)(5), was at issue. The Board, in an administrative decision, found that Humphrey had committed an act of consumer fraud as prohibited by the Board's enabling statute. The Board's enabling statute did not define the term, "consumer fraud," and therefore, the Superior Court looked to the DCFA for guidance. It is in that context the Superior Court ruled that the DCFA did not apply to advertisement or furnishing of professional mental health counseling services. Plaintiffs emphasize that there was no claim for violation of the DCFA in *Humphrey* and that it was an appeal to the Superior Court from a decision of the Board relating to administrative claims brought against a mental health provider which resulted in the revocation of the mental health provider's professional license. Plaintiffs further point out that the Board found that Humphrey committed "consumer fraud" and revoked her license because after learning that her husband/coworker had "bilked" a patient, she did not close down her practice or supervise her husband.[33] According to plaintiffs, "Humphrey has nothing to do with the sale of professional services in the context of the DCFA – it deals with the failure of a professional to supervise her staff and the revocation of her license as a result."[34] Plaintiffs point out that the Superior Court in *Humphrey*, in holding that the DCFA only applies to

[33] *See id*.
[34] Plaintiffs' June 30, 2011 Letter Memorandum at p. 2 (Trans. ID 38454361).

the sale or advertisement of merchandise, was merely quoting the DCFA statute.[35] Plaintiffs further point out that the Superior Court in *Humphrey* specifically stated that "any reference to the Consumer Fraud Act…is illustrative, only."[36] The Court agrees with plaintiffs that *Humphrey* is distinguishable and therefore not instructive on the issue now before the Court.

Defendants rely upon *Wood v. Watson's Auction Service*.[37] Defendants argue *Wood* supports their argument that services are not included within the definition of "merchandise." In *Wood*, the plaintiff alleged that an auctioneer failed to use his professional skill, knowledge and experience to optimize the return for a client at auction. The Court of Common Pleas held that the plaintiff "failed to carry his burden of going forward with the evidence, as to the breach of warranties and consumer fraud claims" because plaintiff was not a consumer of merchandise but of services, and services is not included within the definition of "merchandise."[38] Here, plaintiffs suggest that the Court of Common Pleas inadvertently failed to appreciate the definition of "merchandise" contained in the statute which includes "services."[39] It appears to the Court that the Court of Common Pleas misapprehended the statute because "services" is explicitly

[35] *See* Plaintiffs' June 30, 2011 Letter Memorandum at p. 2; *Humphrey*, 1998 WL 733791, at *7.
[36] *Id*.
[37] *Wood v. Watson's Auction Service*, 2010 WL 5210362 (Del. Com. Pl. Dec. 1, 2010).
[38] *Id.* at *4, *n.16.
[39] *See* Plaintiffs' June 30, 2011 Letter Memorandum at p. 2; *see* 6 *Del. C.* § 2511 (6) "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate or services.

included within the definition "merchandise."[40] The Court finds *Wood* unhelpful for these reasons.

Defendants also rely on *Jamgochian v. Prousalis*[41] in which the Court held that the DCFA does not apply to attorneys. Plaintiffs argue that *Jamgochian* is inapposite because the rationale for that decision was that attorneys are regulated by the Delaware Constitution and the Delaware Supreme Court. Plaintiffs also contend that *Jamgochian* is distinguishable because notwithstanding that engineers are professionals and subject to regulation by the Delaware Association of Professional Engineers, engineers, unlike attorneys, are not regulated by the Delaware Constitution or by the Delaware Supreme Court. The Court agrees with plaintiffs that *Jamgochian* is inapposite and distinguishable.

The final case relied upon by defendants is *Edwards v. William H. Porter, Inc.*[42] The Court in *Edwards* considered whether the DCFA applies in the context of a vehicle lease and concluded it only applies to the sale or advertisement of any merchandise. The Court went on to say:

> That does not end the Court's inquiry, however. *Merchandise includes services*. The Consumer Fraud Act makes it unlawful to engage in fraud in the sale of services. Porter is engaged in the business of selling and leasing automobiles.

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[40] *See* 6 *Del. C.* § 2511 (6) "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate or services; Moreover, the Court of Common Pleas conducted no analysis of the DCFA claim other than a reference in a footnote; *see Wood*, 2010 WL 5210362, at *4 n.16.
[41] *Jamgochian v. Prousalis*, 2000 WL 1610750 (Del. Super. Aug. 31, 2000).
[42] *Edwards v. William H. Porter, Inc.*, 1991 WL 165877, at *6-7 (Del. Super. July 26, 1991).

> It is clear that Porter leased the vehicle to Edwards and it sold its repair and maintenance services to him. While the vehicle was leased and the lease transaction itself is not governed by the Consumer Fraud Act, *the sale of services was clearly separate and is governed by the Consumer Fraud Act*.[43]

According to plaintiffs, "[i]f anything, the *Edwards* case simply supports the straight forward application of the DCFA to the sale of services, which is the issue in this case."[44] Plaintiffs contend that the Legislature intended for the DCFA to be liberally construed. They point to language in the statute that states, "this subchapter shall be liberally construed and applied to promote its underlying purposes and policies."[45] Plaintiffs further note that the purpose of the statute is "to protect consumers and legitimate business enterprises…."[46] According to plaintiffs, if the Legislature truly wished to exclude misrepresentations related to engineering services from the scope of DCFA, it could have and would have done so. Because the Legislature did not include in any such limitation, plaintiffs maintain that the Court is bound by the well-settled rules of statutory construction.[47]

Bearing in mind that the express purpose of the DCFA is to protect consumers and legitimate business enterprises from unfair deceptive

[43] *Id.* (emphasis added); *see* Plaintiffs' June 30, 2011 Letter Memorandum at p. 2-3.
[44] Plaintiffs' June 30, 2011 Letter Memorandum at p. 3.
[45] *See* 6 *Del. C.* § 2512.
[46] *Id*.
[47] Plaintiffs' June 30, 2011 Letter Memorandum at p. 3.

merchandising practices, and that the Act is to be liberally construed and applied to promote its underlying purposes and policies, the Court declines to interpret the DCFA to exclude engineers. It is undisputed that Scott Engineering, Inc. sold RHA professional engineering services. Consequently, defendants' Motion to Dismiss the Delaware Consumer Fraud Act claim is **DENIED**. The Court further finds that the DCFA allegations meet the particularity standard of Rule 9(b).[48] Assuming *arguendo* the Rule 9(b) requirements apply, the Court is satisfied that the allegations in the Amended Complaint place the defendant on notice of the alleged misconduct.[49]

B. Whether Beechwood, as the Purchaser and Current Owner of the Yoder and Parag Properties, Can Enforce the Contracts Against Defendants as a Third-Party Beneficiary.

The general rule is that a non-party to a contract has no legal right to enforce it.[50] However, intended third-party beneficiaries have a right to enforce a contract which confers a benefit to them.[51] To qualify as an intended third-party beneficiary, "not only is it necessary that performance of contract confer benefit upon third-parties that was intended, but the conferring of a beneficial effect on such third-party…should be a material part of the contract's purpose."[52] Plaintiffs

[48] The Court notes that there is a split of authority in Delaware as to whether the Rule 9(b) requirements apply to consumer fraud actions. *See Sammon v. Hartford Underwriters Ins. Co*., 2010 WL 1267222 (Del. Super. Apr. 1, 2010).
[49] *See Saville Indus. Machinery Corp. v. Southmost Machinery Corp*., 742 F.2d 786, 791 (3rd Cir. 1984); *see* FAC.
[50] *See Comrie v. Enterasys Network, Inc*., 2004 WL 293337 (Del. Ch. Feb. 17, 2004).
[51] *Id.*
[52] *Doe v. Cedars Acad., LLC*, 2011 WL 285598, at *1 (Del. Super. Jan. 19, 2011) (citations omitted).

argue that RHA and defendants intended that Beechwood benefit from the Agreement and Supplemental Agreement (*i.e.*, from the engineering services that defendants agreed to perform related to the subdivision of the Properties). Plaintiffs further point out that the entire purpose of the Agreement and Supplemental Agreement was the conferral of a benefit to Beechwood so that Beechwood could subdivide and develop the Properties.[53] Defendants contend that in the absence of a contract, defendants cannot be liable to Beechwood based on the facts alleged in the First Amended Complaint. The Court finds that the plaintiffs' allegations state a claim under which they could conceivably recover, and therefore, plaintiffs have pled sufficient facts to overcome a motion to dismiss on the third-party beneficiary claim.

WHEREFORE, for the reasons stated above, the defendants' Motion to Dismiss is **DENIED**.

Jan R. Jurden, Judge

[53] *See* Plaintiffs' Response to Defendant's Motion to Dismiss at ¶ 7 (Trans. ID 37772461).