

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

HELKA HEDENBERG, ) C.A. NO. 05C-03-038 (JTV)  
)  
Plaintiff, )  
)  
v. )  
)  
TROY D. RABER, BETHANY )  
N. RABER, LISA M. ANDERSON, )  
ESQUIRE, JOE WELLS and )  
HARRINGTON ERA REALTY, )  
INC., )  
)  
Defendants. )

*Submitted: June 1, 2005*  
*Decided: November 14, 2005*

Helka Hedenberg, *Pro Se.*

Craig T. Eliassen, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Defendants Troy D. Raber and Bethany M. Raber.

Noriss E. Cosgrove, Esq., Cooch & Taylor, Wilmington, Delaware. Attorney for Defendant Wells and Harrington ERA Realty.

Paul Cottrell, Esq., Tighe, Cottrell & Logan, Wilmington, Delaware. Attorney for Defendant Anderson.

*Upon Consideration of Defendants'*  
*Motion to Dismiss*  
**GRANTED**

**VAUGHN, President Judge**

***Hedenberg v. Raber, et al.***

C.A. No. 05C-03-038

November 14, 2005

## **ORDER**

Upon review of the defendants' motions to dismiss and the record of the case, it appears that:

1. This case comes before the Court with an extensive procedural history. Although it is a new action, the plaintiff filed a similar suit in May of 2004. That case was filed by an out-of-state attorney and it was ultimately dismissed without prejudice due to the plaintiff's failure to obtain local counsel or have her out-of-state counsel admitted *pro hac vice*.

2. The named defendants in both actions are Lisa Andersen, Esq., Troy and Bethany Raber, and realtor Joe Wells and his company Harrington ERA Realty, Inc. The dispute arises from the sale of a home by the Raber's to the plaintiff in November of 2003. The plaintiff has filed a new complaint *pro se* alleging Fraud and Violation of Contract Privity.<sup>1</sup> The defendants have all filed motions to dismiss on varying grounds as discussed below. The plaintiff did not respond to the motion papers but appeared in Court to oppose the motion.

3. Defendant Andersen moves to dismiss pursuant to Superior Court Civil Rules 9(b), 12(b)(6), and 12(e) and the Raber's have joined Andersen's motion. Andersen argues the complaint is vague and ambiguous. She argues that she cannot discern what allegations the plaintiff is making against which party. She contends that there are allegations of fraud but they are not stated with particularity. Further,

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<sup>1</sup> The Complaint's title actually reads "negligence, fraud, and contract privity" but the body of the pleading only contains a Count I for "Fraud" and a Count II for "Violation of Contract Privity."

***Hedenberg v. Raber, et al.***

C.A. No. 05C-03-038

November 14, 2005

she contends that she is unable to determine what contract is at issue, that there are no exhibits attached despite reference to them in the complaint, and that “violation of contract privity” is not a valid claim for which relief can be granted. Andersen moves to have the action dismissed with prejudice.

4. Defendants Joe Wells and Harrington ERA Realty move to dismiss alleging that the plaintiff has failed to comply with Rules 12(b)(4) regarding insufficiency of process and (b)(5) regarding insufficiency of service of process. They argue that service was defective and improper in that the summons caption named defendants’ counsel rather than the defendants. Further, they contend that service was made upon the attorneys of Cooch & Taylor and they have not been appointed as agents for Mr. Wells or Harrington Realty. They contend that neither Mr. Wells nor any agent or officer of Harrington Realty has been served.

\_\_\_\_5. When reviewing a motion to dismiss for failure to state a claim, all well pled allegations must be accepted as true.<sup>2</sup> If it clear that the plaintiff cannot prove a set of facts that would entitle them to relief, then the Rule 12(b)(6) motion should be granted.<sup>3</sup> Such a motion cannot be granted if a plaintiff may recover under any conceivable set of circumstances susceptible of proof under the complaint.<sup>4</sup> When addressing objections of insufficient service of process, the court may quash the writ

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<sup>2</sup> *Browne v. Robb*, 538 A.2d 949, 950 (Del. 1990).

<sup>3</sup> *Id.*

<sup>4</sup> *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 949, 950 (Del. 1995).

***Hedenberg v. Raber, et al.***

C.A. No. 05C-03-038

November 14, 2005

or dismiss the complaint.<sup>5</sup> A dismissal of the action is generally warranted only when it appears the plaintiff will be unable to effect service of process in the foreseeable future.<sup>6</sup> In passing upon a motion to dismiss, the court must take all allegations in the complaint as true

6. Turning to defendant Andersen's motion, joined by the Rabers, Rule 12(b)(6) contemplates a dismissal of an action where the complaint fails to state a claim for which relief can be granted. The complaint lists negligence, fraud, and violation of contract privity in its title. Initially, any claims of negligence must be dismissed. The complaint title lists negligence but the body of the complaint does not contain a negligence count and negligence is not particularly pled pursuant to Rule 9(b).

7. The count titled "Violation of Contract Privity" must also be dismissed. "To show entitlement of relief as required [by Super. Ct. Civ. R. 8(a)], a complaint must aver either the necessary elements of a cause of action or facts which would entitle the plaintiff to relief under the theory alleged."<sup>7</sup> The plaintiff does not specify the contract to which she is referring. Further, "Violation of Contract Privity" is not a valid action and the defendants are not on sufficient notice of what claims they must defend against.

8. Any allegations of fraud must plead the circumstances constituting fraud

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<sup>5</sup> *Gosnell v. Whetsel*, 198 A.2d 924 (Del. 1964).

<sup>6</sup> *Id.*

<sup>7</sup> *American Ins. Co. v. Material Transit, Inc.*, 446 A.2d 1101 (Del. Super. Ct. 1982).

***Hedenberg v. Raber, et al.***

C.A. No. 05C-03-038

November 14, 2005

with particularity pursuant to Rule 9(b). To sufficiently plead the “circumstances,” the allegations of fraud should refer to “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby.”<sup>8</sup> The plaintiff makes numerous allegations of fraud and deceit throughout her complaint, but she fails to specifically plead the circumstances surrounding the fraudulent misrepresentations. Further, the averments under the fraud count do not contain any allegations of fraud against defendant Andersen, but instead accuse her of negligence. The relevant language reads “[p]laintiff’s attorney, Lisa M. Anderson, was negligent in preparing the deed. Failure to check survey town of Frederica record is negligent per se.” This is a broad allegation of negligence, contained in the count for fraud, and not pled with specificity.

9. The complaint is also incomplete. It references exhibits throughout but no exhibits are attached and the defending parties have not been provided with the exhibits. The plaintiff had several opportunities to amend her original complaint and that complaint was ultimately dismissed for failure to comply with Court rules. The plaintiff’s new complaint contains several deficiencies as discussed above, many of which also appeared in the old complaint and have been previously brought to the plaintiff’s attention.

\_\_\_\_\_ 10. Addressing defendants Wells' and Harrington’s motion, the rule allows the court to order proper service or order a dismissal of the action if it appears the

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<sup>8</sup> *Autrey v. Chemtrust Indus. Corp.*, 362 F. Supp. 1085 (D. Del. 1973).

***Hedenberg v. Raber, et al.***

C.A. No. 05C-03-038

November 14, 2005

plaintiff will be unable to effect proper service. Defendants Wells' and Harrington Realty', however, seek dismissal of the complaint. They argue that the plaintiff has had several opportunities to properly file and serve this complaint and has been unable to do so. In this case, I conclude that plaintiff's inability to file and serve upon the defendant's an appropriate complaint has progressed to the point where dismissal is warranted.

11. Based upon the history of the litigation, the resources already expended by the defending parties, the resulting prejudice to the defending parties, and the plaintiff's inability to file an adequate complaint or obtain proper service of process, dismissal is appropriate at this time. The defendants' motions are **granted** and the plaintiff's complaint is dismissed with prejudice.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary  
cc: Order Distribution  
File