IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIKA L. GUTRIDGE,	§	
	§	No. 291, 2005
Plaintiff Below,	§	
Appellant,	§	Court Below – Superior Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	C.A. No. 03C-06-052
JOHN IFFLAND and	§	
CAROL SZUBIELSKI,	§	
	§	
Defendants Below,	§	
Appellees.	§	

Submitted: December 7, 2005
Decided: December 15, 2005

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 15th day of December 2005, it appears to the Court that:

1) The plaintiff-appellant, Erica Gutridge (the "Buyer"), appeals from the Superior Court's grant of summary judgment dismissing her breach of contract claims. Those claims arise from the Buyer's purchase of residential real property from the defendants-below appellants, John Iffland and Carol Szubielski, formerly husband and wife, (the "Sellers"). In her complaint, the Buyer alleged that the Sellers breached the agreement of sale by making false representations on the disclosure statement, and by failing to properly repair defects on the property before settlement.

2) On appeal, the Buyer contends that the Superior Court erroneously determined that: the Sellers had no duty to warranty the repairs; the Buyer suffered no damages; the Buyer's claim was barred because she could not have reasonably relied on the Sellers' promise to repair; and there was no evidence that the Sellers had made untruthful disclosures.

3) We have concluded that, with one exception, the Superior Court erroneously concluded that there were no triable material issues of fact relating to the Buyer claims of breach of contract. The one exception is the Superior Court's determination that there were no issues of material fact relating to the Buyer's breach of contract claim for untruthful disclosure about the plumbing.

4) The record reflects that the Sellers contracted to sell their Wilmington home to the Buyer in 2001. The standard seller disclosure statement that the Sellers provided to the Buyer answered "no" to the following questions:

> (a) Are there any problems with the roof, flashing, or rain gutters?
> (b) Are there any leaks, backups, or other problems relating to any of the plumbing, water and sewage related items?
> (c) Are there any problems with the heating or air conditioning systems?
> (d) Do fuses blow or circuit breakers trip when two or more appliances are being used at the same time?
> (e) Are there any wall switches, light fixtures or electrical out1ets in need of repair.

5) After the Buyer reviewed the disclosure statement, the parties executed an agreement of sale for the property. Before the settlement and consistent with the Fair Housing Act, the Buyer caused a home inspection to be performed that revealed several defects not addressed by the disclosure statement. Specifically, the inspection revealed that the roof needed repairs, the electrical system had problems, and the boiler failed to operate.

6) As a result of the inspection report, the parties executed an addendum to the agreement of sale ("the Addendum"), wherein the Sellers agreed to the following terms:

(a) The entire roof system including structure should be evaluated by a structure contractor and roofer and all necessary repairs made.

(b) The entire heating system will need to be evaluated by a qualified heating contractor and all necessary repairs made.

(c) All electrical items noted as safety Concerns should be considered part of this major defect, all should be evaluated by a qualified electrical contractor and all needed repairs made.

7) The Sellers had the entire roof replaced before the closing, had the electrical system inspected and repaired, and ordered an evaluation of the heating system, which showed that the system was operable. The Sellers submitted receipts to the Buyer for the above-described contractual work to

evidence that the Sellers had performed their duties as called for by the Addendum. The transaction closed on August 6, 2001.

8) After the closing, several problems arose that the Buyer attributes to the Sellers' failure to properly make the "necessary" and "needed" repairs required by the Addendum. Specifically the kitchen roof leaked, the heater did not work properly, there was a smell of oil (which led to the discovery of a hole in the oil tank), and fuses blew. Sewage also backed up in the basement, causing the Buyer to claim that the Sellers had been untruthful in their disclosure statement that they knew of no plumbing or sewage-related problems.

9) Because of all these problems, the Buyer vacated the property and lived with her mother for approximately one year, paying her $50 a week in rent. During that period, the Buyer hired a contractor to make repairs to the roof, the heater and the electrical system, and to unclog the sewage backup. For that work, the Buyer paid approximately $4,100. The Buyer then brought suit, seeking damages of $6,600 and claiming that the Sellers had breached the agreement of sale by providing false responses in the disclosure statement and by failing to honor their promise to make repairs in the Addendum.

10) Prior to trial, the Sellers moved for summary judgment, which the Superior Court granted. The standard for summary judgment is, whether taking all of the facts in a light most favorable to the non-moving party, there is a genuine issue of material fact requiring a trial.[1] This Court reviews *de novo* the grant of summary judgment.[2]

11) The Buyer first claims that the Superior Court erred in concluding that the Sellers had no duty to warranty the repairs promised in the Addendum. The Superior Court found that:

> The addendum only required Defendants to procure "qualified," and in some cases "licensed," contractors to perform repairs. Nothing in the words of the addendum required Defendants to warranty the work performed by those contractors. This makes sense because the repairs came at the behest of the Plaintiff's inspector. Plaintiff was therefore in just as good a position as Defendants, if not better, to ensure that the work performed met minimum specifications by, for example, having her inspector sign off on the work before she took possession. There was simply no reason for Defendants to take up the burden of guaranteeing the contractor's work, and the text does not say that they did so.[3]

12) Unfortunately, in reaching that conclusion the Superior Court construed the wrong document. The trial judge quoted language ("Qualified heating contractor to evaluate boiler and replace if necessary to certify functioning properly") from an inspection report of the Buyer's mortgage

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[1] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
[2] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999).
[3] *Gutridge v. Iffland*, C.A. No. 03C-06-052, at 4 (Del. Super. June 1, 2005).

company that was included as an exhibit to the Sellers' motion for summary judgment. The correct document--the Addendum itself—read differently: "[t]he entire heating system will need to be evaluated by a qualified heating contractor and *all necessary repairs made"* (italics added).

13) The Buyer argues that that Addendum language required the repairs to be made properly, which (she claims) they were not. The Sellers respond that their only duty was to have a contractor inspect and repair. That, they claim, was done as evidenced by the receipts. The Sellers assert that they did not warranty any repairs that the contractor made. That dispute presents an issue of contract construction.

14) The Addendum can be reasonably read to require that qualified contractors evaluate the roof, the heating, and the electrical system, and make "all necessary [or needed] repairs . . . ." According to the Sellers, the language means that the Sellers' obligations ended with the completion of an inspection and alleged repair.[4] Under the Sellers' construction (which the Superior Court accepted), if a roof problem was identified by the contractor

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[4] *See Frohnapfel v. Madison,* 1989 WL 48594, at *2 (Del. Super. Ct. May 9, 1989) (holding that it would be "utterly unreasonable" for the sellers to believe that their obligation ended on the day of closing under the contract language), The contract in *Frohnapfel* required that the roof be free of leaks. The Sellers in the instant case attempt to distinguish *Frohnapfel* noting that the language of the Addendum does not require that the roof be "free of leaks," but rather that the roof be inspected and repaired as necessary. Common sense would tell us that a roof repaired as necessary, would surely be free of leaks.

and the Sellers had the roof replaced, the Sellers had no further responsibility even if the roof continued to leak.[5] That construction is not commercially reasonable and renders the Addendum obligation illusory,[6] because it is no longer a promise to cure the property defects, but only a promise to hire someone to try.

15) Under the language of the Addendum, the Sellers had an obligation—implicit in the promise to have "all necessary repairs made"—to have those repairs made properly. At the very least, the Addendum is ambiguous on that point and generates a fact dispute that should be the subject of a trial. In either case, the Superior Court erred in ruling as a matter of law that the Sellers had no duty to make the repairs properly.

16) Alternatively, the Sellers claim that summary judgment was correctly granted because statutory law prevents the Buyer from pursuing

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[5] To support their claim that their duty was fulfilled after a contractor inspected and repaired the problems outlined in the Addendum, the Sellers cite *Descano v. Estate of Walters,* 1992 WL 219065 (Del. Aug. 31, 1992). In *Descano,* the contract language stated that the Buyer, at its expense, had the privilege of having the property examined by an inspector. If the House Inspector's report is unsatisfactory, then any repairs, which are necessary, will be made by the Seller at the Seller's expense. . . ." *Id.* at *1. On appeal, we held that "the unambiguous language of the contract did not impose a contractual duty upon the Seller to pay for structural repairs to the house unless the Inspector, who was chosen and paid for by the Buyers, reported an unsatisfactory condition." *Id.* at *2. The *Descano* case is inapposite. There, the buyer could not recover for problems that were not identified by the buyer's inspector. Here, the Buyer did identify problems, and contracted with the Sellers to have them separately inspected and repaired.

[6] *O'Brien v. Progressive Northern Ins. Co.,* 785 A.2d 281, 287 (Del. 2001).

breach of contract claims against them in the present circumstances. The Sellers rely on title 6, section 2575 of the Delaware Code, which provides:

> The buyer shall not have a cause of action against the seller . . . for:
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> (b) Material defects developed after the offer was made but disclosed prior to final settlement, provided seller has complied with the agreement of sale; or
>
> (c) Material defects which occur after final settlement.

17) The Sellers argue that the roof, heating and electrical problems identified by the Buyer developed after final settlement, thereby triggering the protection of Section 2575(c). But the Sellers also (and inconsistently) claim that those three problems were disclosed before the closing, and that Sellers had each problem evaluated and repaired by a contractor, thereby satisfying Section 2575(b). The Buyer contends that there was evidence of a leak in the kitchen roof and electrical problems, all of which predated the sales contract, and that the repairs could not have been properly made, since most of the disputed problems arose within two months of settlement.

18) "Summary judgment is inappropriate 'if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom."[7] Whether the

[7] *Brandywine Transmission Service, Inc. v. Justice*, 1990 WL 72591, at *2 (Del. Apr. 16, 1990) (quoting *Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 718 (1970)).

problems arose after the closing or continued to exist from before (because the repairs or inspections were not adequately made), are triable issues of material fact. Summary judgment was therefore inappropriate.

19) The Buyer's second claim is that the Superior Court erroneously concluded that the Buyer had suffered no damages because she could have had (and may still have) a warranty claim against the contractors. The Superior Court found that the Buyer had a claim against the contractors because the Buyer was the intended beneficiary of their actions due to the Sellers' imminent surrender of the house to the Buyer, and because some of the contractors had acknowledged and corrected their mistakes. Thus, the Superior Court found the Buyer had suffered no damages.

20) The agreements to inspect and repair the roof, the heating and electrical systems were between the Sellers and the individual contractors. Although the Buyer was not a party to those contracts, it is possible, as the Superior Court observed, that the Buyer may have qualified as the intended beneficiary of those repairs. Therefore, the Buyer may have a potential warranty claim against the individual contractors for improper repair work.[8]

21) Having a possible right to sue the contractors, however, does not foreclose the Buyer from seeking damages against the Sellers for their

[8] *See generally* 13 Richard A. Lord, *Williston on Contracts* § 37:1 (4th ed. 2000).

alleged breaches of the Addendum. The Superior Court's reasoning suggests that some kind of novation occurred, in which the parties agreed that the Buyer would look only to the contractors, rather than to the Sellers, to enforce her contract claims.[9] There is no evidence of record to support that unstated assumption.

21) The Superior Court stated that some of the contractors had acknowledged and corrected their mistakes "seemingly at no cost" to the Buyer. In fact, the record reflects that only one contractor, the roofer, returned to the Buyer's home at her request. That contractor made one attempt to complete repairs to the roof over the kitchen. The Buyer claims the attempt failed because the leak persisted.

22) The Buyer proffered evidence that she paid $4,100 in repairs, plus $50 a week in rent during the year that she was unable to inhabit the premises because of the needed repairs. The Sellers respond that the Buyer violated her duty to mitigate her damages by not suing the contractors for breach of warranty, and instead by unilaterally hiring her own contractor to complete the repairs. Findings relating to damages and to mitigation of

[9] *Berg v. Liberty Fed. Sav. & Loan Ass'n*, 428 A.2d 347, 349 (Del. 1989).

damages are issues to be determined by the trier of fact.[10] Therefore, summary judgment on the issue of damages was inappropriate.

23) The Buyer next claims that the Superior Court erred in concluding that the Buyer could not reasonably rely on the Sellers' promise to repair under the Addendum because the Buyer failed to inspect the repairs. However, the Buyer advanced a claim under the Addendum for breach of contract, a cause of action for which reliance is not an element.[11] Thus, the Superior Court erred in dismissing the Buyer's breach of contract claim.

24) The Buyer's final contention is that the Superior Court erred in finding that there was no evidence to support her assertion that the Sellers provided untruthful responses in the disclosure report as to the condition of the plumbing and sewage systems. In the disclosure report, the Sellers represented that they did not know of any plumbing or sewage problems. Shortly after closing on the property, the Buyer had to pay to clear the sewer line (running from the Street to the house) that had backed up into the basement.

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[10] *Gulf Oil Corp. v. Slattery*, 172 A.2d 266, 270 (Del. 1961).
[11] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003) (holding that the elements of a breach of contract claim are: the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff).

25) The Buyer offers no evidence that the Sellers knew of the plumbing and sewage problems, or that those problems had manifested themselves before the closing. Instead, the Buyer argues that it can be inferred from the nature and timing of the problem, that the Sellers would have experienced similar problems before the sale. The Buyer also argues that because the Sellers admitted making other significant misrepresentations on the disclosure report, it is reasonable to infer that they would have failed to disclose known sewage problems, and on summary judgment, all reasonable inferences from the evidence must be decided in favor of the non-moving party.[12] These arguments are without merit.

26) Summary judgment must be granted where there are no issues of material fact and the moving party is entitled to judgment as a matter of law.[13] In deciding whether there is a triable issue of material fact, the court must view the evidence in the light most favorable to the non-moving party.[14] The burden initially falls upon the moving party to show the nonexistence of any issue of material fact, but then shifts to the non-moving party to show the contrary. "It is not enough for the Opposing party merely to assert the existence of . . . a disputed issue of fact. The opponent of a

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[12] *Aeroglobal Capital Management LLC v. Cirrus Industries, Inc.*, 871 A.2d 428, 444 (Del. 2005).
[13] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999).
[14] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970).

motion for summary judgment 'must do more than simply show that there is some metaphysical doubt as to material facts.'"[15] Rather, the motion-opponent "is obliged to bring in some evidence showing a dispute of material fact."[16]

28) The Buyer offers no evidence that the Sellers knew of a plumbing problem before settlement. The only evidence she presented was that the main sewer line backed up into the basement approximately two and a half months after the parties closed on the property. The Buyer also points to the Sellers' untruthful disclosures about the roof and electrical system, suggesting that it can be inferred from those disclosures that the Sellers lied throughout their entire disclosure statement. That inference is not reasonable. Even giving the Buyer the benefit of favorable inferences as to the nature and timing of the sewage back-up, without some evidence that the Sellers actually knew of the plumbing problem, the Buyer's claim must fail.

[15] *Brzoska v. Olson*, 668 A.2d 1355, 1363 (Del. 1995).
[16] *Phillips v. Delaware Power & Light Co.*, 216 A.2d 281, 285 (Del. 1966).

The judgments of the Superior Court are reversed with the exception of the judgment on the plumbing and disclosure claims, which is affirmed. This matter is remanded for further proceedings, in accordance with this order.

BY THE COURT:

/s Randy J. Holland
Justice