NO. COA12-1407
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

JONATHAN WHITE, JEFFREY WHITE and BARBARA WHITE,
Plaintiffs

v.

Pamlico County
No. 11 CVS 205

BURTON FARM DEVELOPMENT COMPANY LLC and BODDIE-NOELL ENTERPRISES, INC. d/b/a KITTY HAWK LAND COMPANY,
Defendants

JOHN DETTRA and wife, FRANCES DETTRA,
Plaintiffs

v.

Pamlico County
No. 11 CVS 207

BURTON FARM DEVELOPMENT COMPANY LLC and BODDIE-NOELL ENTERPRISES, INC. d/b/a KITTY HAWK LAND COMPANY,
Defendants

JAMES LEFEVRE, ROSALINDA LEFEVRE, individually and as Trustees of their Respective Living Trust, ALEX LEFEVRE, DIEGO DAYAN, PATRICK DAYAN, and INNER BANKS PARTNERSHIP, LLC,
Plaintiffs

v.

Pamlico County
No. 12 CVS 17

BURTON FARM DEVELOPMENT COMPANY LLC and BODDIE-NOELL ENTERPRISES, INC. d/b/a KITTY HAWK LAND COMPANY,
Defendants.

Appeal by plaintiffs from orders entered 12 March 2012 and 17 May 2012 by Judge Benjamin G. Alford in Pamlico County Superior Court. Heard in the Court of Appeals 4 June 2013.

Gregory E. Wills, P.C., for Plaintiff-appellants.

Poyner Spruill LLP, by J. Nicholas Ellis, for Defendant-appellees.

ERVIN, Judge.

Plaintiffs Jonathan White, Jeffrey White, and Barbara White; John and Frances Dettra; and James and Rosalinda LeFevre, both individually and as trustees of their respective living trusts, Alex LeFevre, Diego Dayan, Patrick Dayan, and Inner Banks Partnership, LLC., appeal from orders dismissing their claims against Defendants Burton Farm Development Company LLC and Boddie-Noell Enterprises, Inc., d/b/a Kitty Hawk Land Company, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and from orders denying their motions to reconsider the dismissal of their claims. On appeal, Plaintiffs argue that the trial court erred by dismissing all of their claims against Boddie-Noell and by dismissing all their claims against Burton Farm, except their breach of implied contract claim, on the grounds that their complaints adequately asserted a direct claim against Boddie-Noell for breach of implied contract, claims against both

Defendants for fraudulent concealment of a material fact and unfair or deceptive trade practices, and a claim for piercing Burton Farm's corporate veil. In addition, Plaintiffs argue that the trial court erred by denying their reconsideration motions. After careful consideration of Plaintiffs' challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.[1]

I. Factual Background

"This appeal arises from the development of approximately 900 acres of real property located in Pamlico County known as Arlington Place and revolves around a dispute over the extent to which Defendants failed to comply with an alleged obligation to construct a deep water marina in the course of developing the

[1]As Plaintiffs note in their appellate brief, the complaints filed in this case incorporate by reference the complaint filed on 29 April 2011 in Pamlico County File 11-CVS-87 and captioned *Bernard Mancuso, Jr., et. al. v. Burton Farm Development Company LLC, and Boddie-Noell Enterprises, Inc.*, __ N.C. App __, __ S.E.2d __ (2013) ("*Mancuso*"), which we have also decided today. As a result of the fact that the two cases involve virtually identical claims asserted against the same defendants and revolve around many of the same legal arguments, we have elected to quote from our opinion in *Mancuso* in appropriate instances in deciding this case. Moreover, although the present appeal involves three separate cases which have been consolidated for our consideration, those "cases have substantially identical facts, the same causes of action, the same Defendants and all parties were represented by the same attorneys." (For that reason, we have addressed Plaintiffs' challenges to the trial court's orders on a consolidated basis.

property. Boddie-Noell is the majority owner of Burton Farm, with both entities having been involved in the development of Arlington Place." *Mancuso*, __ N.C. App at __, __ S.E.2d at __. "Defendants purchased the land for Arlington Place in October 2005. According to the marketing materials distributed to potential buyers and the statements made by Defendants' employees, Defendants' plans for the development of Arlington Place included the construction of various recreational facilities, including a clubhouse, a swimming pool, a tennis court, and a marina." *Mancuso* at __, __ S.E.2d at __.

In October 2006, Defendants began selling lots in Arlington Place. Plaintiff Jonathan White is the son of Plaintiff Barbara White and a friend of Plaintiff Jeffrey White. On 3 October 2006, Jonathan White signed Purchase Agreements, with the "express approval" of the other White Plaintiffs, contracting to purchase three lots in Arlington Place. Neil White, the now-deceased husband of Barbara White, was substituted as a buyer of one of these lots at closing, while Jeffrey White was added as a co-buyer for the other two lots. Plaintiffs James and Rosalinda LeFevre, individually and as trustees of the James and Rosalinda LeFevre living trusts; their son, Alex LeFevre; brothers Patrick and Diego Dayan; and a limited liability company known as Inner Banks Partnership, LLC, that had been formed by Alex LeFevre and

the Dayan brothers for the purpose of investing in Arlington Place, also obtained interests in lots in Arlington Place. On 5 October 2006, Alex LeFevre and Diego Dayan executed Purchase Agreements with the "express approval" of the other LeFevre-related Plaintiffs in which they contracted to purchase three lots in Arlington Place. Finally, Plaintiffs John and Frances Dettra, a married couple, signed a Purchase Agreement to buy a lot in Arlington Place on 22 September 2007.

Complaints were filed by the White Plaintiffs on 30 September 2011, by the Dettra Plaintiffs on 5 October 2011, and by the LeFevre-related Plaintiffs on 23 January 2012 in which each group of plaintiffs sought to recover damages for breach of implied contract, fraudulent concealment of a material fact, unfair or deceptive trade practices, and the piercing of Burton Farm's corporate veil in order to permit a finding of liability against Boddie-Noell. In each complaint, Plaintiffs alleged that marketing materials disseminated in connection with sales efforts at Arlington Place and oral statements made by Defendants' agents indicated that the construction of a marina would be a central feature of the Arlington Place development. In addition, Plaintiffs alleged that, for several years after the dates upon which they purchased their lots in Arlington Place, Defendants continued to indicate that they planned to

construct a marina during the course of the development process. After learning in May 2011 that the Mancuso plaintiffs had filed a civil action against Defendants for the purpose of seeking "to compel construction of a marina in Arlington Place," Plaintiffs incorporated the Mancuso "court file" into their respective complaints.

On 11 November 2011 and 8 February 2012, Defendants moved to dismiss Plaintiffs' complaints pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). On 14 February 2012, Plaintiffs filed a motion seeking the entry of an order consolidating all the cases arising from or relating to Defendants' failure to construct a marina at Arlington Place, including *Mancuso*. On 20 February 2012, the trial court held a hearing for the purpose of addressing all pending motions, including Defendants' dismissal motions and Plaintiffs' consolidation motion. On 12 March 2012, the trial court entered orders dismissing with prejudice Plaintiffs' claims against Defendant Boddie-Noell and all of the claims that Plaintiffs had asserted against Burton Farm, with the exception of their claims for breach of implied contract.

On 19 March 2012, Plaintiffs filed motions seeking, among other things, the entry of an order making the dismissal of their claims without, rather than with, prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, or certifying the dismissal of

their claims for immediate appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). On 11 April 2012, Plaintiffs noted an appeal to this Court from the trial court's dismissal order. After conducting a hearing for the purpose of addressing the issues raised by Plaintiffs' motions on 30 April 2012, the trial court entered an order denying Plaintiffs' requests that the dismissal of their claims be without prejudice, that their appeals from the trial court's dismissal order be certified for immediate review, and that all of the cases relating to Defendants' failure to construct a marina at Arlington Place be consolidated. Plaintiffs noted an appeal to this Court from the denial of their motions pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. On 14 August 2012, Plaintiffs voluntarily dismissed their breach of implied contract claim against Burton Farm without prejudice.

II. Legal Analysis

A. Dismissal of Plaintiffs' Substantive Claims

1. Standard of Review

"Our review of the grant of a motion to dismiss under [N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] is *de novo*. We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.'" *Bridges v. Parrish*, __ N.C. __, __,

742 S.E.2d 794, 796 (2013) (quoting *Coley v. State*, 360 N.C. 493, 494-95, 631 S.E.2d 121, 123 (2006). "This Court treats factual allegations in a complaint as true when reviewing a dismissal under [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(6)." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) (citing *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006). "Legal conclusions, however, are not entitled to a presumption of truth." *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000). "A trial court considering a motion to dismiss on the basis of [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(6) should construe the complaint liberally and only grant the motion if it appears certain that plaintiffs could prove no set of facts which would entitle them to relief under some legal theory. *Fussell*, 346 N.C. at 225, 695 S.E.2d at 440. 'A complaint may be dismissed pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.'" *Id.* (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

2. Sufficiency of Plaintiffs' Allegations

a. Breach of Implied Contract

In their first challenge to the trial court's orders, Plaintiffs argue that the trial court erroneously dismissed their "main claim" against Boddie-Noell, in which they asserted that Defendants breached an "implied contract" under which Defendants were obligated to construct the proposed marina. In support of this contention, Plaintiffs argue that they sufficiently stated a direct claim against Boddie-Noell for breach of implied contract; that provisions of the Interstate Land Sales Act (ILSA) are relevant to this claim and serve to "make marketing materials relevant to the analysis" of their claim in spite of the fact that the Purchase Agreement contains language which precludes any consideration of non-contractual documents such as marketing materials in determining the nature and extent of the parties' obligations to each other; that their "ILSA claims" are not barred by the relevant statute of limitations; and that prior decisions of this Court and the Supreme Court allow the assertion of their breach of implied contract claims and the consideration of parol evidence in support of these claims. We do not find Plaintiffs' arguments persuasive.[2]

[2]Although the breach of implied contract claim at issue in connection with Plaintiffs' appeal from the trial court's dismissal order is directed solely against Boddie-Noell while the breach of implied contract claim at issue in *Mancuso* was directed against Burton Farm, the two claims are still

The plaintiffs in *Mancuso* also attempted to assert a claim for breach of an implied contract against Defendants; however, summary judgment was granted in favor of Defendants with respect to the *Mancuso* plaintiffs' implied contract claim. As a result of the fact that the relevant contractual documents and controlling authorities are essentially identical in both cases, the same analysis that underlies our decision to affirm the decision to grant summary judgment in favor of Defendants in *Mancuso* is equally applicable in this case.

> A claim for breach of an implied contract "is generally cognizable under North Carolina law," *In re Proposed Foreclosure of Claim of Lien Filed Against Johnson*, 366 N.C. 252, 259, 741 S.E.2d 308, 312 (2012), and "rests on the equitable principle that one should not be allowed to enrich himself unjustly at the expense of another." *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 346, 634 S.E.2d 548, 556 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 167, 639 S.E.2d 651 (2006) (citations omitted). However, "[it] is a well established principle that an express contract precludes an implied contract with reference to the same matter[,]" *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (citing *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 765, 102 S.E.2d 257, 259 (1958)) (other citations omitted), so that, if "there is a contract between the parties[,] the contract governs the claim and the law will not imply

---

essentially identical given that the arguments upon which Plaintiffs rely treat Burton Farm and Boddie-Noell as essentially identical.

> a contract." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (citing *Vetco Concrete Co.*, 256 N.C. at 713-14, 124 S.E.2d S.E.2d at 908)). In addition, since "[t]here cannot be an express and an implied contract for the same thing existing at the same time," "[n]o agreement can be implied where there is an express one existing." *Vetco*, 256 N.C. at 713-14, 124 S.E.2d at 908.

Mancuso, __ N.C. App at __, __ S.E.2d at __. In this case, as in *Mancuso*, the parties executed express contracts governing Defendants' obligations regarding the provision of recreational facilities, such as the proposed marina, that contain integration and merger provisions that preclude consideration of evidence contradicting or expanding upon the terms of the express contract. As a result, the contractual documents defining the rights and obligations of the parties establish Boddie-Noell's right to have Plaintiffs' claims for breach of implied contract dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

> In the present case, the parties executed an express contract that addressed Defendants' obligations relating to the provision of recreational facilities such as a marina, a fact which precludes any consideration of evidence which contradicts the terms of that express agreement and tends to show the existence of an "implied contract." A careful analysis of the documents that embody the express contract between the parties, which include the Purchase Agreements and the United States Department of Housing and Urban Development

property report, which was expressly incorporated into each Purchase Agreement,[] establishes that Defendants were entitled to summary judgment in their favor.

The Purchase Agreements between the parties specifically provide that:

> BY THE EXECUTION HEREOF YOU ACKNOWLEDGE THAT EXCEPT AS SET FORTH HEREIN OR IN THE PROPERTY REPORT GIVEN TO YOU, NO REPRESENTATION, WARRANTY, GUARANTEE OR PROMISE, EXPRESS OR IMPLIED, HAS BEEN MADE TO OR RELIED UPON BY YOU IN MAKING THE DECISION TO EXECUTE THIS AGREEMENT AND PURCHASE THE HOMESITE, AND THAT YOU HAVE RELIED UPON YOUR OWN JUDGMENT IN MAKING SUCH DECISIONS AND NOT UPON ANY STATEMENT OR STATEMENTS MADE BY SELLER, ITS AGENTS, EMPLOYEES OR REPRESENTATIVES, EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT OR IN THE PROPERTY REPORT.

In addition, the Purchase Agreements include a merger clause which provides that the "Agreement represents the entire agreement between the parties and may not be modified or amended except as agreed between the parties in writing." Thus, the Purchase Agreements specifically disclaim the right of any purchaser to rely on any representation not contained in the relevant contractual documents and provide that the entire agreement is contained in the Purchase Agreement and the HUD report.

The HUD report contains numerous warnings concerning the risks inherent in a decision to purchase an unimproved lot in Arlington Place and states in the clearest possible terms that Defendants had not

obligated themselves to complete various proposed improvements, such as the marina. For example, the first page of the HUD report states, in large bold-faced capital letters, "**READ THIS PROPERTY REPORT BEFORE SIGNING ANYTHING**." The opening section of the HUD report, which is titled "Risks of Buying Land," begins by stating that:

> RISKS OF BUYING LAND
>
> The future value of any land is uncertain and dependent upon many factors. DO NOT expect all land to increase in value.
>
> Any value that your homesite may have will be affected if the roads, utilities and all proposed improvements are not completed.

After the section addressing the "Risks of Buying Land," another warning appears which states that:

> THROUGHOUT THIS PROPERTY REPORT THERE ARE SPECIFIC WARNINGS CONCERNING THE DEVELOPER, THE SUBDIVISION OR INDIVIDUAL HOMESITES. BE SURE TO READ ALL WARNINGS CAREFULLY BEFORE SIGNING ANY CONTRACT OR AGREEMENT.

The next portion of the HUD Report addresses matters of "General Information," including an explicit warning that the "Developer may change its plans for this Subdivision from time to time in its sole discretion." After this general introductory information, the HUD Report contains sections addressing specific issues, such as water and sewer availability, easements, the filing of plats, and proposed private roads. Each of these report sections contain separate warnings printed in all capital letters advising prospective purchasers (1) that there was no guarantee or promise by

Defendants that they would not default on the deed of trust applicable to the entire development before obtaining a release from that overall deed of trust relating to the purchaser's homesite, in which case the purchaser would lose his or her lot; (2) that regulatory authorities had not approved the proposed plats and might "require significant alterations before they will approve them" or refrain from "allow[ing] the land to be used for the purpose for which it is being sold;" (3) that no funds had been set aside to guarantee completion of subdivision roads; and (4) that the use of an on-site septic system had not been approved for individual homesites and that "there are no assurances that permits can be obtained for the installation and use of an individual on-site system." As a result, the HUD report warned prospective purchasers that, because Arlington Place was in the early stages of development, Defendants did not guarantee the successful completion of even the most basic aspects of the project, such as obtaining authorization to build residences on particular homesites, obtaining permission to construct an on-site septic system, or completing subdivision roads.

The "Recreational Facilities" section, which addresses the extent of Defendants' obligations regarding the provision of amenities, such as a marina, contains additional disclaimers. At the beginning of this section, the HUD report states that "[w]e currently plan to construct the facilities listed in the chart below; however our plans have not been finalized and are subject to change." Significantly, the "chart below" included only two items: parks and walking trails. In other words, the marina upon which Plaintiffs' claims rest is not even listed among the recreational facilities that were "currently plan[ned]." In addition, the following

statement appears immediately after the "chart below:"

> We are not contractually obligated to provide or complete the above-referenced amenities and there is therefore no assurance that they will ever be provided or completed. Our plans are subject to change from time to time in our sole discretion.

At the conclusion of the "Recreational Facilities" section is a subsection entitled "Other Facilities" that discusses the possible creation of private clubs, including a yacht club that would be appurtenant to a proposed marina, and that provides, in pertinent part, that:

> A private membership club is being established to own and operate a swimming pool, clubhouse and tennis courts[.] . . . Plans for these facilities and dues have not been established at this time; however, the Developer is building these amenities in conjunction with the development of the Phase 1 lots. . . .
>
> A second club is being contemplated by the Developer that is contingent upon the [developers's] ability to construct a marina at the Subdivision. The Developer is pursuing plans and permits for a marina facility at this time; however, the plans are in the formative stages only and there is no assurance that the marina will ever come to fruition. If developed, the developer intends to create another club to be the Arlington Place Yacht Club that

> will include amenities to be determined by the Developer[.] . . . The Yacht Club is proposed only and may never be built or operated.
>
> We are not contractually obligated to provide or complete the Swim and Tennis Club or the Arlington Place Yacht Club and there is therefore no assurance that they will ever be provided or completed.

Although Plaintiffs contend that this "language is consistent with Plaintiffs' understanding, based on Defendants' representations, [that] construction of the marina was contingent on obtaining a permit and would begin once the permit was obtained," we do not find this logic persuasive.

As an initial matter, given the explicit merger clause contained in the Purchase Agreement, Plaintiffs may not properly rely on "Defendants' representations" except as contained in the written documents. Moreover, Plaintiffs' "understanding" is inconsistent, rather than consistent, with the language quoted above, which states explicitly that the developers' "plans [for the construction of a marina and associated yacht club] are in the formative stages only and there is no assurance that the marina will ever come to fruition." We find it difficult to imagine language that would more clearly inform prospective buyers that Defendants were not contractually obligated to build any recreational facilities, including the marina. The inclusion of the phrase "contingent upon the [developer's] ability" in the relevant report language does not, despite Plaintiffs' assertion to the contrary, suffice to create any material issue of fact

> given that "ability" is a generalized term that allows for the consideration of a wide variety of factors, including economic feasibility, the ability to obtain any necessary permits, and other potential difficulties. As a result, we have no hesitation in concluding that the language contained in the "Recreational Facilities" section of the HUD report is clear, that none of its terms are ambiguous, and that it unequivocally establishes that Defendants had not assumed any contractual duty to actually construct a marina in Arlington Place.

Mancuso, __ N.C. App at __, __ S.E.2d at __.[3] As a result, for the same reasons which underlie our decision to uphold the order granting summary judgment in favor of the defendants in *Mancuso*, we conclude that the trial court did not err by dismissing Plaintiffs' claims for breach of an implied contract against Boddie-Noell pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

In urging us to reach a contrary conclusion, Plaintiffs note that, although 15 U.S.C. § 1703(a)(1)(B) refers to a

---

[3]The HUD reports provided to the three groups of Plaintiffs in this case are almost identical to each other and to the reports at issue in *Mancuso* and are equally emphatic in clearly disavowing any legal obligation of Defendants to construct the proposed marina. As a matter of fact, the HUD report provided to the Dettra Plaintiffs, who purchased their lot about a year after the White and LeFevre-related Plaintiffs purchased their lots, is even clearer, since it contains a boxed warning which appears above the recreational facilities section stating that "WE MAY COMPLETE THE RECREATIONAL FACILITIES BELOW BUT WE ARE NOT CONTRACTUALLY OBLIGATED TO DO SO. YOU SHOULD CAREFULLY CONSIDER YOUR PURCHSE OF A HOMESITE IF IT IS BASED SOLELY ON THE [A]SSUMPTION THAT THESE RECREATIONAL FACILITIES WILL BE AVAILABLE." (emphasis in original)

"printed property report," the HUD report was provided to them in the form of a CD rather than a hard copy. Assuming, for purposes of discussion, that Defendants acted improperly by giving Plaintiffs the HUD report in CD, rather than hard copy, format, Plaintiffs have neither alleged nor shown any prejudice arising from this action. Each Purchase Agreement contained a provision authorizing cancellation of the agreement within seven days after the date of execution. Plaintiffs have not alleged that any of them lacked access to a computer or printer, made an unsuccessful attempt to obtain a printed copy of the HUD report, had difficulty printing a copy of the HUD report, or were otherwise prejudiced by the fact that they received the HUD report in CD, rather than hard copy, format. As a result, we conclude that the fact that Plaintiffs received the HUD report in the form of a CD rather than a hard copy does not justify an award of relief in this case.

In addition, Plaintiffs quote excerpts from the ILSA regulations addressing a developer's obligation to construct amenities discussed in its marketing materials and precluding the use of marketing materials which are inconsistent with the language contained in the relevant contractual document. However, Plaintiffs have failed to explicitly argue that Defendants violated any specific ILSA provision. In addition,

we note that 24 C.F.R. § 1710.103(a) provides, in pertinent part, that:

> If the developer represents either orally or in writing that it will provide or complete roads or facilities for water, sewer, gas, electricity or recreational amenities, it must be contractually obligated to do so[.] . . . However, a developer that has only tentative plans to complete may so state in the Property Report, provided that the statement clearly identifies conditions to which the completion of the facilities are subject and states that there are no guarantees the facilities will be completed.

As a result of the fact that Defendants clearly stated in the HUD report that their plans for the construction of a marina were tentative and that there was no guarantee that a marina would ever be built, we believe that they have complied with the applicable ILSA requirements, a conclusion which precludes any determination that Defendants violated ILSA by failing to construct the proposed marina after having described it in their oral representations and written marketing materials.

Finally, Plaintiffs argue that a number of decisions by this Court and the Supreme Court allow the use of parol evidence to support the maintenance of a breach of implied contract claim under circumstances similar to those present here. According to well-established North Carolina law, "[t]he parol evidence rule is a rule of substantive law, though it is often expressed as if

it were a rule of evidence." *Phelps v. Spivey*, 126 N.C. App. 693, 697, 486 S.E.2d 226, 229 (1997).

> "Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract. Thus, it is assumed the [parties] signed the instrument they intended to sign[,] . . . [and, absent] evidence or proof of mental incapacity, mutual mistake of the parties, undue influence, or fraud[,] . . . the court [does] not err in refusing to allow parol evidence[.]"
>
> *Drake v. Hance*, 195 N.C. App. 588, 673 S.E.2d 411, (2009) (quoting *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 708-09, 567 S.E.2d 184, 188 (2002)). Thus, "'[t]he parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict' the terms of an integrated written agreement, though 'an ambiguous term may be explained or construed with the aid of parol evidence.'" *Id.* (*quoting Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984), and *Vestal v. Vestal*, 49 N.C. App. 263, 266-67, 271 S.E.2d 306, 309 (1980)) (citations omitted).

Mancuso at __, __ S.E.2d at __. "[M]erger clauses were designed to effectuate the policies of the Parol Evidence Rule; i.e., barring the admission of prior and contemporaneous negotiations on terms inconsistent with the terms of the writing" and "create a rebuttable presumption that the writing represents the final agreement between the parties." *Zinn v. Walker*, 87 N.C. App.

325, 333, 361 S.E.2d 314, 318 (1987), *disc. review denied*, 321 N.C. 747, 366 S.E.2d 871 (1988).

In support of their position that an implied contract to construct the marina can be predicated on the oral representations made by and marketing materials disseminated by Defendants, Plaintiffs cite three cases, each of which is readily distinguishable on the basis of the relevant facts and none of which holds that parol evidence may be utilized to vary or contradict the terms of a written agreement. In *Lyerly v. Malpass*, 82 N.C. App. 224, 346 S.E.2d 254 (1986), *disc. review denied*, 318 N.C. 695, 351 S.E.2d 748 (1987), the plaintiffs

> had purchased lots in the Inlet Point subdivision from the defendants, who had developed that subdivision. According to the plaintiffs, the defendants had pledged to build a boat basin, to provide an aquatic connection to the Intracoastal Waterway, and to pave an access road[, with these amenities shown in the subdivision plats recorded in the office of the New Hanover County Register of Deeds]. . . . As a result, in *Lyerly*, unlike in the present situation, the recorded plats and restrictive covenants included a commitment to construct the disputed amenities. In addition, nothing in our opinion in *Lyerly* indicates that the relevant contractual documents contained an explicit disclaimer of specific obligations or language precluding reliance on external representations, both of which are present here. As a result, given the absence of any indication that the contractual documents precluded consideration of oral statements and non-contractual representations, *Lyerly*

> does not justify a decision in Plaintiffs' favor.

Mancuso at __, __ S.E.2d at __. In *Wall v. High Rock Realty Inc.*, 162 N.C. App 73, 590 S.E.2d 283 (2004), a developer who initially expected that the lots that it was offering for sale would have access to a lake and boat ramp recorded covenants declaring that the defendants would "provide for the continued maintenance" of the "boat ramp and pier, including the area designated as 'lake access,'" and posted a sign at the lots stating "'All Lots with Lake Access.'" *High Rock*, 162 N.C. App at 75, 509 S.E.2d at 284. After failing to obtain the necessary lake access, the defendants recorded a new plat that omitted any reference to the availability of a private boat ramp. The defendants did not, however, remove the sign advertising that all lots would have lake access. In addition, the deed by means of which the plaintiffs purchased their lot referenced the original plat, which depicted lake access, rather than the updated plat. As a result, since the relevant documents were not inconsistent with the oral representations upon which the *High Rock* plaintiffs relied, our decision in that case does not stand for the proposition that an implied contract to construct a particular amenity can be enforced in the face of clear, unambiguous contractual documents to the contrary. Finally,

Plaintiffs cite *River Birch Assoc. v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), for the proposition that "[p]arol assurances made by a developer to prospective buyers regarding the general scheme or plans of development that the developer intends to pursue are admissible to establish the existence of such a scheme" and that such "parol evidence may be in the form of a field map, sales brochures, maps, advertising or oral statements on which purchasers relied." 326 N.C. at 127, 388 S.E.2d at 553 (citing *Warren v. Detlefsen*, 281 Ark. 196, 199, 663 S.W.2d 710, 711-12 (1984)). However, a careful review of *River Birch* reveals that it affirms, rather than rejects or undermines, the rule that such evidence may not be admitted for the purpose of contradicting the applicable contractual documents. The primary issue in *River Birch* was the extent to which the City of Raleigh had the authority under a municipal ordinance to require a developer to convey land depicted as a common area on preliminary plats to the homeowners' association. In considering the manner in which a subsidiary issue relating to the proper location of the common area should be resolved, the Supreme Court stated that:

> We do not suggest the affidavits are competent to identify the boundaries of the common area, for then the declarations would be used to alter the terms of the written agreement. However, where the declarations confirm that the parties intended certain documents to identify the boundaries of land referred to in other documents, then those declarations will be admitted for that limited purpose. . . . Where a contract to convey land that otherwise satisfies the statute of frauds is part oral and

> part written, parol evidence is admissible so long as it does not conflict with the writing.
>
> *Id.* at 127, 388 S.E.2d at 554 (citing *Boone v. Boone*, 217 N.C. 722, 729, 9 S.E.2d 383, 387 (1940)). As a result, a careful review of *River Birch* reveals that it affirms, rather than rejects or undermines, the rule that parol evidence may not be admitted for the purpose of contradicting binding contractual documents. The same is true of *Wall v. Fry*, 162 N.C. App. 73, 590 S.E.2d 283 (2004), another case cited by Plaintiffs, which undercuts the general rule discussed above. As a result, Plaintiffs have not cited any authority, and we know of none, which stands for the proposition that parol evidence may be considered for the purpose of contradicting the terms of a written contract or establishing the existence of an implied contract in a situation which would otherwise be governed by an express agreement.

Mancuso, at __, __ S.E.2d at __. Thus, for all of these reasons, we conclude that Plaintiffs are not entitled to relief from the trial court's decision to dismiss their claim for breach of implied contract against Boddie-Noell.

b. Fraudulent Concealment of a Material Fact

Secondly, Plaintiffs argue that the trial court erred by dismissing their claim for fraudulent concealment of a material fact. In their brief before this Court, Plaintiffs assert that, at some point in 2008, Defendants decided to postpone or cancel the construction of the proposed marina and that their failure

to inform Plaintiffs about their change of plans constitutes actionable fraud. We disagree.

"The essential elements of fraud are: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658 (1992) (quoting *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). "A claim for fraud may be based on an 'affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose.'" *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696, 682 S.E.2d 726, 733 (2009) (quoting *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (internal citation omitted), *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986)).

Plaintiffs' fraudulent concealment of a material fact claim rests on the unsupported premise that, after Plaintiffs purchased lots in Arlington Place, Defendants had a legal duty of apparently indefinite duration to keep Plaintiffs apprised of any changes in their development plans. Plaintiffs have not

cited any authority in support of this position, and we know of none.[4] As we have already noted, Defendants clearly warned prospective buyers in the Purchase Agreements and the HUD report that Defendants retained the right to change their plans with respect to the construction of the proposed marina and specifically warned prospective purchasers that there was "no assurance that the marina will ever come to fruition." As a result of the fact that Plaintiffs' complaints fail to allege facts that, if true, would establish that Defendants had any duty to notify Plaintiffs that they had decided to refrain from or postpone constructing the proposed marina, the trial court did not err by dismissing Plaintiffs' claim for failure to disclose a material fact.

c. Unfair or Deceptive Trade Practices

Thirdly, Plaintiffs argue that the trial court erred by dismissing their unfair or deceptive trade practices claim.

[4]The cases cited in Plaintiffs' brief during the course of their discussion of this issue involve instances of alleged fraud or failure to disclose a material fact that occurred in connection with the actual transaction between the parties. However, none of these cases suggest that a seller has an ongoing duty to provide a buyer with additional information concerning subsequent modifications to his or her development plans for years after the date upon which the buyer purchased his or her property. As a result, we conclude that these decisions do not provide any support for Plaintiffs' contention that Defendants had a legally enforceable duty to keep them apprised about changes in their plans for developing Arlington Place.

Although Plaintiffs assert on appeal that "the conduct alleged in [Plaintiffs'] complaints is exactly why our legislature enacted N.C. Gen. Stat. § 75," the only specific support that Plaintiffs have provided in support of this assertion is their contention that "Defendants continued to assert that marina construction would start as soon as the [required] permit was obtained for the 3 year period immediately preceding [Plaintiffs'] law suit without [Defendants having] the intent of actually building the marina." More specifically, Plaintiffs contend that, even though they purchased their lots in 2006 and 2007, (1) Defendants decided at some point in 2008 to cancel or postpone the construction of the proposed marina; (2) Defendants failed to inform Plaintiffs about this change of plan and, instead, continued to suggest that the marina would be constructed as soon as necessary environmental permits had been obtained in their public pronouncements; and (3) Defendants' failure, during the three years between 2008 and 2011, to inform Plaintiffs that immediate construction of the marina no longer appeared to be economically feasible constituted an unfair or deceptive business practice actionable pursuant to N.C. Gen. Stat. § 75-1.1. We do not find this argument persuasive.

In their brief, Plaintiffs place principal reliance upon *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980),

aff'd as modified, 302 N.C. 539, 276 S.E.2d 397 (1981), in which the Supreme Court held that a valid unfair and deceptive trade practices claim did not require proof of actual fraud or bad faith on the part of the defendant. As Plaintiffs note, the trial court in *Marshall* had instructed the jury to decide, in determining whether the defendant had engaged in an unfair and deceptive trade practice, whether the defendant had led the plaintiffs to believe that he would provide certain amenities in the trailer park in which the plaintiffs rented spaces from the defendant. According to Plaintiffs, *Marshall* stands for the proposition that a party's failure to provide an amenity after representing that the amenity in question would be provided constitutes an unfair and deceptive trade practice for purposes of N.C. Gen. Stat. § 75-1.1. We do not, however, believe that Plaintiffs' argument rests on a correct understanding of *Marshall*.

Although the plaintiffs in *Marshall* had rented spaces in the defendant's trailer park, "[n]one of [them] relied upon a written lease agreement." *Marshall*, 47 N.C. App. at 539, 268 S.E.2d at 101. For that reason, the claims asserted by the plaintiffs in *Marshall* did not require a consideration of the impact of oral or written representations that were inconsistent with written contractual documents, which contained integration

and merger clauses, executed by the parties. Secondly, this Court held, in a portion of its opinion in *Marshall* that was left undisturbed by the Supreme Court, that the trial court had erred by directing a verdict in the defendant's favor concerning the preliminary issue of whether the defendant had even breached his unwritten agreement with the plaintiffs. As a result, neither this Court nor the Supreme Court addressed the issue of whether a developer could be held liable on the basis of representations contained in oral statements and extra-contractual documents for failing to construct an amenity which the developer specifically disclaimed any obligation to provide in the relevant contractual documents.

According to the Purchase Agreements and the HUD reports, Defendants never assumed a legal obligation to construct a marina or to keep Plaintiffs informed about changes in their plans with respect to the construction of the proposed marina. Thus, given the existence of a specific disclaimer of any legally binding obligation to construct the proposed marina, the fact that Defendants chose not to provide Plaintiffs with updated information concerning their plans for the construction of the marina does not subject Defendants to a finding of liability for engaging in an unfair and deceptive trade practice. As a result, Plaintiffs are not entitled to relief

from the trial court's decision to dismiss the claim that they asserted against Defendants pursuant to N.C. Gen. Stat. § 75-1.1.

d. Piercing the Corporate Veil

Next, Plaintiffs argue that the trial court erred by dismissing their attempt to pierce Burton Farm's corporate veil in order to obtain a finding of liability against Boddie-Noell. "It is well recognized that courts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). Thus, the viability of Plaintiffs' veil-piercing claim is dependent on the viability of the underlying claims against Burton Farm. As a result of the fact that we have upheld the trial court's decision to dismiss Plaintiff's fraudulent concealment of material fact and unfair and deceptive trade practices claims against Burton Farm,[5] we need not address

[5]As we noted earlier in this opinion, the trial court did not dismiss Plaintiffs' claim for breach of implied contract against Burton Farm. However, given that Plaintiffs voluntarily dismissed their breach of implied contract claim against Burton Farm as an apparent part of the process of ensuring that this Court would reach the merits of their challenge to the trial court's orders, it would, at an absolute minimum, be premature for us to address the validity of any veil-piercing claim that Plaintiffs might wish to assert with respect to their breach of

the validity of the trial court's decision to dismiss Plaintiffs' veil-piercing claim and decline to disturb its decision with respect to the veil-piercing issue for that reason.

B. Post-Dismissal Motions

Although they have challenged the trial court's refusal to grant their post-dismissal motion to dismiss their claims without, rather than with, prejudice, the only grounds that Plaintiffs have asserted in support of this claim is the contention that, had their claims been dismissed without, rather than with, prejudice, Plaintiffs could have amended their complaint in such a manner as to salvage their claims against Defendants. Plaintiffs have not, however, demonstrated how any amendment which they might wish to make to their complaints would have had the effect of precluding the dismissal of their claims. Instead, Plaintiffs simply rely on "the reasons set forth above" in support of their challenge to the trial court's refusal to grant their reconsideration motion. As a result of the fact that we have already addressed and rejected Plaintiffs' arguments in addressing their challenges to the trial court's dismissal order, we conclude, without further discussion, that

---

implied contract claim against Burton Farm.

the trial court did not err by denying Plaintiffs' post-dismissal motions.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Plaintiffs' challenges to the trial court's dismissal and reconsideration orders have merit. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).