Leonenko v. Ebner, No. 210-4-03 Rdcv (Teachout, J., Feb. 28, 2008)

STATE OF VERMONT
RUTLAND COUNTY

ALEX LEONENKO and	)	
ALLA DZUGAEVA	)	
	)	**Rutland Superior Court**
	)	**Docket No. 210-4-03 Rdcv**
v.	)	
	)	
GERHARD M. EBNER and	)	
PAGONA D. BRADY	)	
	)	
v.	)	
BARBARA WALOWIT and	)	
BARBARA WALOWIT REALTY, INC.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER
Final Hearing on the Merits

This matter came before the court for a final hearing on the merits on October 31 and November 1, 2007 on Plaintiff's claims and Defendants' counterclaims, the Defendants' third party claims having been dismissed by partial judgment of September 26, 2006.

Plaintiffs were present and represented by Attorneys John J. Kennelly and Sharon Underwood. Defendants were present and represented themselves. Both parties filed post-hearing proposed findings and memoranda of law.

The case arises out of a contract whereby Plaintiffs were to purchase the Butternut Inn in Killington from Defendants. After the contract was signed and before the closing date, Plaintiffs discovered that the property had been subject to monitoring for contamination as the result of an underground storage tank leak on another property in the vicinity, and the closing did not occur.

In this suit, Plaintiffs seek return of their deposit and other damages based on claims of negligent misrepresentation about the property and fraudulent inducement to enter the contract. They also claim that Defendants breached the contract by failing to return the deposit upon the failure of a contingency. Defendants counterclaim that Plaintiffs breached the contract by failing to close after waiving all conditions, entitling Defendants to retain the deposit as liquidated

damages. They also claim that Plaintiffs violated the covenant of good faith and fair dealing by refusing to negotiate details preparatory to closing.

Based on the Findings of Fact and Conclusions set forth below, Plaintiffs prevail on their negligent misrepresentation claim, and are awarded damages accordingly. Plaintiffs' other claims and Defendants' counterclaims are dismissed.

Findings of Fact

A preponderance of the evidence supports the following findings of fact.

In late 1993, the Agency of Natural Resources of the State of Vermont (hereinafter ANR) investigated a report of a gasoline odor in Killington, and discovered that there was a leaking underground storage tank at the Summit Lodge, and that it had contaminated some water wells in the vicinity. This prompted a major clean-up effort. Bob Haslam of the Department of Environmental Conservation of the ANR was the project manager. Summit Lodge hired Groundwater of Vermont to do the clean-up work.[1] Initial work included sampling water from area wells to test for contamination.

Defendants were the owners of the Butternut Inn and Mrs. Brady's Restaurant, which was located two properties away from the Summit Lodge and down-gradient from it. Mr. Ebner had designed the Inn himself, and Defendants had owned and operated it for many years. Two wells were on the property, and the water was tested as part of the Summit Lodge leak investigation. On May 6, 1994, ANR wrote to inform Defendant Brady that while no gas was detected in her well, several other wells in the nearby vicinity were contaminated. She was invited to participate in a program of periodic monitoring of wells and to have the opportunity to receive copies of future monitoring results. A well serving Mrs. Brady's Restaurant was initially monitored under the program. By November of 1994, two wells on properties very close to Defendants showed some indication of contamination.

In late 1994, the Defendants were experiencing a loss of water, which they attributed to "de-watering" caused by the contamination remediation effort.[2] They contacted ANR, which investigated and concluded that its work was not the cause of the Defendants' loss of water. Defendants did not accept this conclusion. The water loss was a significant problem for them in running their business, and they had to truck in water. Relations between the Defendants and ANR deteriorated as a result of the Defendants' perception that ANR was unresponsive to their plight. Defendants hired a lawyer to assist them with the water loss problem.

Defendants withdrew permission for the ANR quarterly monitoring of their wells. This was in early January of 1995, at about the same time that Groundwater of Vermont reported to ANR that the Brady water supply had been tested four times in 1994, in January, September,

[1] Groundwater's name later changed to Marin Environmental, and then to ECS Marin.
[2] Remediation work included pumping water from contaminated wells in an effort to remove the contaminated water. The Defendants suspected that this was reducing the groundwater flow available to their wells.

October, and November, and that MTBE[3] was detected in September and October at very low levels, with no petroleum products detected in November. In a letter dated February 8, 1995, Mr. Haslam advised Ms. Brady that low levels of gasoline compounds had been detected in Defendants' water supply, and that although the water was safe for drinking, ANR recommended the use of bottled water.

The Defendants hired their own hydrogeologist, Geomapping Associates, which issued a Report on February 8, 1995. In the Report, it was noted that on December 5 and December 16, 1994, a sheen was visible in the pool and hot tub at the Butternut Inn, which suggested the possibility of contamination. It stated, however, that the results of its water samples were that there was no contamination of the Defendants' water.

The Defendants' problem of lack of water continued for at least a year and a half. In June of 1996, Attorney Jon Readnour was their attorney. In that capacity, he received a Report prepared by Ken Bannister with an opinion concerning the cause of damage to the Defendants' wells. In that letter, paragraphs #3 and #4 read as follows:

3. The site visit confirmed that the Cook well, Summit Lodge wells and the North Star wells are indeed upgradient of the Butternut wells.
4. The distribution of wells that show contamination by petroleum hydrocarbons, almost certainly related to the leaky tank at the Summit Lodge, can be observed to include areas near, past and downhill of the Butternut wells. This suggests that the Butternut wells are in the flow path of groundwater migrating from the leaky tank site, i.e. groundwater flow that is recharging the Butternut wells.

The Defendants, through their attorney, were on notice that their property was in the migration path. They did not seek to rejoin the well monitoring program. They were still experiencing lack of water. Eventually, they extended the depth of one well and had work done to restore the use of the other, but did not resume participation in the monitoring program.

The periodic test results on area wells showed that the water supply on the Reitter property, immediately adjacent to the Defendants' property, showed MTBE concentrations trending upward over time, and in June of 2000, Mr. Haslam directed treatment of the water system on the Reitter well. It is not clear that Defendants knew of this at the time; they could have if they had continued their participation in the ANR well monitoring program, as test results were available to participants. They had opted out of the program altogether.

In 2002, Defendants listed the Butternut Inn property for sale with realtor Barbara Walowit. Defendants claim that they told Barbara Walowit about the water problem in conjunction with her work as seller's agent. The credible evidence is that they told her about the loss of water problem, but not about a risk of migration of petroleum toward their property. The well monitoring program was still active.[4]

At this time, Plaintiff Leonenko owned a bed and breakfast in West Dover called the Red

[3] MTBE is a gasoline additive, indicating the presence of gasoline.
[4] Wells continued to be monitored until 2004.

Oak Inn, which was also listed for sale with Barbara Walowit, with the plan of replacing it with a larger similar business. Plaintiffs learned of the availability of the Butternut Inn from Barbara Walowit. In September of 2002, Plaintiffs made a visit to the Butternut Inn without Barbara Walowit, and made casual low-key inquiries. Mr. Ebner showed them the rooms, pool, and restaurant. During his visit, Barbara Walowit was actually there showing the property to a different prospective purchaser.

As a result of the first visit, the Plaintiffs became interested, and made more visits to the Butternut Inn. Defendants themselves, particularly Mr. Ebner, personally spent time with them to show the property and describe the operations of the inn and restaurant. Mr. Ebner showed Mr. Leonenko the blueprints from the original building design, and gave them to him. Mr. Leonenko still has them. The two couples (Plaintiffs and Defendants) had dinner together and the Plaintiffs spent the night. There was a cooperative exchange of information between Plaintiffs and Defendants. Nothing was said about the history of contamination in the neighborhood. The Plaintiffs were not from the Killington area, and did not know of it.

In September of 2002, Plaintiffs made an offer, and negotiations began. Plaintiffs were particularly interested in structuring the sale of the Red Oak Inn and the purchase of the Butternut Inn as an IRS Code § 1031 tax-deferred exchange. Defendants accepted the Plaintiffs' second offer on September 25, 2002, and on November 11, 2002, the last party signed the 26-page Purchase and Sales Agreement. On that date, Plaintiffs paid a deposit of $38,250.00 to the trust account of Defendants' attorneys, Readnour and Barone.

The contract called for a closing on or before January 31, 2003, unless extended by mutual agreement, and made the Plaintiffs' obligation contingent on the sale of the Red Oak Inn prior to closing, unless otherwise agreed by the parties. Defendants agreed to cooperate with Plaintiffs in completing the transaction as a tax-deferred exchange.

The Defendants agreed to provide $200,000 in financing, with terms to be negotiated prior to closing. The contract provided, in paragraph 16 titled "Purchaser's Due Diligence," that "Purchaser shall, at their sole discretion and expense, undertake, to the extent deemed necessary by Purchaser, a due diligence review and inspection of the Premises and the financial records of the business." It also stated in subparagraph (d): "If, as a result of Purchaser's due diligence review, Purchaser determines that there are any material defects to the Premises, . . . or if the environmental assessment referenced in Paragraph 17 discovers physical conditions unacceptable to Purchaser," Purchaser was to give specified notice, and if Sellers failed or were unable to correct the problem, either Sellers or Purchaser could terminate the Agreement, and "the deposit will be returned with all interest accrued thereon to the Purchaser, and Purchaser shall be released from all further obligations hereunder."

Paragraph 17 specified other conditions to closing, and stated that if "any one of these conditions not be completed despite Purchaser's diligent efforts, Purchaser shall be entitled to terminate the Agreement and have the deposit returned with all interest accrued thereon." These included specified financing terms to be obtained by Purchaser by December 10, 2002, unsatisfactory inspection results, with notice provided by December 10, 2002, and, if required by a lender, "or if desired by Purchaser in their sole discretion, Purchaser at their expense shall hire

a consultant to conduct a thorough environmental assessment of the Premises and such assessment shall conclude that the Premises are free of any Hazardous Substances and there exists no environmental conditions requiring remediation or constituting a violation of any environmental statute, regulation or ordinance."

Between September and November 11th, when the contract was formed, Mr. Leonenko continued to visit the Butternut Inn to learn more about the property and the operation of the inn and restaurant from the Defendants. He stayed overnight at least once. At some point, most likely after the contract was signed, he worked with Mr. Ebner to help install some new windows. On November 28th, Thanksgiving, Mr. Leonenko visited and offered to help in the restaurant that night. As it turned out, he and an employee from the Red Oak Inn were the only servers for the evening.

Also in November, on November 25, 2002, Marin issued a Report in which it noted an increasing trend of contamination on the nearby Reitter and Lees/Vastano properties. As previously noted, the Reitter property was immediately adjacent to the Defendants' property. It is unknown whether Defendants actually knew of this report at the time. They could have if they had been following monitoring program results. In any event, they did not inform the Plaintiffs of this development.

Plaintiffs relied on what they had been shown and told about the condition of the property, which did not include anything to suggest concerns about water contamination risk, and chose not to have an environmental assessment done. On December 18, 2002, a new attorney for the Defendants, John Facey, wrote to Plaintiffs' attorney concerning many details and arrangements for the closing. At the end of the two page letter was the following:

> Finally, the nearby Summit Inn property experienced a gasoline tank leak some years ago. The plume of the contamination expanded beyond the Summit Inn property line. A number of adjacent wells were contaminated. As [sic] result of the contamination, the Summit Inn drilled new wells and those new wells impacted the Butternut Inn's well. My clients hired a hydrogeologist and extended the depth of the Butternut Inn well. They have had no additional problems and have experienced no contamination from The Summit Inn leak ever. [Exhibit 25.]

This was the first mention from Defendants to Plaintiffs of the gasoline leak at the Summit Lodge and any effect on water supplies in the vicinity. Ms. Brady testified that Defendants had encouraged their attorney to disclose certain conditions about the property, including the "Purdy lien," earlier than the date of this letter, and that this would have put Plaintiffs on notice about 'water issues.' The evidence is clear that despite the many direct and personal communications between the parties prior to the signing of the contract, certain facts were never mentioned to the Plaintiffs: the fact of the Summit Lodge leak, its effect on area wells initially and over time, and the fact that the Butternut Inn was in its migration path.

Three days later, on December 21, 2002, Plaintiff Leonenko signed a contract to sell the Red Oak Inn, with a closing to take place on or before January 31, 2003.

After Plaintiffs learned of the Summit Lodge leak, Mr. Leonenko acted to obtain more information. He personally visited the ANR office three times to review the clean-up project files and learn what he could about it. He learned that from 1993-96, there were low levels of contaminants in the Reitter well on the property adjacent to Defendants, but that the levels had increased from 1996-98 and exceeded Vermont limits by 2002. He also learned that the Defendants had stopped their participation in the monitoring program in 1995.

In the meantime, progress toward a closing of the Red Oak Inn was slow. Mr. Leonenko testified that he and his lawyer were having trouble making contact with the buyers. This testimony was vague. The court cannot find that Plaintiffs made diligent efforts toward a closing on the sale of the Red Oak Inn by January 31, 2003.

On January 14, 2003, Plaintiffs notified Defendants that they no longer wished to buy the Butternut Inn because of the information they had acquired about the Summit Lodge leak, and they sought the return of their deposit plus additional damages in an amount undetermined at the time. Defendants claimed that Plaintiffs were obligated to close as they had allowed all contingencies to lapse and had not made diligent efforts to sell the Red Oak Inn. Defendants would not agree to a return of the deposit funds without a general release, which the Plaintiffs would not give. After deciding not to proceed with the purchase of the Butternut Inn, the Plaintiffs immediately began looking for another property.

On April 4, 2003, the closing on the sale of the Red Oak Inn took place. In May, the Plaintiffs became aware that the Hartness House in Springfield, Vermont was on the market, and they purchased it in July of 2003.

The court finds credible Plaintiffs' testimony that if they had had knowledge of the Summit Lodge leak, such knowledge would have affected their willingness to enter into the contract to purchase the Butternut Inn, and that if they had known, prior to November 11, 2002, what was contained in the DEC files, they would not have signed a contract to purchase the property. The testimony is supported by the evidence that once they learned of the leak in the letter from Attorney Facey, they immediately researched the specifics at the ANR office. This was clearly a matter of importance to running a business on the property, and to Plaintiffs personally, as shown by their actions.

They seek: the return of their deposit of $38,250, expenses related to negotiating and entering into the contract to purchase the Butternut Inn including travel, lost business income for the four months they had no income from the time of the sale of the Red Oak Inn to the purchase of the Hartness House, and interest. Their total damages claim is $121,117.81 as of November 1, 2007, as shown on Plaintiff's Exhibit 49.

Plaintiffs' reasonable losses caused by the Defendants' failure to give them important information about the property prior to the signing of the contract include:

(1) Legal fees for preparation of Purchase and Sales Agreement, and for review and correspondence related to the Purchase and Sales Agreement: $8,768.33, and interest on $6,435.63 from December 15, 2002

(2) Deposit paid: $38,250.00, and interest from November 11, 2002

(3) Loss of business income for three months: $5,000 x 3 = $15,000, plus interest from July 31, 2003. Three months is the length of time from when Defendants should have told Plaintiffs to when they did (September to December), and also the length of time of Plaintiffs' loss of business income (April to July).

Expenses related to the initial visits and the research work at ANR and with realtors could well have been incurred as part of pre-purchase investigation, even if the neighborhood contamination information had been disclosed prior to signing the contract. Thus it is not proved that such expenses are caused by the failure to disclose. Expenses of locating another property to buy would also have been incurred in any event. Loss of business income is limited to the three month period that Defendants' failure to disclose caused delay to Plaintiffs in receipt of business income.

Conclusions of Law

Plaintiffs' Claims

Plaintiffs assert claims for negligent misrepresentation and fraudulent inducement, and seek damages in addition to the return of the deposit. They also claim breach of contract.

Negligent Misrepresentation

The elements of negligent misrepresentation are that one who (1) in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, (2) supplies false information (3) for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them (4) by their justifiable reliance upon the information, if the representer (5) fails to exercise reasonable care or competence in obtaining or communicating the information. Restatement (Second) of Torts § 552(1); *Howard v. Usiak*, 172 Vt. 227, 230–231 (2001) (quoting *Limoge v. People's Trust Co.*, 168 Vt. 265, 268–69 (1998)).

The first and third elements apply to Defendants in this case, as they were sellers of the business property they owned, and they provided to Plaintiffs information with respect to the property the Plaintiffs were considering buying as a business transaction. The second element is also proved. Defendants provided Plaintiffs with a considerable amount of information about the property, including showing them all over the premises, answering their questions about how to operate the business, supplying the blueprints, sharing dinner to discuss the property, and having them spend the night. Under the circumstances of such communication, by saying nothing at all about the fact that surrounding wells had been contaminated by an upgradient gasoline leak, that contaminants had been migrating downgradient over time, and that the property was in the migration path, Defendants' silence had the effect of supplying false information.

The remaining elements call for a closer look at Defendants' and Plaintiffs' conduct. The

fifth element focuses on the Defendants, and the question is whether their failure to disclose the facts surrounding the leak and migrating contaminants was a failure to exercise reasonable care or competence in communicating information. "What is reasonable is, as in other cases of negligence, dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors." The issue is one for the fact-finder. *Limoge v. People's Trust Co.,* 168 Vt. 265, 270 (1998) (quoting Restatement (Second) of Torts § 552(1), comment e).

Defendants created circumstances between themselves and Plaintiffs of open communication, cooperation, and trust in relation to the property and its characteristics. Defendants provided the hospitality of sharing dinner with them, hosting them overnight, and helping them to learn how to operate the inn and restaurant. The Defendants' involvement with the Plaintiffs was direct and personal. Plaintiffs were thus entitled to expect that if there was some significant piece of information about the property, Defendants would tell them.

The information itself was important information. A reasonable buyer would consider the environmental history of the property and the surrounding land to be significant. In a case involving the neighboring Vastano property, the Vermont Supreme Court has stated, "we are certain that a reasonable person would consider the information possessed by KVRE [realtor]—that the well of their prospective home was being monitored for possible gasoline contamination from a nearby LUST site—to be important in deciding whether to purchase the property or calculating how much to pay for it." *Vastano v. Killington Valley Real Estate,* 2007 VT 33 ¶ 9, 18 Vt. L. Wk. 129. In that case, the property was being monitored. While the Butternut Inn was not being monitored, it had previously been part of the monitoring program, which had produced information about contamination found in neighboring wells several years later. Moreover, the property was in the migration path.

An additional factor is that the property is located in high terrain in a ski resort area. This is not the type of property that would normally cause a reasonable buyer to be on the lookout for problems of environmental contamination. The occurrence of a leak, with gasoline migrating into neighboring wells, is an unusual circumstance, and one that buyers could not reasonably be expected to ask about or seek to protect themselves against.

Taking all of these circumstances into account, for the Defendants to say nothing is a failure to use reasonable care in communicating information about the property. Plaintiffs have met the burden of proof on this element.

The fourth element focuses on the Plaintiffs, and the question is whether they justifiably relied on the Defendants' representation-by-silence. "A representation is not actionable unless the plaintiff in fact relies upon it. To rely, the plaintiff must choose her conduct because of the representation, either acting or refraining from action because or partly because of the representation. For example, the plaintiff who enters into a transaction with the defendant does not rely upon the defendant's misrepresentation if she enters into the transaction without a belief in its truth, or doesn't learn of the misrepresentation until after the transaction has closed, or would have entered the transaction whether or not the misrepresentation had been made." Dan

B. Dobbs, The Law of Torts § 474, at 1358.

The facts show that the Plaintiffs did rely on the Defendants' representation-by-omission. They testified that they would not have signed the contract if they had known of the leak and its potential effect. While such testimony has to be evaluated in relation to Plaintiffs' motivation in the lawsuit, in this case it is credible. This is shown by the fact that immediately upon receiving the letter from Attorney Facey dated January 18, 2003, which contains only a brief reference to a lack of risk of contamination, Mr. Leonenko acted immediately to investigate the matter by going to the ANR office and reviewing the contents of their files and determining the facts. Furthermore, after obtaining the information from the ANR files, Plaintiffs acted without delay to notify Defendants that they would not proceed with the purchase. This is consistent with common sense: a person making a substantial investment in a property for purposes of a mountain inn and restaurant business is not likely to undertake a risk of possible contamination of the water supply, and is likely to rely on representations (including by omission) that no such risk exists. Even if a buyer were willing to accept risk under the circumstances, the facts surrounding the possibility of contamination have an effect on one of the essential terms of a purchase and sales agreement—price.

It is true that under the contract, the Plaintiffs had the opportunity to seek an environmental assessment, and if they had done so and the risk was discovered, they would have had the opportunity to terminate the contract. However, the existence of this provision in the contract did nothing to put the Plaintiffs on notice that there was a reason to undertake an environmental assessment. The Defendants' failure to mention the significant phenomenon of a high mountain gas leak affecting wells in the vicinity gave Plaintiffs no reason to think that such an assessment would be advisable. Thus, the fact that the contract gave the Plaintiffs the opportunity to obtain such an assessment does not change the fact that the Plaintiffs justifiably relied on the Defendants' silence as a basis for assuming that the property did not carry a risk of complications of environmental contamination, particularly to a business resource as fundamental to an inn and restaurant as the water supply.

Plaintiffs have sustained their burden of proof on the five elements necessary to establish a claim based on negligent misrepresentation. Damages have been proved as set forth in the Findings of Fact.

Fraudulent Inducement

"An action for fraud or deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party's knowledge, and was relied on by the defrauded party to his damage." *Bennington Housing Authority v. Bush*, 2007 VT 60, ¶ 8, 18 Vt. L. Wk. 193 (quoting *Union Bank v. Jones*, 138 Vt. 115, 121 (1980)) (defining fraud in the inducement); accord *Lewis v. Cohen*, 157 Vt. 564, 568 (1991) (defining fraudulent inducement to contract). Proof must be by clear and convincing evidence. *Id.*

According to Prosser and Keeton, a plaintiff must prove (1) a false representation made by the defendant; (2) knowledge or belief on the part of the defendant that the representation is

false; (3) an intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation; (4) justifiable reliance upon the representation on the part of the plaintiff; and (5) damage to the plaintiff, resulting from such reliance. The Law on Torts § 105, at 728 (5th ed. 1984); accord Restatement (Second) of Torts § 525.

A misrepresentation of fact may include silence where there is a duty to speak. *Cheever v. Albro,* 138 Vt. 566, 571 (1980); Restatement (Second) of Torts § 550 (defining fraudulent concealment). A duty to speak arises "from the relations of the parties, such as that of trust or confidence, or superior knowledge or means of knowledge." *White v. Pepin*, 151 Vt. 413, 416 (1989) (quoting *Cheever*, 138 Vt. at 571). Sellers of a home have a duty to disclose material defects of which they are aware at the time of a sale. *Cushman v. Kirby*, 148 Vt. 571, 576 (1987) (seller described water as "a little hard" when in fact it contained sulfur and smelled like rotten eggs unless treated with chlorine); *Silva v. Stevens*, 156 Vt. 94 (1991) (sellers of earth-sheltered home misrepresented quality of construction and failed to disclose a history of water leaks and dampness).

The court cannot conclude, on the facts of this case, that Defendants knew that they were making a false representation, or intended to induce the Plaintiffs to buy the property in ignorance of the truth. The Defendants had no knowledge of actual contamination of the water supply on their property. While there were two tests in 1994 showing small amounts of petroleum compounds, the amounts were well within the standards established by the State of Vermont, and the following test showed no contamination. The Defendants had engaged a hydrogeologist of their own, who had tested their water, and despite suggestions of contamination, had found no contamination. They had done considerable work on issues related to their water supply from late 1994 through 1996, and had no knowledge of actual contamination.

It is not as if there was an actual presence of contaminants that they were concealing. While they knew that as of June of 1996, their property was in the migration path, considerable remediation had been done early on, and there is no evidence that after December of 1994, there was any evidence to suggest that their water supply was contaminated. On these facts, the court cannot conclude that the Defendants intended to induce the Plaintiffs to buy based on false information. While it was negligent for them not to tell the Plaintiffs about the history of the Summit Lodge leak and its *potential* significant effect on the Butternut Inn property, there was not an actual defect that they were under an obligation to disclose.

Accordingly, Plaintiffs have not met their burden of proof on this claim.

Breach of Contract

Plaintiffs contend that because they did not close on the sale of the Red Oak Inn by January 31, 2003, they were entitled to the return of their deposit under contract terms. Defendants raised the defense that Plaintiffs could not show that they had made "diligent efforts" to sell the Red Oak Inn as they were required to do by the contract. As the findings of fact show, Plaintiffs have not shown that they made diligent efforts, and thus are not entitled to terminate the contract and receive back their deposit on those grounds. More importantly, the conclusion above shows that the contract was a result of a negligent misrepresentation on the part of the

Defendants. The Plaintiffs have prevailed on their claim of negligent misrepresentation, and are not entitled to a duplication of remedy.

Defendants' Claims

Counterclaim for Breach of Contract

Defendants claim that the Plaintiffs waived the benefit of all contingencies to their obligation to close under the contract, and because they failed to close, Defendants are entitled to retain the deposit as liquidated damages. Because the court has concluded that the contract was entered into as a result of a negligent misrepresentation on the part of the Defendants, the Defendants are not entitled to enforcement of contract terms. Their counterclaim is therefore dismissed.

Counterclaim for Violation of the Covenant of Good Faith and Fair Dealing

For the reasons stated above, Defendants are not entitled to enforce remedies related to breach of contract. Moreover, no evidence was introduced in support of this claim. This counterclaim is therefore dismissed.

ORDER

Plaintiff's attorney shall prepare a Judgment based on the foregoing Findings of Fact and Conclusions of Law. Defendants shall have five days after service of the proposed Judgment to file any objections.

Dated at Rutland, Vermont this 28th day of February 2008.

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Mary Miles Teachout
Superior Court Judge