IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

THE WASHINGTON HOUSE CONDOMINIUM ASSOCIATION OF UNIT OWNERS, On Its Own Behalf And On Behalf Of Multiple Unit Owners, and WILLIAM E. MONTGOMERY, and TAMARA A. MONTGOMERY, Individually,	)	
Plaintiffs,	)	
v.	)	C.A. No. N15C-01-108 WCC CCLD
DAYSTAR SILLS, INC., a Delaware Corporation, DAVID N. SILLS, IV WASHINGTON HOUSE PARTNERS, LLC, a Delaware Limited Liability Company, ARCHITECTURAL CONCEPTS, P.C., a Pennsylvania Corporation, AVALON ASSOCIATES OF MARYLAND, INC., a Maryland Corporation, and ENVIRONMENTAL STONEWORKS, LLC, a Delaware Limited Liability Company,	)	
Defendants.	)	

Submitted: July 23, 2015
Decided: October 28, 2015

On Defendant Daystar Sills, Inc. and David N. Sills, IV's Motion to Dismiss DENIED

On Defendant Architectural Concepts, P.C.'s Motion to Dismiss DENIED

On Defendant Environmental StoneWorks, LLC's Motion to Dismiss GRANTED

MEMORANDUM OPINION

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CARPENTER, J.

Before this Court are Defendants Daystar Sills, Inc. ("Daystar") and David N. Sills, IV's ("Sills") Motion to Dismiss Plaintiffs' Complaint (Counts II, III, IV, V, and VII), Defendant Architectural Concepts, P.C.'s ("Architectural") Motion to Dismiss Plaintiffs' Complaint, and Defendant Environmental StoneWorks, LLC's ("ESW") Motion to Dismiss Plaintiffs' Complaint. For the reasons stated in this Opinion, Daystar and Sills' and Architectural's Motions are DENIED, and ESW's Motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' Complaint arises from alleged defects in the design and construction of Washington House Condominium ("Washington House" or "the Condominium") in Newark, Delaware. Washington House is a six-story building, containing fifty-four residential units, and four commercial units. Daystar served as the developer, builder, and general contractor for the construction of the Condominium. Sills, as the President and sole owner of Daystar, formed Washington House Partners, LLC ("WHP") to facilitate the development of the Condominium and sale of its units. WHP created and organized the Washington House Condominium Association of Unit Owners ("Association"), a council of unit owners responsible for oversight of the Condominium. Sills appointed

himself to serve as the sole member of the Association while construction and development of the Condominium were ongoing. Daystar hired Architectural and ESW to perform design and construction work at the Condominium. Construction of the Condominium was completed in October 2008, and within a year more than half of the residential units had been sold.

On January 30, 2009, ESW filed a mechanics' lien claim against Daystar and WHP to recover outstanding payments for the exterior stone work it completed on the Condominium. In response, Daystar filed an Answer and Counterclaim against ESW, alleging breach of contract, breaches of express and implied warranties, and negligence. The parties entered into an Arbitration Agreement and thereby agreed to "resolve all disputes and matters in controversy" and that the arbitration would be a final adjudication. On January 6, 2012, an Arbitrator's Order was entered and ESW was required to pay $400,000.00. On March 2, 2012, the judgment against ESW was satisfied.

In 2012, the Unit Owners elected members to the Association Council to replace Sills and assume control of the Association. The Association hired Avalon to perform maintenance and repair work at the Condominium, including repairs to the Condominium's exterior walls.

In 2014, Plaintiffs discovered that the Condominium, as built, contains serious construction and design defects. The defects include sections of the masonry veneer separating and/or falling from the building. On September 8, 2014, the City of Newark issued a Notice of Violation of Building Codes to the Condominium, requiring the erection of safety barriers and scaffolding around the building perimeter, and the removal, repair, and replacement of the exterior masonry veneer.

Plaintiffs filed this Complaint on January 14, 2015. The Complaint alleges seven counts: (I) Negligence; (II) Breach of Contract; (III) Breach of Express and Implied Warranty; (IV) Violation of Buyer Property Protection Act; (V) Breach of Duty in the Organization and Pre-Turnover Control of the Association; (VI) Negligent Repair; and (VII) Breach of Contract—Third Party Beneficiary. Defendants filed their respective Motions to Dismiss and the Court heard oral arguments on the motions.

STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted."[1] When analyzing a motion to dismiss under Rule 12(b)(6), the Court generally must

[1] Super. Ct. Civ. R. 12(b)(6).

proceed without the benefit of a factual record and assume as true the well-pleaded allegations in the complaint.[2] A complaint is "well-pleaded" if it puts the opposing party on notice of the claim being brought against it.[3] Therefore, the Court may dismiss a complaint under Rule 12(b)(6) only where the Court determines with "reasonable certainty" that no set of facts can be inferred from the pleadings upon which the plaintiff could prevail.[4] However, documents integral to or incorporated by reference in the complaint may be considered.[5] "Where an agreement plays a significant role in the litigation and is integral to a plaintiff's claims, it may be incorporated by reference without converting the motion to a summary judgment."[6]

Additionally, although the Court need not blindly accept as true all allegations nor draw all inferences in the plaintiff's favor, "it is appropriate . . . to give the pleader the benefit of all reasonable inferences that can be drawn from its pleading."[7] "Only if the [C]ourt can say with reasonable certainty that plaintiff

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[2] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38–39 (Del. 1996) (citing *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988)).
[3] *See Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995) (citing *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 59 (Del. 1970) and Super. Ct. Civ. R. 8(e)(1), (f)).
[4] *See Solomon*, 672 A.2d at 38 (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).
[5] *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).
[6] *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *4 (Del. Super. Apr. 16, 2014).
[7] *See In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).

could prevail on no state of facts inferable from the pleadings may the court dismiss a complaint at this preliminary stage."[8]

DISCUSSION

Daystar and Sills, Architectural, and ESW each move to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court will address each Motion separately below.

I. Daystar and David Sills' Motion to Dismiss

A. Counts II, III, and IV

Daystar and Sills move to dismiss Counts II, III, and IV of Plaintiffs' Complaint under the theory that the Unit Owners only entered into contracts for their respective units with WHP. In other words, they argue that the Unit Owners are only in privity of contract with WHP and cannot maintain claims for Breach of Contract (Count II), Breach of Express and Implied Warranties (Count III), or Violation of the Buyer Property Protection Act (Count IV) against Daystar and Sills. Further, Daystar and Sills argue that Plaintiffs have failed to plead sufficient facts to establish Daystar and Sills were in an agency relationship with WHP. Rather, Daystar and Sills contend Plaintiffs "lump" Daystar, Sills, and WHP

[8] *Id.* (citing *Rabkin*, 498 A.2d at 1104).

together throughout the Complaint without regard to corporate form, contractual relationships, or their respective roles. As such, they maintain Counts II, III, and IV, should be dismissed as to Daystar and Sills.

In response, Plaintiffs argue that the determination of whether an agency relationship exists is a fact-intensive inquiry incapable of resolution this early on in the proceedings. Even still, Plaintiffs contend they have alleged an agency relationship between WHP, Daystar, and Sills that is sufficient to withstand Daystar and Sills' Motion to Dismiss. Specifically, Plaintiffs emphasize that the Complaint alleges that Daystar and Sills exercised complete control over WHP and that Daystar and Sills directed acts by and through WHP. As such, Plaintiffs maintain the Complaint is sufficiently well-pleaded to put Daystar and Sills on notice of the claims asserted against them in Counts II, III, and IV.

It is true that inquiry into whether an agency relationship exists is usually a question of fact for the jury.[9] An agency relationship is "created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent."[10] In the present case, Plaintiffs allege that Daystar and Sills created, controlled, managed, and operated WHP; that WHP was acting

[9] *Fisher v. Townsends, Inc.*, 695 A.2d 53 (Del. 1997).
[10] *Id.* at 57.

as an agent for Daystar and Sills at their direction;[11] and that WHP was simply an instrumentality used by Daystar and Sills to market and sell the Condominium units.[12] Upon reviewing the well-pleaded Complaint, the Court finds Plaintiffs' allegations form a reasonable inference under which Plaintiffs could prevail. Further, the Court finds dismissal prior to additional discovery regarding the nature of the relationship between WHP, Daystar, and Sills would be premature. While discovery may clarify the corporate relationship among the entities and their interactions, the information presently before the Court provides no basis to foreclose the litigation at this juncture. Therefore, Daystar and Sills' Motion to Dismiss Counts II, III, and IV is denied.

B. Count V

Daystar and Sills argue that Count V—Breach of Duty in the Organization and Pre-Turnover Control of the Association––must be dismissed as to Daystar. Daystar and Sills emphasize that Plaintiffs' Complaint alleges that Sills was the sole member of the Homeowner's Association and asserts no basis for Daystar's liability. As such, Daystar and Sills contend that the inclusion of Daystar in this

[11] Compl. ¶ 20.
[12] Compl. ¶ 18.

count without the necessary factual predicate entitles Daystar to be dismissed from Count V.

Plaintiffs argue Daystar should not be dismissed from Count V because the Complaint adequately alleges that WHP was Daystar's agent and that Daystar directed and controlled WHP regarding: (1) the construction of the condominium; (2) creation, management, and control of the Association; (3) sale of the units; (4) communication with purchasers regarding quality and the operating budget; and (5) the active concealment and failure to disclose defects. Accordingly, Plaintiffs maintain that Daystar and Sills' Motion to Dismiss Daystar from Count V should be denied.

The Court finds, at this juncture, that Daystar and Sills' argument that Plaintiffs have failed to plead any basis for Daystar's liability for Count V to be without merit. The Complaint contains allegations specifically referencing Daystar's creation, management, and control of the Association,[13] representations made to purchasers by Daystar concerning the quality of the condominium and the operating budget,[14] as well as Daystar's active concealment of, and failure to disclose, defects.[15] The Court, at this stage of the case, accepts Plaintiffs' well-

[13] Compl. ¶¶ 32–33.
[14] Compl. ¶¶ 41–48.
[15] Compl. ¶¶ 49–57.

pleaded facts regarding Daystar's breach of its duties in its organization and pre-turnover control of the Association. It is reasonably conceivable that discovery could reveal Daystar played a significant role in the organization and pre-turnover control of the Association based on the allegations contained in this Complaint. Should discovery prove otherwise, Daystar will have the opportunity to argue this issue once more at the summary judgment phase of the proceedings. Therefore, Daystar and Sills' Motion to Dismiss Count V is also denied.

C. Count VII

Daystar and Sills next contend that Count VII—Breach of Contract, Third Party Beneficiary—must be dismissed. Daystar and Sills rely on *Bromwich v. Hanby*,[16] wherein the Court stated that it "must look to the contract language when determining whether a stranger to the contract is a third-party beneficiary."[17] Daystar and Sills argue that there is no contract between WHP and Daystar that specifically references or contemplates Plaintiffs as third-party beneficiaries. Further, Daystar and Sills contend Plaintiffs inappropriately included Sills in Count VII because the allegations lack the factual predicate necessary to establish his liability. Therefore, Daystar and Sills argue that Count VII must be dismissed.

[16] 2006 WL 8250796 (Del. Super. July 1, 2010).
[17] *Id.* at *2.

In response, Plaintiffs assert that the Complaint sufficiently alleges that Plaintiffs are intended third-party beneficiaries of WHP's agreements with Daystar. Count VII of the Complaint alleges: (1) WHP owed contractual and other duties to the Unit Owners who are members of the Association; (2) WHP entered into contractual agreements with Daystar to perform those duties; (3) WHP intended for the Unit Owners to benefit from Daystar's performance; (4) the benefits conferred on the Unit Owners were material aspects of the agreements between WHP and Daystar; and (5) the Unit Owners are third-party beneficiaries of those agreements. Therefore, the allegations sufficiently assert Plaintiffs' third-party beneficiary status and should withstand Daystar and Sills' Motion to Dismiss.

As a general rule, parties who are strangers to the contract have no legal right to enforce it.[18] Yet, where a contract intends to confer a benefit upon another, he or she may obtain rights as a third-party beneficiary.[19] For a contract to confer third-party beneficiary rights, "not only is it necessary that performance of the contract confer a benefit upon a third person that was intended, but the

[18] *RHA Const., Inc. v. Scott Eng'g Inc.*, 2011 WL 3908765, at *5 (Del. Super. Sept. 1, 2011).
[19] *Id.*

conferring of the beneficial effect on such third-party . . . should be a material part of the contract's purpose."[20]

In their Complaint, Plaintiffs allege WHP entered into contractual agreements with Daystar to enable Daystar to perform the duties WHP owed to Plaintiffs, such as ensuring that the condominium was in compliance with applicable building codes and was constructed in a workmanlike manner.[21] Plaintiffs further allege that WHP intended for the Unit Owners to benefit from Daystar's performance, and that this benefit was a material aspect of the agreement between WHP and Daystar.[22] While the Court admits it has some concern regarding the legal sufficiency of this count of the Complaint, it finds at this preliminary stage of the litigation that Plaintiffs' allegations sufficiently state a claim under which they could conceivably recover, and therefore, Daystar and Sills' Motion to Dismiss Count VII is denied.

II. Architectural Concepts' Motion to Dismiss

Architectural argues Plaintiffs' claim for negligence against Architectural is no longer susceptible to adjudication. Architectural contends that Daystar and Sills' failure to join Architectural in the previous action with ESW ("ESW-Daystar

[20] *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (Del. Super. 1990).
[21] Compl. ¶¶ 139–41.
[22] Compl. ¶¶ 142–46.

Action") bars Plaintiffs from pursuing their current suit against Architectural.[23] The ESW-Daystar Action concerned defects in the exterior masonry veneer of the Condominium. Architectural argues that despite Daystar and Sills' knowledge of the building's visibly deficient facade, no claim was filed against Architectural alleging its design was deficient or negligently crafted. Architectural asserts that Plaintiffs' claims against Architectural have been fully litigated, with a result favorable to Daystar and Sills.

Plaintiffs respond that their claims were not litigated in the ESW-Daystar Action. Plaintiffs contend that neither they nor Architectural were parties in the ESW-Daystar Action and there is no evidence that Daystar and Sills represented Plaintiffs' interests in that case. Plaintiffs also argue that the only defects at issue in the ESW-Daystar Action were those involving the masonry veneer. In the present case, Plaintiffs also articulate claims concerning construction and design defects, deficiencies in the roof, balconies, patios and garage, drainage issues, and other latent defects. Therefore, Plaintiffs argue the claims in the present case were not fully litigated or adjudicated in the ESW-Daystar Action.

[23] Architectural argues that the pleadings in the ESW-Daystar Action, a case related to the case *sub judice*, are part of the official record and are subject to judicial notice and may be considered on a motion to dismiss.

The Court finds that res judicata does not bar Plaintiffs from asserting a claim against Architectural in the present case. One of the elements that must be proven to establish res judicata is that "the parties to the original action were the same as those parties, or in privity, in the case at bar."[24] Architectural was neither a party in the ESW-Daystar Action, nor were its interests aligned with the ESW in the ESW-Daystar Action such that Architectural can be said to have been in privity with ESW. Because the parties and issues as they relate to Architectural differ from those asserted in the ESW-Daystar Action, Plaintiffs' claims here are not barred by res judicata.

Architectural alternatively argues that it cannot be held liable for Daystar and Sills' negligent repair and failure to apply the damages awarded in the ESW-Daystar Action to the proper repair of the building facade. Architectural argues Daystar and Sills' breach of their duty to repair the building facade is an intervening and superseding act that has become the sole proximate cause of Plaintiffs' injuries. Thus, Architectural maintains it should be absolved of any liability.

[24] *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006).

In Delaware, a plaintiff can only recover for a defendant's alleged negligence if that negligence proximately caused the plaintiff's injury.[25] The Delaware Supreme Court has stated that "[p]roximate cause exists if a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."[26] An intervening act does not automatically break the continuous sequence of events. However, if the act "was not reasonably foreseeable, the intervening act supersedes and becomes the sole proximate cause of the plaintiff's injuries, thus relieving the original tortfeasor of liability."[27] Architectural can escape liability if it can show that Daystar and Sills' failure to repair the building facade was a break in the sequence of events that was not reasonably foreseeable. Yet, such a determination is fact-driven and thus incapable of resolution at this stage of the proceedings.

Finally, in what can only be viewed as a desperate Hail Mary, Architectural argues the defects in the building facade were open, obvious, and discoverable to Daystar and Sills when they accepted Architectural's work. In other words, it appears that Architectural argues that it should be excused from liability despite its deficient work simply because Daystar and Sills were aware of the defects in the

[25] *See Culver v. Bennett*, 588 A.2d 1094, 1096–97 (Del. 1991).
[26] *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000).
[27] *Duphily v. Del. Elec. Co-op, Inc.*, 662 A.2d 821, 829 (Del. 1995).

building facade. And, even if the design defects were not open and obvious because the fasteners at issue were behind the veneer, Architectural argues that the defective work was easily discoverable because inquiry into the visible issues that presented would have revealed the defective fasteners. Architectural posits that once accepted, an owner is solely liable for the continued maintenance, upkeep, and safety of the subject property. Thus, Architectural contends that it cannot be liable for injuries arising from defects that were discoverable prior to Daystar and Sills accepting Architectural's work, but which occurred after the project was completed and accepted by Daystar and Sills.

At this juncture, the Court will only comment that determining whether the defects were latent or discoverable is a fact-driven inquiry. The Court accepts Plaintiffs' well-pleaded facts regarding the latent defects in the building facade and does not accept any of Architectural's arguments that knowledge of deficient work would relieve them of answering the Complaint. Therefore, Architectural's Motion to Dismiss is denied.

III. Environmental StoneWorks' Motion to Dismiss

ESW argues that its Motion to Dismiss should be granted because the claims currently asserted against ESW were litigated and resolved in the prior

ESW-Daystar Action. Thus, it is ESW's position that Plaintiffs' claims against ESW are barred under the doctrine of res judicata. ESW claims the prior ESW-Daystar Action included a counterclaim for negligence by Daystar against ESW on grounds that ESW's work "was not free from defects, was not executed in a workmanlike manner, does not meet the standard of practice and does not conform to the contract."[28] The parties agreed to arbitrate the ESW-Daystar Action which ultimately resulted in an Arbitrator's Order requiring ESW to pay Daystar $400,000.00.

ESW contends that res judicata bars Plaintiffs' current claims because: (1) the parties agreed to have the ESW-Daystar Action decided by way of arbitration, thus the Arbitrator had jurisdiction over the action; (2) Plaintiffs in the present action are in privity with Daystar because Plaintiffs' and Daystar's interests are aligned in alleging that ESW's negligent workmanship regarding the masonry caused damages; (3) the adjudication of the ESW-Daystar Action was final; (4) Plaintiffs' cause of action here—negligent workmanship regarding the masonry—were successfully pursued by Daystar in the ESW-Daystar Action; and (5) the issues in the ESW-Daystar Action were decided adversely to ESW, as Daystar prevailed on its claim and recovered a $400,000.00 award.

[28] Environmental StoneWorks' Mot. to Dismiss, Ex. C.

In response, Plaintiffs argue that they are not in privity with Daystar. Plaintiffs assert that Daystar was not acting in the interests of the current Plaintiffs in the ESW-Daystar Action. They argue this is evidenced by Daystar's failure to utilize the damages received in the ESW-Daystar Action to properly repair the building. As such, Plaintiffs maintain they cannot be considered to be in privity with Daystar for purposes of res judicata.

Under Delaware law, a party claiming that the doctrine of res judicata bars a subsequent action must demonstrate the presence of the following five elements:

> (1) [T]he original court had jurisdiction over the subject and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.[29]

The Court finds ESW has satisfied the five elements for res judicata. Daystar and ESW consented to having the matter arbitrated and agreed to resolve all disputes and matters in controversy. The parties further agreed that the arbitration would be a final adjudication. As this Court noted in *Meheil v. Solo Cup Co.*,[30] "valid and final arbitration awards are given the same effect as a court's

[29] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 192 (Del. 2009).
[30] 2007 WL 901637 (Del. Super. Mar. 26, 2007).

judgment under the doctrine of res judicata."[31] Plaintiffs' argument that they did not consent to or participate in the arbitration is of no consequence, because, as the Court will next address, Plaintiffs are in privity with Daystar. Thus, Plaintiffs are bound by the arbitration decision.

For purposes of res judicata, two parties are in privity where the "relationship between two or more persons is such that a judgment involving one of them may justly be conclusive on the others, although those others were not party to the lawsuit. A critical factor for the privity analysis is whether the interests of a party to the first suit and the party in question in the second suit are aligned."[32] Plaintiffs' argument that their interests were not adequately represented by Daystar in the previous action is without merit. Daystar pursued a claim against ESW for negligent workmanship in the construction of the stone veneer of the Condominium which is the same complaint Plaintiffs have with ESW. Even if it is proven that Daystar disregarded Plaintiffs' interests by not utilizing the arbitration award of damages to make the proper repairs, such conduct is irrelevant to the determination of privity. While it may be a basis to assert a claim against Daystar, it does not supply sufficient grounds for requiring ESW to re-litigate their conduct.

[31] *Id*. at *5.
[32] *Grunstein v. Silva*, 2011 WL 378782 (Del. Ch. Jan. 31, 2011).

Thus, the Court is satisfied that the original cause of action was the same as the current claim. Daystar's counterclaim in the ESW-Daystar Action alleged negligence against ESW for the defective masonry work it completed on the Condominium. Daystar sought to recover the cost to correct, repair, and replace ESW's deficient work. The present case also seeks recovery for ESW's negligent workmanship in its masonry construction on the Condominium. Plaintiffs' claim that the current defects were discovered after the judgment was entered in the ESW-Daystar Action does not preclude res judicata. "The general rule is that res judicata gives preclusive effect not only to claims that were actually raised, but also to those that might have been raised."[33] The Court finds that Plaintiffs' current claims are barred by res judicata because they were asserted in the ESW-Daystar Action.

CONCLUSION

For the reasons set forth in this Opinion, Daystar Sills, Inc. and David Sills' and Architectural Concepts' Motions to Dismiss are hereby **DENIED**, and Environmental StoneWorks' Motion to Dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr
Judge William C. Carpenter, Jr.

[33] *Mehiel*, 2007 WL 901637, at *5.