

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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June 5, 2014

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***RE: Martin L. Bloom and Phyllis R. Bloom v. Sussex Group Partners,
LLC, and Schell Brothers, LLC
C.A. No.: S12C-08-015 - ESB***

Date Submitted: March 10, 2014

Dear Counsel:

This is my decision on the motion for summary judgment filed by defendants Sussex Group Partners, LLC, and Schell Brothers, LLC, in this case involving allegations of fraud and breach of contract made by plaintiffs Martin L. Bloom and Phyllis R. Bloom against the defendants regarding the Blooms' purchase of a house from the defendants in a partially-completed residential development.¹ The Blooms purchased this particular house, in part, because it had a nice view of the open space

¹ The defendants' joint motion for summary judgment makes no effort to avoid liability based on their differing roles in this matter.

and trees behind it. Indeed, the defendants charged, and the Blooms paid, a premium for the house because of its location in the development. Unbeknownst to the Blooms and before they signed a contract to purchase the house, the defendants were seeking approval from the Sussex County Planning and Zoning Department to modify the approved subdivision plan for the development to place 15 building lots into what had previously been open space behind the Blooms' house. The defendants obtained approval to do this after the Blooms settled on the house. The defendants never told the Blooms about this. The defendants did tell the Blooms before they signed a contract to purchase the house that the development was subject to change. However, in the contract that the Blooms signed, the defendants warranted that they would not materially modify the development. The Blooms only became aware of this change after they saw the defendants constructing houses in the area that they thought was going to remain open space. The Blooms then filed a complaint against the defendants, alleging fraud and breach of contract claims. The defendants argue that the fraud claims fail because they disclaimed all representations they made to the Blooms, and that the breach of contract claim is barred by the merger by deed doctrine. I have denied the defendants' motion for summary judgment, concluding that when the evidence is viewed in the light most favorable to the Blooms it appears that the defendants ran afoul of several consumer protection statutes and their own

contractual warranties.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist.² The moving party bears the burden of establishing the non-existence of material issues of fact.³ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.⁴ The Court views the evidence in a light most favorable to the non-moving party.⁵ Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.⁶ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.⁷ If, however, material issues of fact exist or if

² *Moore v. Sizemore*, 405 A. 2d. 679, 680 (Del. 1979).

³ *Id.*

⁴ *Id.* at 681.

⁵ *Id.* at 680.

⁶ *Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

⁷ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.⁸

DISCUSSION

Consumer Fraud

Delaware's applicable consumer fraud law is set forth in 6 *Del. C.* §2511, *et seq.* The purpose of this subchapter is to protect consumers from unfair or deceptive merchandising practices.⁹ §2513(a) defines an unlawful practice as:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

§2513(a) applies to the sale of real estate and may be enforced by a private citizen.¹⁰ The Blooms argue that the defendants violated §2513(a) because while the defendants in their promotional materials and through their sale agents were extolling the virtues of certain lots with a view of the open space, the defendants were actually in the process of seeking approval from the local zoning authority to eliminate a

⁸ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

⁹ 6 *Del. C.* §2512.

¹⁰ *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1073 (Del. May 24, 1983).

portion of that open space. The defendants argue that they did not violate §2513(a) because they disclaimed all representations they made to the Blooms. The defendants reason that by telling the Blooms that the development was subject to change, they are not responsible for anything they said or did not say about the development. I disagree. Delaware law generally allows a party to “contract around fraud”¹¹ by contractually disclaiming any representations that the party made to entice the other party to enter into a contract. However, I see no application for such a rule in a matter like this where the legislature has enacted a statute to protect consumers from such a practice. §2513(a) specifically prohibits a seller from misrepresenting and/or concealing any material fact in connection with the sale of that real estate to a consumer. It is one thing to extol the virtues of a development while disclosing that the development is subject to change. However, it is quite a different thing to actively be working on those changes and concealing those efforts from a prospective buyer. If the Blooms had known what the defendants were trying to do with the open space behind their house before they signed a contract to buy the house, then they could have made an informed decision about what to do. The defendants’ concealment of this material fact from the Blooms prevented them from doing that and is exactly the type of practice that §2513(a) is designed to address. Viewing the

¹¹ *Airborne Health, Inc., v. Squid Soap, LP*, 984 A.2d 126, 140 (Del. Ch. Nov. 23, 2009).

evidence in the light most favorable to the Blooms, I conclude that the defendants have arguably violated §2513(a), making the granting of summary judgment impermissible.

Buyer Property Protection Act

_____The Delaware Buyer Protection Act is set forth in 6 *Del. C.* §2571, *et seq.* §2572 requires a seller of residential real property to disclose in writing to the buyer all material defects at the time the property is offered for sale and that are known prior to final settlement. This disclosure has to be made in writing before the seller signs the listing agreement and must be updated as necessary for any material changes occurring to the property before final settlement. These disclosures are part of a “Seller’s Disclosure of Real Property Condition Report” and must be given to all prospective buyers before the buyer makes an offer to purchase. The disclosure report for the Blooms’ house contained the following:

#7. Is there any defect, damage or problem with any common elements or common areas which could affect their value or desirability?

Answer: No.

#13. Are you aware of any zoning violations, non-conforming uses, or set-back violations?

Answer: No.

#16. Are you aware of any existing or threatened legal action affecting the property?

Answer: No.

#17. Do you know of any violations of local, state or federal laws or regulations relating to this property?

Answer: No.

#18: Question: Are you aware of anything else you should disclose to a prospective buyer because it may materially and adversely effect the value or desirability of the property?

Answer: No.

The Blooms argue that the defendants violated §2572 because their answers to these questions are false, reasoning that the defendants knew that the open space behind the Blooms' house was important to them and failed to disclose that they were in the process of eliminating a portion of it. The defendants argue that they did not violate §2572 because they disclaimed all representations they made to the Blooms. The defendants once again reason that by telling the Blooms that the development was subject to change that they are not responsible for anything they said or did not say about the development. They also argue that their answers to these questions are factually accurate. I do agree with the defendants that their answers to questions 7, 13, 16 and 17 are accurate. However, I disagree with the defendants' underlying

rationale, as well as their argument that their answer to question 18 is factually accurate. §2572 requires affirmative answers to a series of questions. A disclaimer is not enough, particularly where, as I noted before, the defendants were actively trying to eliminate a portion of the open space behind the Blooms' house. This statute, like the consumer fraud statute, is designed to protect buyers of real estate by requiring sellers to disclose to buyers information that may materially and adversely affect the value or desirability of the property to the buyer so the buyer can make an informed decision before the buyer makes an offer to purchase. The defendants did not do this. There is no doubt that the open space was important to the Blooms. Similarly, there is no doubt that the defendants, as experienced real estate developers, would have known that. Viewing the evidence in the light most favorable to the Blooms, I conclude that the fact that the defendants were seeking to eliminate a portion of the open space behind the Blooms' house was a material fact that the Blooms would have wanted to know before they signed a contract to buy the house. Thus, the defendants' answer to question 18 is not accurate. Given this, I conclude that the defendants have arguably violated §2572, making the granting of summary judgment impermissible.

Common Law Fraud

The first element of a common law fraud claim consists of a false

representation made by the defendant.¹² The defendants argue that they disclaimed all representations that they made to the Blooms. As I noted before, Delaware law generally allows a party to contract around fraud by contractually disclaiming any representations the party made to entice the other party to enter into a contract.¹³ The defendants attempted to do this in this case. They put disclaimers in their promotional materials and in their contract with the Blooms.¹⁴ The contract also had a merger clause which stated that any representations made by the defendants to the Blooms that were not in the contract were not to be considered to be a part of that contract.¹⁵ However, the defendants did warrant in their contract with the Blooms that they would not materially modify the development.¹⁶ This would appear to be a false representation since the defendants were at the time they made the representation actively trying to modify the development by adding 15 lots to the open space and in fact did eventually make that modification. Viewing the evidence in the light most favorable to the Blooms, I conclude that the defendants arguably

¹² *Stephenson*, 462 A.2d at 1074.

¹³ *Airborne Health, Inc.*, 984 A.2d at 140.

¹⁴ See Exhibit A of Complaint.

¹⁵ See Purchase Agreement ¶ 28.

¹⁶ See Buyer Acknowledgment of Community Documents Form. (Addendum F to the contract.)

committed common law fraud, making the granting of summary judgment impermissible.

Breach of Contract

The defendants argue that any representations they made in the contract were extinguished by the merger by deed doctrine. This doctrine provides that the contract merges into the deed, extinguishing all representations made in the contract and leaving the parties with only those representations made in the deed. However, this doctrine is inapplicable where fraud is involved.¹⁷ In such cases, fraud revives the contract.¹⁸ Thus, having found that the Blooms' fraud claims survive the defendants' motion for summary judgment, so does their breach of contract claim.¹⁹

Other Matters

The defendants argue that the Blooms' claims are barred by the statute of limitations. This argument is of no consequence because the defendants did not raise the statute of limitations in their answer. Thus, they have waived it.²⁰ The defendants

¹⁷ *Haase v. Grant*, 2008 WL 372471, at *2 (Del. Ch. Feb. 7, 2008).

¹⁸ *Id.*

¹⁹ The defendants' warranty in the contract that they would not materially modify the development arguably would, by its very nature, survive the merger by deed doctrine. Otherwise, such a warranty would make no sense.

²⁰ Superior Court Civil Rule 8(c).

also argue that their conduct does not merit an award of punitive damages. Whether it does or not is a matter usually reserved for the finder of fact after a trial.²¹

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal

oc: Prothonotary

cc: Counsel

²¹ *Alston v. Chrysler Corp.*, 1999 WL 463703 at *1. (Del. Super. May 24, 1999).