IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUPERIOR COUNTY

T. BRUCE WILMOTH, individually and as President, Agent, Representative, employee, and/or Servant of T. BRUCE WILMOTH CUSTOM HOMES & DESIGNS, INC., and T. BRUCE WILMOTH CUSTOM HOMES, INC., T. BRUCE WILMOTH CUSTOM HOMES & DESIGNS INC., A Delaware Corporation, D/B/A T. BRUCE WILMOTH CUSTOM HOME & DESIGN INC., and T. BRUCE WILMOTH CUSTOM HOMES, INC., A Delaware Corporation.	)	
Plaintiff,	)	
v.	)	C.A. No. 06A-10-002-JEB
JOHN KUHN and KRISTEN KUHN,	)	
Defendant.	)	

Submitted: February 1, 2007
Decided: March 28, 2007

OPINION

Appeal from a decision of the Court of common Pleas.
Affirmed.

Appearances:

Tara M. DiRocco, Esquire and David E. Matlusky, Esquire
Attorney for Plaintiff T. Bruce Wilmoth, et al.

Loreto P. Rufo, Esquire.
Attorneys for Defendants John and Kristen Kuhn.

JOHN E. BABIARZ, JR., JUDGE.

This opinion addresses an appeal from a decision of the Court of Common Pleas filed by Defendants T. Bruce Wilmoth individually, and two companies of which he was president and owner, T. Bruce Wilmoth Custom Homes & Designs, Inc., and T. Bruce Wilmoth Customs, Inc. Plaintiffs are John and Kristen Kuhn, who filed a complaint in the lower court for breach of contract and fraudulent conversion. After several failed attempts to move the case into arbitration, Plaintiffs moved for summary judgment. The lower court granted the motion, and Defendants appealed. For the reasons explained the decision of the Court of Common Pleas is affirmed.

In March 2005, the Kuhns signed a contract to buy a home from T. Bruce Wilmoth Homes & Designs, Inc. The agreement included construction of a home as well as purchase of the lot, located in Westover Hills, Wilmington, Delaware. The Kuhns put down a $50,000 deposit on the $1.9 MM contract.

In April 2005, the Kuhns gave notice to Wilmoth that they were unable to build the pool of their choice on the property and were therefore terminating the contract pursuant to ¶ 14 of the agreement, which provides as follows:

> Buyer's obligations hereunder are contingent upon Buyer being able to install as in-ground pool and related facilities in the back yard of the premises of a size and shape acceptable to Buyer in Buyer's sole discretion. In the event that Buyer determines that an acceptable pool cannot be installed in the back yard of the premises, Buyer may terminate this Agreement upon notice given to the seller within forty-five (45) days after the date hereof, in which event this Agreement shall be null and void and Seller shall immediately return to Buyer all deposits paid by Buyer to Seller.

Pursuant to ¶ 8 of the contract, the Kuhns asked for a refund of their deposit. In May 2005, Wilmoth sent the Kuhns a letter rejecting the termination of the contract and refusing to return

the deposit. In September 2005, the Kuhns filed suit in the Court of Common Pleas, seeking damages of $50,00 plus interest, fees and costs.

The matter was scheduled for arbitration in February 2006 and in May 2006. Wilmoth asked for and received a continuance for both proceedings. A third arbitration was scheduled for September 2006. Just prior to the arbitration, Wilmoth's attorney filed a motion to withdraw, which the Kuhns opposed because of the already lengthy delays. The Kuhns also filed a motion to bypass arbitration and a motion for summary judgment.

A hearing on the three motions was heard in the Court of Common Pleas in September 2006. Following oral argument, the judge ruled from the bench, granting the Kuhns' motion for summary judgment based on the clear language of the sales contract. Wilmoth filed an appeal to this Court, seeking a reversal of the summary judgment and a remand for a trial on the merits in the Court of Common Pleas.

When reviewing a decision of the Court of Common Pleas granting summary judgment, this Court must examine the record to determine whether the court below correctly applied the appropriate legal principles.[1]

Wilmoth argues that the summary judgment against him should be reversed because (1) piercing the corporate veil is a question of fact, (2) Custom Homes is not a proper defendant in this litigation and (3) breaching the duty of good faith and fair dealing is a fact question.

As a threshold matter, these issues were not argued below, and they are not to be raised

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[1] *Shain v. Delaware Federal Credit Union*, 2006 WL 2382831, at *1 (Del. Super.); *Baldwin v. Conner*, 1999 WL 743276, at *2 (Del. Super.).

on appeal.[2] It must also be said that piercing the corporate veil is an equitable doctrine and has no relevance to this case; nor does the Superior Court have jurisdiction over such an action.[3] As to privity, there is no question that T. Bruce Wilmoth and his corporations have acted as one entity, not only in the court proceedings but also in the business proceedings. There is no dispute that Custom Homes was not in privity with T. Bruce Wilmoth and T. Bruce Wilmoth Custom Homes & Designs.[4]

Finally, the trial judge correctly ruled that under the unambiguous language of the sales contract Wilmoth's duty to refund the Kuhns' deposit arose when the Kuhns informed him that they could not have the pool on their choice in their backyard. The contract imposes on the Kuhns no requirement to explain, verify or defend their decision, as found by the trial judge.

The decision of the Court of Common Pleas granting summary judgment in favor of the Kuhns is ***Affirmed.***

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEBjr/ram/bjw
Original to Prothonotary

[2] *Wilmington Trust Co. v. Conner*, 415 A.2d 773 (Del. 1980).

[3] *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251 (Del. Ch.); *Marketing Products Mgmt, LLC v. HealthandBeautyDirect.com, Inc.* 2004 WL 249581 (Del. Super.).

[4] *Foltz v. Pullman Inc.*, 319 A.2d 38, 41 (Del. Super. Ct. 1974).