IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

REGINALD BRASBY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 05C-10-022-RFS
	)	
LEROY MORRIS, individually, and	)	
MORRIS REAL ESTATE ASSOC.,	)	
INC., and L & L HOMES, INC.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Upon Defendant's Motion for Summary Judgment.
Granted in Part. Denied in Part.

Submitted: November 27, 2006
Decided: March 29, 2007

Tasha Marie Stevens, Esquire, Fuqua and Yori, P.A., Georgetown, Delaware, Attorney for Plaintiff.

Dean A. Campbell, Esquire, Hudson, Jones, Jaywork & Fisher, LLC, Georgetown, Delaware, Attorney for Defendants.

STOKES, Judge

This is my decision regarding Defendants', Leroy Morris, Morris Real Estate Assoc., Inc., L. Morris Associates, Inc., and L & L Homes, Inc. (collectively referred to as "Morris"), Motion for Summary Judgment. For the reasons set forth herein, the Motion is granted in part and denied in part.

STATEMENT OF FACTS

Leroy Morris is an employee, officer, agent, and director of Morris Real Estate Associates, Inc., L. Morris Associates, Inc., and L & L Homes, Inc. L & L Homes, Inc. is a corporation which erects prefabricated or modular homes.

A relationship was established in September of 2002 between Morris and Reginald Brasby (hereinafter "Plaintiff"). In their first meeting, Plaintiff advised Morris that he was looking for property to purchase and informed Morris of what he was willing to spend. In the time between their first meeting and the matter presently in dispute, the parties worked on two other land/home packages. Each of those deals fell through when Plaintiff was unable to obtain financing.

During the course of their dealings, Plaintiff wrote multiple checks to Morris. The checks were each written at the request of Morris. Plaintiff's understanding was that the money "was to buy … land and use the land as a downpayment [sic]" for the construction of a home. Transcript at 14, ll. 23-24. The total amount paid by Plaintiff was $58,500; consisting of the following individual amounts: (1) $1,500 paid on September 21, 2002; (2) $6,000 paid on February 12, 2003; (3) $1,000 paid on April 10, 2003; (4) $40,000 paid on August 7, 2003; and (5) $10,000 paid on August 7, 2003.[1]

[1] The final two checks were written on the same date. They reflect Plaintiff's acceptance of Morris' request that the $50,000 amount requested be broken into two separate checks.

On October 4, 2003, Plaintiff entered into a Residential Contract of Sale (hereinafter "Land Contract") with William Graves for the purchase of real property located in Millsboro, Delaware. The Contract identified Leroy Morris as the selling broker and L. Morris Associates as the selling agency for both buyer and seller. The purchase price agreed upon in the Land Contract was $55,000

The Land Contract provided space where the parties could indicate any applicable financing conditions. Included in the options, was a box indicating that "[n]o [f]inancing [c]ontingency" existed. The Land Contract fails to indicate, in either way, whether a financing contingency existed. The Contract does, however, indicate that Plaintiff, using his best efforts, had five days from the date of Contract acceptance to obtain financing. Furthermore, if a written commitment for financing could not be obtained by October 15, 2003 then either party to the Contract was free to declare the Contract null and void.

On the same day Plaintiff signed the Land Contract, he also entered into a contract with Morris for the construction of a thirty-one foot by fifty-two foot home to be placed on a foundation (hereinafter "Home Contract").[2] The home was to be a modular home, constructed in large part at an off-site location. The Home Contract quoted a price of $124,200.00. The Contract was only two pages long and did not contain any reference to an expected date of completion or deadline date.

In the middle of November 2003, Morris received a notice from Sunset Mortgage that indicated "preliminary credit approv[al]" for Plaintiff.[3] *See* Ex. D of Opening Br. on Summ. J. The "max base loan amount" specified in the notice was $143,000. Additionally, the notice provided that

[2] The Home Contract is dated October 2, 2003, the same day that Plaintiff signed the Land Contract. However, the seller of the land did not sign the Land Contract until October 4, 2003. For this reason, the Court uses the later date as the date of the Land Contract.

[3] The heading on the notice bears the date November 17, 2003, however, the facsimile date stamped on the bottom margin indicates that the notice was sent on November 12, 2003. This inconsistency is noted by the Court, but does not affect the Court's ruling.

Plaintiff would be required to have twenty-five percent of the property's value as a down payment. The financing was not guaranteed as the note indicated in relevant part that it was "not a mortgage comitment [sic] nor [did] it guaranty an approval."

Subsequently, Plaintiff and Morris signed a notarized, written agreement setting a construction and settlement deadline of January 15, 2004 or sooner. The agreement also contained provisions explaining how any excess deposit money, above the required twenty-five percent, would be applied to the total purchase price.[4] This agreement is dated November 19, 2003.

In December 2003, Plaintiff, after being told repeatedly by Morris that progress was being made, learned that no physical structure had been erected at the construction site.[5] Plaintiff contacted an attorney, who in turn sent a letter (hereinafter "Letter") to Morris requesting "written adequate assurance of timely performance of the contract by January 3, 2004 or [an] immediate refund [of] the $58,500.00 with interest and $10,000.00 for the inconveniences that he [Plaintiff] ha[d] experienced …." Ex. F. of Opening Br. on Summ. J.

Morris responded to the Letter on January 9, 2004, indicating that "[a]ll designs and plans [had] been submitted to the State." Ex. H of Pl.'s Answering Br. in Opp'n to Defs.' Mot. for Summ. J. Morris also stated in his letter that he intended to proceed with construction according to plans, but that his best estimate placed the completion date "approximately thirty days behind schedule." Id.

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[4] The total purchase price was $179,200 ($55,000 for the land, and $124,200 for the home). Twenty-five percent of that would be $44,800. Plaintiff paid $58,500 to Morris, leaving $13,700 unaccounted for. The November 19, 2003 agreement between Plaintiff and Morris indicates that the parties agreed to use the deposit money to pay the twenty-five percent deposit, and that the excess would be used according to the terms of the agreement.

[5] Morris asserts that the construction process was underway because plans, detailing construction specifications, had been created.

On January 12, 2004, Plaintiff's attorney filed a complaint with the Delaware State Police. The letter, addressed to Sgt. Sherry Benson, read in part: "Mr. Brasby [Plaintiff] wants his money back." The clear intent of the letter was to terminate the relationship between Plaintiff and Morris and obtain a quick return of all monies paid by Plaintiff.

The Delaware State Police were in contact with Morris following their receipt of the January 12, 2004 letter. Morris was advised to return the $58,500 or face prosecution for home improvement fraud.

On February 25, 2004, Morris delivered a check for $57,700 to Plaintiff's attorney's office. Accompanying the check was a hand-written document listing deductions and credits to the total amount paid by Plaintiff. From the $58,500 total, $1,000 was deducted for the cost of plans from an earlier contract, and $200 was added for interest accrued. Morris avers that an agreement of release from the sale of land was received by Plaintiff along with the check and tally-sheet. Plaintiff, however, asserts that the unsigned and undated release was not received until the parties were at arbitration.

Plaintiff was in possession of Morris' check on February 26, 2004. On the third attempt at cashing the check, Plaintiff was able to successfully receive the funds from a bank.

STANDARD OF REVIEW

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681.

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, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(3); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If material issues of fact exist, or if 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 inappropriate. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

DISCUSSION

I. Contract Claims

(a) Time of the Essence

Plaintiff and Morris entered into the Home Contract on October 2, 2003, for the construction and placement of a prefabricated home. It contained mutually agreeable terms, but it did not specify a date for completion. Furthermore, the contract did not explicitly state that time was of the essence. Where the language of a contract does not contain a specific declaration that time is of the essence, the law permits the parties a reasonable time in which to tender performance. *Novozymes v. Codexis, Inc.*, 2005 Del. Ch. LEXIS 73, at *11 (Del. Ch. May 26, 2005). The reasonable time for performance is given "regardless of whether the contract designates a specific date on which such performance is to be tendered." *Id.*; *see also,* 17A Am. Jur. 2d *Contracts* § 474 ("[T]he mere designation of a particular date upon which a thing is to be done does not make that date the essence of the contract.").

On November 19, 2003, the parties executed a valid modification of their contract which did provide a deadline for completion.[6] The insertion of a deadline did not, in and of itself, make time of the essence to the contract. When determining whether time is of the essence, the Court is free to look at two things: (1) whether the language in the contract specifically sates that time is of the essence, and (2) whether the "course of dealings between the parties must imply that time was of the essence." *Walker v. Concrete Creations*, 2005 Del. C.P. LEXIS 33, at *4 (Del. C.P. Aug. 31, 2005); *See also*, *Silver Props., L.L.C. v. Ernest E. Megee, L.P.*, 2000 Del. Ch. LEXIS 67, at * 5 (Del. Ch. Apr. 27, 2000) (finding that generally time is not of the essence in real estate contracts unless the contract specifically says so).

The original contract between Plaintiff and Morris did not state that time was of the essence, nor did the modification make such an explicit declaration. As such, the significance given to the deadline for completion will hinge on a reasonable interpretation of what could be implied by the dealings between the parties. A question exists on whether Morris's knowledge of Plaintiff's position was sufficient to make the duty imposed by the modification of the essence to the Contract. This type of inquiry is fact specific, and it cannot be resolved on the record presently before the Court.

(b) Material Breach of the Contract

Delaware law firmly supports the principle that "a party [to a contract] is excused from performance … if the other party is in material breach" of his contractual obligations. *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003). "The converse of this principle

[6] The letter, modifying the October 2, 2003 contract, was valid without any additional consideration as modifications of contracts governed by the UCC are only required to be executed in good faith. *See* 67 Am. Jur. 2d *Sales* § 62 (stating that modular homes are "goods" under the UCC until affixed to real property).

is that a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract." *Id.* If time was of the essence to this contract, then the January 15 deadline imposed by the modification would be a material provision of the agreement.

Plaintiff's Letter to Morris requesting written adequate assurance of timely performance demanded proof from Morris that construction would be completed by January 15. Assuming time was of the essence, in order for Morris' response to constitute an anticipatory repudiation, giving rise to an immediate cause of action for breach of a material provision, it must have amounted to an "unequivocal statement … that he [would] not perform his promise." *See Manley v. Assocs. in Obstetrics & Gynecology, P.A.*, 2001 Del. Super. LEXIS 314, at *20 (Del. Super. July 27, 2001). An expression of doubt alone as to one's ability to tender performance on time is not enough to amount to repudiation. *Elliott Associates v. Bio-Response, Inc.*, 1989 Del. Ch. LEXIS 63, at *10 (Del. Ch. May 23, 1989) (This authority cites New York law for the stated proposition, however, Delaware law equally supports the Court's position); 9-54 Corbin on Contracts § 974 ("It has been thought that a mere expression of inability to perform in the future is not a repudiation of duty and cannot be operative as an anticipatory breach.").

What constitutes adequate assurance under Title 6, Section 2-609 of the Delaware Code will vary depending on the factual circumstances of the case. The facts in this case suggest possible deception on the part of Morris. In this regard, the level of assurance required of Morris would be more than may be required of a person whose actions have precisely mirrored their words. *See* U.C.C. § 2-609, cmt. 4 ("For example, where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will

not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner-cutter might well be considered insufficient without the posting of a guaranty ….").

Resolution of this issue depends on whether time is determined to be of the essence to the Contract. If time is found to be of the essence, then Morris's response to Plaintiff's request for adequate assurance shows a likely inability to complete the contract by the January 15 deadline. Although Morris's letter uses phrases like "best estimate" and "approximately thirty days behind", the facts of the case indicate that Morris had no intent, nor did it appear that he had the capability, to complete construction by the stated deadline. If, on the other hand, time is found not to be of the essence, then the reasonableness of Plaintiff's enlistment of the Delaware State Police to obtain a return of his money would be another fact question.

(c) Accord and Satisfaction

Title 6 Section 3-311 of the Delaware Code provides a framework for discharging a claim through accord and satisfaction by use of an instrument. Section 3-311 provides that accord and satisfaction by use of an instrument can only occur,

> [i]f a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, …

6 *Del. C.* § 3-311(a) (2007). Furthermore, the person against whom the claim is asserted must prove "that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." 6 *Del. C.* § 3-311(b) (2007).

Similarly, the elements required for common law accord and satisfaction are:

> (1) that a bona fide dispute existed as to the amount owed that was based on mutual good faith; (2) that the debtor tendered an amount to the creditor with the intent that payment would be in total satisfaction of the debt; *and* (3) that the creditor agreed to accept the payment in full satisfaction of the debt.

Trader v. Wilson, 2002 Del. Super. LEXIS 92, at *9 n.5 (Del. Super. Feb. 1, 2002). The comments to U.C.C. section 3-311 state that accord and satisfaction by use of an instrument follows the common law rule with some minor variations to reflect modern business conditions. *See Trilogy Dev. Group v. Teknowledge Corp.*, 1996 Del. Super. LEXIS 342, at *16 (Del. Super. Aug. 20, 1996). Neither the common law, nor Title 6 Section 3-311 contains a provision permitting the creditor to in any way "alter the full payment check to defeat its discharging effect, short of repaying the money to the debtor." *Id.*

"'Accord' is when 'one party to an existing contract may agree with the other party to accept from him in the future a stated performance in satisfaction of the subsisting contractual duty,' and 'the performance of the accord' is 'the satisfaction of the claim.'" *Wagner v. Hendry*, 2000 Del. Ch. LEXIS 33, at *17 (Del. Ch. Feb. 23, 2000). The "accord" functions as the making of a new contract. *Id.* Until "satisfaction" is completed the new contract remains executory, and the original cause of action is not discharged. *Empire Box Corp. v. Jefferson Island Salt Mining Co.*, 36 A.2d 40, 43 (Del. 1944).

Whether the parties agree that the new contract is to be accepted as full performance and satisfaction of the pre-existing duty is "usually a question of fact, which must be proved by the party alleging it …." *Id.* at 17-18. When the provisions of the new contract, the accord, do not expressly state that it is in full satisfaction of the claim, and such an intent cannot be readily implied, pertinent

evidence of surrounding circumstances is often admissible to prove intent. *Empire Box Corp.*, 36 A.2d at 43.

The hand-written note attached to Morris's check to Plaintiff serves as the only reference to any dollar figures higher than that of the actual amount tendered. Neither the check itself, nor the hand-written note bears language akin to a notation that payment was made in full. Plaintiff's December 30, 2003 letter demanding written adequate assurance made an alternative demand for an immediate refund of the $58,500 previously paid by Plaintiff *and* $10,000 for the inconveniences experienced by Plaintiff. Assuming that Plaintiff still believed his claim to be worth $68,500 at the time Morris tendered his check, that would leave $10,000 unaccounted for in Morris's hand-written tally sheet. It is not clear from the record before the Court whether the check, representing $1,000 less than the total amount paid by Plaintiff, was intended to satisfy all claims between the parties, or whether it was merely a partial payment made in fear of prosecution. This issue must be further developed through trial.

II. Tort Claims Against Morris Real Estate Associates, Inc., L. Morris Associates, Inc., and L & L Homes, Inc. – Economic Loss Doctrine

(a) Negligence

"The economic loss doctrine is a judicially created doctrine that prohibits recovery in tort where a product has damaged only itself (i.e., has not caused personal injury or damage to *other* property) and, the only losses suffered are economic in nature." *Marcucilli v. Boardwalk Builders,* 1999 Del. Super. LEXIS 597, at *11 (Del. Super. Dec. 22, 1999) (citation omitted). Economic loss is defined as "any monetary loss[], costs of repair or replacement, loss of employment, loss of business or employment opportunities, loss of good will, and diminution in value." *E.g.*, *Christiana*

Marine Serv. Corp. v. Texaco Fuel & Marine Mktg., 2002 Del. Super. LEXIS 305, at *21 (Del. Super. June 13, 2002) (citation omitted).

The economic loss rule is a court-adopted measure that prohibits certain claims in tort where overlapping claims based in contract adequately address the injury alleged. The economic loss rule is not an affirmative defense. The driving principle for the rule is the notion that contract law provides a better and more specific remedy than tort law. *See* Am. L. Prod. Liab. 3d § 60:41 ("The pragmatic reason behind the rule is straightforward: 'The physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended. Thus, the fear of 'crushing useful activity by liability' is the moving force behind the rule."). The economic loss rule supports the ability of persons to allocate the risks of business transactions.

The economic loss rule is especially suited to situations where privity of contract exists. *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1200 (Del. 1992). Plaintiff and Morris entered into such a contractual relationship. Consequently, the economic loss doctrine precludes Plaintiff from bringing a negligence claim since the damages alleged are only economic losses. *See* Compl. ¶ 22 ("As a result of Defendants, L. Morris Associates, Inc. and Leroy Morris', breach of duties and fiduciary responsibilities, Plaintiff was unable to secure the purchase of the property."). *See McKenna v. Terminex Intern. Co.*, 2006 WL 1229674 (Del. Super. Mar. 13, 2006). There exists no reason to extend tort law into areas that can be adequately governed by contract law. The damages alleged were the foreseeable consequence of the unfulfilled Home Contract. For this reason, the alleged damages are inappropriate for tort law application, and Plaintiff's negligence claim must be dismissed.

(b) Negligence Per Se

Plaintiff also asserts in the Complaint that Morris should be held liable for being negligent per se. This claim is prohibited in much the same was as Plaintiff's common law negligence claim. The presence of statutory language does not alter the effect of the economic loss doctrine in this case. In the Complaint, Plaintiff alleges that Morris' conduct violated 11 *Del. C.* §§ 917(b)(1) and (b)(2). The loss allegedly suffered from such violation is listed as follows: "a. Plaintiff did not receive the benefit of its bargain; b. Plaintiff was unable to purchase the real property and home per the land and home contracts; and c. Plaintiff did not have the benefit of or receive interest on the $58,500.00 deposit from October 2003 through February 2004." Compl. ¶ 47. These types of losses are exactly the type of "economic losses" that are covered by the economic loss rule. *See Council of Unit Owners of Sea Colony East, etc. v. Carl M. Freeman Assoc., Inc.*, 1990 Del. Super. LEXIS 412, at *15 (Del. Super. Oct. 16, 1990) ("[E]conomic loss 'is essentially the failure of the purchaser to receive the benefit of its bargain – traditionally the core concern of contract law.'" (citation omitted)). For these reasons, count IV of the Complaint, alleging negligence per se, must be dismissed.

(c) Fraud

Claims of fraud, even where purely economic losses are asserted, are not always prohibited by the economic loss rule. *Council of Unit Owners of Sea Colony East, etc.*, 1990 Del. Super. LEXIS 412, at *15 ("Fraud is a recognized exception to the limitation of the economic loss doctrine."); Am. L. Prod. Liab. 3d § 60:41. However, as a general rule, "in order for contract and tort claims to co-exist in an action, the plaintiff must allege that the defendant breached a duty that is independent of the duties imposed by the contract." *McKenna*, 2006 WL 1229674, at *2; *see also*,

Werwinski v. Ford Motor Co., 286 F.3d 661 (3d Cir. 2002) ("We particularly are influenced by an emerging trend in these and other jurisdictions 'recognizing a limited exception to the economic loss doctrine for fraud claims, but only where the claims at issue arise independently of the underlying contract.'" (citation omitted)). Allegations of fraud that go directly to the inducement of the contract, rather than its performance, would present a viable claim.

Plaintiff's fraud allegations against Leroy Morris in his representative capacity[7] are focused exclusively on the performance of the contract. In the Complaint, Plaintiff asserts that Morris's "statements and assurances about the *progress, construction, and completion* of the home were false." Compl. ¶ 30 (emphasis added). The statements and assurances for which Plaintiff bases his claim were all made at a point in time following the formation of a valid contract. In this regard, the fraud claims do not arise independently of the underlying contract. Instead, the statements and assurances relate directly to the performance of the contract and are better addressed by applicable contract law.

This result is unaltered by the contract modification which took place on November 19, 2003. A valid, albeit executory, contract was in place prior to the November 19 modification. Any representations made by Morris between the initial contract date and November 19 did not alter the validity of the Home Contract. Consequently, the allegedly fraudulent representations made by Morris in his representative capacity do not relate to the inducement of Plaintiff to enter into a contractual relationship. The Court finds no reason to allow Plaintiff to pursue a claim of fraud

[7] Leroy Morris is alleged to have acted on behalf of Defendants, L & L Homes, Inc., L. Morris Associates, Inc., and Morris Realty Associates, Inc.

where the injury alleged is best addressed by the law of contract. For this reason, count III of the Complaint, alleging fraud against Leroy Morris in his representative capacity, must be dismissed.

III. Leroy Morris as a Party to Action

The personal participation doctrine stands for the idea that, in certain situations, an officer in a corporation can be held liable for his own wrongful acts. *Brandt v. Rokeby Realty Co.*, 2004 Del. Super. LEXIS 297, at *26 (Del. Super. Sept. 8, 2004). The doctrine attaches liability to corporate officers for torts which they "commit, participate in, or inspire, even though the acts are performed in the name of the corporation." *Heronemus v. Ulrick*, 1997 Del. Super. LEXIS 266, at *4 (Del. Super. July 9, 1997). Courts have further clarified this point by noting that individual liability attaches only where an officer "directed, ordered, ratified, approved, or consented to" the tortious act in question. *Brandt*, 2004 Del. Super. LEXIS 297, at *26.

Plaintiff has alleged facts sufficient to move forward with a claim of fraud against Leroy Morris individually. Plaintiff asserts that Leroy Morris, acting individually, knowingly made false statements to Plaintiff which Plaintiff in turn relied upon, to his detriment. A question of fact remains as to whether Leroy Morris was in fact acting in an individual or a representative capacity, and whether his statements amount to fraudulent conduct. These issues cannot be resolved at this stage of the litigation.[8]

CONCLUSION

Considering the foregoing, Defendants' Motion for Summary Judgment is denied in part and granted in part. Summary judgment is denied with respect to Plaintiff's breach of contract claim,

[8] Plaintiff has asserted that Leroy Morris committed fraud individually. In this instance, there is no overlap of contract and tort law. The economic loss doctrine focuses on limiting parties to the appropriate basis of recovery, not on restricting the possible sources of recovery.

granted with respect to Plaintiff's negligence, negligence per se, and fraud claims against Morris Real Estate Associates, Inc., L. Morris Associates, Inc., and L & L Homes, Inc., and denied with respect to Plaintiff's fraud claim against Leroy Morris individually.

IT IS SO ORDERED

cc: Prothonotary
Tasha M. Stevens, Esquire
Dean A. Campbell, Esquire