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

MIDLAND RED OAK REALTY, INC. AND MRO SOUTHWEST, INC. Plaintiffs, v. FRIEDMAN, BILLINGS & RAMSEY & CO., INC. AND VELASCO GROUP, L.L.C. Defendants.	)))))))))))	C.A. No. 04C-05-091 CLS

Upon Consideration of Defendants' Motion To Dismiss.
DENIED IN PART.
GRANTED IN PART.

Date submitted: November 15, 2004
Date decided: February 23, 2005

ORDER

Jonathan L. Parshall, Esquire, Murphy Spadaro & Landon, Wilmington, Delaware, Shawn L. Raymond, Esquire, J. Hoke Peacock III, Esquire, Susman Godfrey LLP, Houston, Texas, Attorneys for Plaintiffs Midland Red Oak Realty, Inc. and MRO Southwest, Inc.

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SCOTT, J.

I. Facts

In this action, Plaintiffs Midland Oak Realty, Inc. and MRO Southwest, Inc. ("MRO") are suing Defendants Friedman, Billings, Ramsey & Co., Inc. ("FBR") and Velasco Group, L.L.C. ("Velasco") over a real-estate financing contract. MRO is a Delaware corporation with its principal office in Midland, Texas. FBR is a Delaware corporation with its principal office in Arlington, Virginia. Velasco is a limited liability Virginia corporation.

MRO is a real-estate investment firm engaged in buying, developing, and managing undervalued commercial properties in Texas, Oklahoma, and Arizona. In June 1999, MRO entered into a three-year financing contract with Lehman Brothers. The financing was to cover fifteen properties. MRO was required to pay the principal balance and a $5.275 million exit fee when the credit facility expired on July 1, 2002.

During the summer of 2001, MRO began to search for financing to replace the Lehman contract. MRO was put in touch with FBR to discuss possible financing options. In the beginning of 2002, MRO also interviewed other financing consultants. Ultimately, MRO chose FBR and Holliday Fenoglio Fowler ("Holliday") to discuss financing options. MRO informed each of the firms that it needed to re-finance before the Lehman contract expired. FBR and Holliday

suggested that the financing be split into an “A” piece and a “B” piece in order to optimize financing.

FBR made its pitch to MRO on January 28, 2002. Jeff McClure, then vice-president of FBR, made several representations to MRO. He first stated that FBR had expertise in real estate financing, specifically, it was their specialty and they knew the market “better than anyone.” McClure also represented to MRO that $24 million was a reasonable amount for financing of the “B” piece. McClure was confident in “B” piece financing. He suggested that MRO find the cheapest price for the “A” piece.

In February, 2002, MRO assigned the “B” piece to FBR and the “A” piece to Holliday. MRO told Lehman about the re-financing effort. Lehman agreed in front of a Velasco representative to waive the $5.275 million fee if MRO re-financed the “A” and “B” pieces before the Lehman contract expired. While FBR had already begun work on financing, its contract with MRO had not been signed. The contract was not signed until May 6, 2002. The terms of engagement specified that FBR would find financing on “a best efforts basis.”

Holliday secured financing for the “A” piece with Greenwich Corporate Products. FBR, however, had not found financing as of April, 2002. In mid-April, McClure left FBR to start his own consulting group, Velasco. FBR assured MRO that McClure departure would not affect the “B” piece financing.

At a May 1, 2002 status conference between MRO, FBR and Holliday, FBR notified the parties that it had enlisted the help of Velasco to obtain financing. MRO was not a party to this contract. McClure attended the meeting on behalf of Velasco and stated that " I have the deal done" in regard to the "B" piece. MRO informed Velasco that a Texas financier, Smith Brownlie, wanted to underwrite the transaction, but would need at least sixty days. McClure responded that the "B" piece was done, and did not need Brownlie's money.

On June 4, 2002, Holliday, Velasco, FBR, and MRO met in Texas. Brownlie was also present. Brownlie asked McClure about the status of the "B" piece. McClure responded that he had not finalized any financing. In addition, he stated that MRO's "B" piece financing was "in good shape." Brownlie became agitated because he had wished to finance the project but was told that the financing was already completed. Velasco and FBR indicated to MRO after the meeting that they had sent several proposals to different sources.

When asked to provide evidence of potential financers, Velasco provided MRO and Holliday with a list of people not regularly in the real estate finance market. This caused MRO and Holliday to be alarmed. A lack of pitch book for the real estate financing also alarmed MRO. When Velasco finally did produce offers they had received for the "B" piece, MRO realized that they were well below the price

needed to replace the Lehman contract. FBR assured MRO that "the deal would get done" and "not to worry."

Ultimately, the Lehman contract expired without financing for the "B" piece. Holliday had tried at the last minute to obtain financing, but was unsuccessful. As a result of not obtaining re-financing, MRO became in default to Lehman. Subsequently, MRO and Lehman entered into a forbearance agreement. MRO has liquidated the vast majority of its portfolio holdings.

II. Standard of Review

Delaware has clear standards for granting a Rule 12(b)(6) Motion to Dismiss. The Court must accept all well-pled allegations as true.[1] The Court must then apply a broad sufficiency test: "whether a plaintiff may recover under any reasonable conceivable set of circumstances susceptible of proof under the complaint."[2] Dismissal will not be granted if the complaint "gives general notice as to the nature of the claim asserted against the defendant."[3] Further, a complaint "will not be dismissed unless it is clearly without merit, which may be either a matter of law or of fact."[4] "Vagueness or lack of detail," standing alone, is insufficient to dismiss a claim.[5]

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[1] *Spence v. Funk*, 396 A.2d 967, 968 (Del. Supr. 1978).
[2] *Id*. (Internal citation omitted).
[3] *Diamond State Tel. Co. v. Univ. of Delaware*, 269 A.2d 52, 58 (Del. Supr. 1970).
[4] *Id*.
[5] *Id*.

III. Discussion

In determining how to rule on the Motion, this Court must look to the contract between FBR and MRO. FBR contends that the contract language permits recovery only for “willful misconduct or gross negligence.” It is their position that the Motion to Dismiss should be granted because MRO has failed to plead either willful misconduct or gross negligence in their First Amended Complaint. MRO counters that the Motion should not be dismissed because the indemnity provision does not apply until this Court issues a final ruling on the merits.

The Indemnity Provision of the FBR/MRO contract states in pertinent part:

> The Company agrees to indemnify and hold harmless FBR and its affiliates . . . and their respective directors, officers, employees, agents and controlling persons . . . The Company will not be liable to any Indemnified Party under the foregoing indemnification and reimbursement provisions . . . to the extent that any loss, claim, damage or liability is found in a final, non-appealable judgment by a court of competent jurisdiction to have resulted primarily from FBR’s *willful misconduct or gross negligence*. (emphasis added) . . .
>
> The Company also agrees that no Indemnified Party shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Company or its security holders or creditors related to or arising out of this engagement of FBR pursuant to, or the performance by FBR of the services contemplated by, this Agreement except to the extent that any loss, claim, damage or liability is found in a final, non-appealable judgment by a court of competent jurisdiction to have resulted primarily from FBR’s *willful misconduct or gross negligence*. (emphasis added).

A. *Plain Meaning Rule*

In Delaware, the principles governing contract interpretation are well settled.[6] "Where the contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning."[7] If the parties disagree as to the proper interpretation of the contract, the disagreement does not automatically create an ambiguity.[8] Instead, "a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[9]

In the case *sub judice*, the express language of the FBR/MRO agreement reserves Plaintiff's right to deny indemnification to Defendant if a court has rendered a final judgment holding that FBR acted with willful misconduct or gross negligence. By employing the Plain Meaning Rule, this Court agrees with MRO that a determination of indemnification cannot be made with respect to the parties, on at least a few of the claims, until after this case has gone to trial and been decided.

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[6] *Northwestern Nat'l Ins. Co., v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. Supr. 1995).
[7] *Id.* (Internal citation omitted).
[8] *Id*.
[9] *Id*. (citing *Rhone-Poulenc Basic Chemicals Co., Inc. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. Supr. 1992)).

B. Recovery of Breach of Contract in Tort Law

FBR asserts that Counts III and IV must be dismissed against them because a plaintiff may not recover in tort for breaches of contract agreements. This Court agrees.

"As a general rule under Delaware law, where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort."[10] In both *Pinkert v. Olivieri* and *Tristate Courier and Carriage, Inc. v. Berryman*,[11] the Delaware courts held that a breach of contract claim could not be "bootstrapped into a fraud claim merely by adding the words 'fraudulently induced' or alleging that the contracting parties never intended to perform."[12]

MRO's claims of Fraud and Negligence are based entirely on obligations owed by FBR under the contractual agreement. The alleged material misrepresentations made by FBR are not collateral issues in this case. FBR has not violated any common law duty independent of the financing contract terms. In addition, MRO has not pointed to a representation or obligation other than the existence of the financing agreement upon which it can base a fraud or negligence claim. FBR's Motion to Dismiss is **Granted** as to Counts III and IV.

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[10] *Pinkert v. Olivieri*, 2001 WL 641737 *5 (D. Del. 2001).
[11] 2004 WL 835886 * 11 (Del. Ch. 2004). (Internal citation omitted).
[12] *Pinkert*, 2001 WL 641737 at *5; *Tristate Courier and Carriage, Inc.*, 2004 WL 835886 at *11.

C. Willful Conduct and Gross Negligence May be Averred Generally

Moreover, FBR argues that MRO has failed to sufficiently plead a cause of action because MRO's First Amended Complaint does not use the word "willful." This Court disagrees.

Delaware Superior Court Rule 9(b) describes the causes of actions that are to be pled with particularity. It reads:

> *(b) Fraud, negligence, mistake, condition of mind*. In all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake should be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.

Willful and wanton each refer to a "distinct state of mind."[13] Accordingly, willful and wanton need only be averred generally as required in Rule 9(b).

In *Hedrick v. Webb*,[14] the Court held that "the term aver [ ] implies that there must be at least a positive assertion of the state of mind."[15] There, the plaintiffs failure to mention wanton negligence or willful intent in their Complaint was fatal.[16] The Court held that the plaintiffs had no cause of action under the Tort Claims Act because they failed to mention the state of mind.[17]

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[13] *Johnson v. Pritchett*, 2001 WL 1222100 *3 (Del. Super)(citing *Jardel Co., Inc. v. Hughes*, 523 A.2d 528, 529-30 (Del. Supr. 1987)).
[14] 2004 WL 2735517 (Del. Super.).
[15] *Id*. at *7.
[16] *Id*.
[17] *Id*.

While Plaintiffs do not use the word "willful" in their Complaint, this Court does not find the omission to be fatal. As discussed below, Plaintiffs have alleged sufficient facts to withstand a Motion to Dismiss.

D. Wanton Conduct is a Question for the Jury

Generally, the issue of whether facts and circumstances amount to willful conduct or gross negligence is a fact question for the jury.[18] It is a matter of law when the "conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence."[19]

Willful conduct has been defined as a "conscious indifference" or "I don't care attitude which is the prerequisite of wanton behavior."[20] Wanton conduct is a "conscious indifference to consequences in circumstances where [the] probability of harm to another within the circumference of the conduct is reasonably apparent, although harm to such others in not intended."[21]

1. *Breach of Contract*

This Court finds that there is evidence from which a reasonable jury could find that FBR was grossly negligent or engaged in willful conduct in breaching the financing contract with MRO. First, the contract language stated that FBR conduct the Offering on a "best efforts basis only after execution of an underwriting

[18] *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. Supr. 1983); *Nicholson v. Mount Airy Lodge, Inc.*, 1997 WL 805185 *4 (E.D.Pa). (Internal citations omitted).
[19] *Id.*(citing *Albright v. Abington Mem'l Hosp.*, 696 A.2d 1159,1165 (Pa. 1997)).
[20] *Eustice*, 460 A.2d 509. (Internal citations omitted).
[21] *Id*. (citing *Law v. Gallegher*, 197 A. 479, 482 (Del. Supr. 1938)).

agreement." As of May 1, 2002, FBR contended that the "deal was done." The deal, however, was not done and these representations were made merely three months before the expiration of the Lehman credit facility. In addition, the statements that led MRO to believe that the B piece was proceeding to the underwriting stage may not have been boasting. Finally, the issue of whether FBR was grossly negligent when they told Brownlie, who wanted to secure financing for the Lehman project, that he need not finance the project because it was done is best suited for a determination by the fact-finder.

2. Breach of Covenant of Good Faith and Fair Dealing

The concept that a covenant of good faith and fair dealing is implied in a contractual relationship is well accepted in Delaware.[22] Good faith has been defined as "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."[23] Although MRO's allegations of the breach of covenant of good faith are vague at best, this Court does not believe that the count is so clearly without merit that it be dismissed. Accepting all well-pled allegations as true, FBR may have acted in disregard to MRO's expectations that financing be obtained when it told a possible financier that the "deal was done," when in fact, it was not.

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[22] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. Supr. 1992). At common law, fair dealing and good faith was impliedly a part of every kind of contract. *See* Restatement (Second) of Contracts § 204 (1979).
[23] Restatement (Second) of Contracts §205, cmt. a. (1979).

This Court **DENIES** FBR's Motion to Dismiss Counts I and II because it cannot be concluded as a matter of law that FBR's conduct was not willful or grossly negligent.

E. Velasco's Relationship with FBR

FBR and Velasco both asserted at the Motion that Velasco was in fact FBR's agent under the FBR/MRO contract. It is FBR's position that MRO must concede that Velasco is an agent of FBR because some of the causes of action against FBR stem from Velasco's actions. In contrast, MRO contends that previous to the hearing, FBR would not admit that Velasco was its agent. This Court believes that at this stage in the proceedings, there is a basis upon which the Plaintiffs may recover against Velasco. Velasco's Motion to Dismiss Counts III, IV, and V of the First Amended Complaint is **DENIED**.

"Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[24] On the other hand, if the agent is an independent contractor, and the employer does not retain control over him, the employer is not liable for the independent contractor's negligent actions.[25]

In the pleadings before the Court, there is insufficient evidence to determine if Velasco was an agent or an independent contractor for purposes of this Motion.

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[24] Restatement (First) of Agency § 1(1) (1933).
[25] Restatement (Second) of Torts § 414 (1977).

This Court is cognizant that FBR enlisted the help of Velasco, however, the status of their relationship remains an issue to be determined. This Court, with so little information, cannot conclude as a matter of law what Velasco's status was in the contract. The Motion, therefore, will not be dismissed with regard to the claims against Velasco.

IV. Conclusion

Based on the foregoing reasons, Counts III and IV are DISMISSED against FBR. Counts I and II remain against FBR. Counts III, IV, and V remain against Velasco.

IT IS SO ORDERED.

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J. Calvin L. Scott, Jr.