SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
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Re: ***Legatski v. Bethany Forest Assoc., Inc., v. Harris et al.***
C.A. No. 03C-10-011-RFS

Date submitted: January 10, 2006
Date decided: April 28, 2006

Dear Counsel,

This is my decision regarding Defendant Bethany Forest Associates Inc.'s Motion for Summary Judgment. For the reasons set forth herein, the motion is denied.

BACKGROUND

On October 12 1993, the Plaintiffs, Richard and Mary Legatski ("the Legatskis") entered into a contract with Bethany Forest Associates, Inc. ("Bethany Forest") to buy a lot in the Bethany Forest subdivision and to have a custom home built on it. The contract obligated Bethany Forest to design and construct a septic system for the house. Bethany Forest applied for and received a permit from the Department of Natural Resources Environmental Control ("DNREC") to install a septic system. The permit required the

system to be inspected by DNREC's Division of Water Resources once installed and prior to be it being covered with fill dirt. The septic system was designed by J. Ross Harris ("Harris"), a Professional Engineer of Environmental Consultants International Corp. ("ECI"). Bethany Forest hired Ormil Savage ("Savage"), a subcontractor, to install it. Harris, Savage and ECI are all third-party defendants in this case.

Plaintiffs allege that once the system was installed, DNREC was never notified and the Division of Water Resources never inspected it, as was required by law. It was covered with fill dirt, and Plaintiffs began to reside in the house part-time shortly thereafter. Plaintiffs further allege that the Certificate of Occupancy was obtained upon the false representations of Bethany Forest that the septic system had been properly installed and inspected. A further addition onto the home was built by Bethany Forest in 1996.

In September of 2002, after the Legatskis had recently begun residing in the house full-time, the septic system alarm activated, indicating problems. Soon after, it was discovered that the drain field lines were blocked and the pump was not in the proper location. In addition, there was dirt in the tank and water standing on the drain field. A subsequent DNREC inspection determined that the system had failed prematurely, most likely because of poor site inspection and improper construction practices. A replacement system had to be installed.

Upon inspection of the failed unit, Harris opined that the system had only lasted as long as it did because the house was rarely occupied. He stated that it would likely have showed signs of failure within the first year had the house been occupied full-time immediately after construction.[1]

[1] ECI letter to DNREC dated October 25, 2002.

Plaintiffs filed a Complaint on July 29, 2003, alleging negligence, breach of fiduciary duty and fraud. Bethany Forest filed an answer as well as an additional Complaint against third-party defendants Harris, ECI and Savage. Harris and Savage then answered this second Complaint, both alleging cross-claims back against third-party plaintiff Bethany Forest, as well as against one another.

On April 11, 2005, Defendants Bethany Forest then filed a Motion for Summary Judgment against the Legatskis alleging that none of the three legal theories of Plaintiffs' claim have the necessary factual or legal support. On June 27, Plaintiffs filed a Motion to Amend the Complaint to include counts of breach of contract and breach of warranty. On September 15, 2005, this Court granted the Motion to Amend. An Amended Complaint was then filed by Plaintiffs on September 27, 2005.

STANDARD OF REVIEW

Summary judgment cannot be granted where material issues of fact exist; only a jury can resolve them. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). The moving party must establish the lack of material factual issues. *Id*. Should the moving party establish the absence of material factual issues, the nonmoving party must prove the presence of such issues in order to prevent summary judgment. *Id*. at 681. In consideration of a motion for summary judgment, the evidence is viewed in a light most favorable to the nonmoving party. *Id*. at 680. Where the moving party has produced sufficient evidence under Superior Court Civil Rule 56, the non-moving party may not rely solely upon her pleadings. *Id*. Evidence must be produced showing a material issue of fact. *Steffen v. Colt Industries*, 1987 WL 8689, *3 (Del. Super. Ct.) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986)). Summary judgment is not appropriate if

the Court determines that it does not have sufficient facts to enable it to apply the law. *Reese v. Wheeler*, 2003 WL 22787629, * 2 (Del. Super. Ct.) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

DISCUSSION

The five claims in the complaint (as amended) all arise from the same basic circumstances. The Plaintiffs bought a house from Defendant Bethany Forest. Defendant was selling pre-construction houses, essentially acting as both the seller and contractor for this project. The Defendant was to install a septic system for the house which was to be completed before occupancy. The septic system failed and Plaintiffs seek damages.

1. Negligence

The case for negligence is based on the determinations that the septic system was negligently installed. The accusations are two-fold. First, that the actual septic system was negligently installed and constructed. Second, that Bethany Forest was negligent both in their supervision of their subcontractor and in their duties to the Plaintiffs. Plaintiffs allege that it was the responsibility of Bethany Forest, as the land owner and permit holder for the septic system to ensure that the system was properly installed and inspected before the occupancy by the Plaintiffs for two reasons. First, because it is required under the laws of the State of Delaware, and second, because Defendants were contractually obligated to do so.

Essentially, Plaintiffs assert that Defendants' failure to obtain the permits for the septic system, or the Certificate of Occupancy, amount to negligence at common law. Defendants were under a duty to the Plaintiffs, imposed by contract and statute, to obtain

documented certification for the work done on the house. The allegations are that this duty was breached. Had the certifications been obtained, the defects in the septic system would have been found and corrected. Instead, the alleged breach has directly caused financial damage to the Plaintiffs.

Bethany Forest alleges that the assigning of the duties of installing the septic system to a subcontractor as well as contracting with ECI to inspect the system relieves them of any negligence. However, in a similar case before this Court, *Hawthorne v. Summit Steel, Inc.*, 2003 WL 23009254 (Del. Super.), where the record was silent as to the contractual relationship between the contractors and subcontractors, this Court ruled that absent some evidence to the contrary, the obligation for overall workplace supervision and oversight was not contracted away from one party to another, but rather was shared between them.

Bethany Forest's reliance upon the subcontractors to design and build the septic system and also to secure all appropriate government approvals does not relieve it of liability because there is evidence that even though the approvals never were obtained, Bethany Forest provided assurances to the Plaintiffs that the approvals had been obtained. In order to support its argument, Defendant must at least show that its assurances that all necessary approvals were obtained was not negligent.

Further, Defendant has cited no law in support of its proposition that because the installation and construction of the septic system was completed by a subcontractor, Bethany Forest cannot be liable to the Plaintiffs for any deficiencies. Thus, there are substantial questions of fact left to be determined. Therefore, summary judgment on this issue is not appropriate.

Additionally, it has long been held that issues of negligence are generally not to be disposed of on summary judgment. Our Supreme Court has held that, "only where there can be no reasonable difference of opinion as to the conclusion to be reached on the question of whether an intervening cause is abnormal, unforeseeable, or extraordinarily negligent, should the question be determined by the Court as a matter of law." *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 831 (Del. 1995). That is not the case here.

2. Breach of Fiduciary Duty

Plaintiffs allege that a fiduciary duty was breached by Bethany Forest when it did not abide by all the state regulations and inspections prior to the septic system being covered and placed in service. Defendant states that there is no basis under the law to create fiduciary obligations in this type of transaction, a contractual relationship between a vendor and a vendee in an arm's length transaction.

It is understood in Delaware law that the "elements of breach of fiduciary duty that must be proven by a preponderance of evidence by the plaintiff are: (i) that a fiduciary duty exists; and (ii) that a fiduciary breached that duty. *York Linings v. Roach,* 1999 Del. Ch. LEXIS 160 at *5." ***Heller v. Kiernan*****,** 2002 WL 385545 (Del.Ch.).

Black's Law Dictionary (8th ed. 2004) defines a fiduciary as: "A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor." It then further defines a fiduciary relationship as:

> A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. • Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within

> the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

Therefore, it seems that the argument Plaintiffs make in this case is based on the first three relationships described above. Plaintiffs assert that their relationship with Bethany Forest was one in which Bethany Forest had a duty to act for or give advice to Plaintiffs on matters falling within the scope of the relationship. The Plaintiffs entered into a contract with Defendant that left the design, construction and overall installation of the septic system within the sole control of Bethany Forest. As a result, Bethany Forest had a duty to act for Plaintiffs in all matters falling within the scope of the installation of the septic system, including proper construction, installation and the obtaining of all necessary permits.

The premise of Plaintiffs' argument is a contractual relationship, that is generally considered to be an arm's length transaction (which by definition involves unrelated parties, each acting in their own self interest) becomes fiduciary when one side contractually places themselves in a position which requires it to act for the benefit of the other side (the definition of a fiduciary relationship).

This Court notes that although this may not be the most common argument for a breach of a fiduciary duty, it is by no means the first time our courts have looked at it. In *Crosse v. BCBSD, Inc.*, 836 A.2d 492 (Del. 2003), our Supreme Court cited its own holding that "the concept of a fiduciary relationship, which derives from the law of trusts, is more aptly applied in legal relationships where the interests of the fiduciary and the beneficiary incline toward a common goal in which the fiduciary is required to pursue solely the interests of the beneficiary in the property. *See Corrado Bros. v. Twin City Fire Ins. Co.,* 562 A.2d 1188, 1192 (Del.1989)." In *Crosse*, the determination of whether

or not a fiduciary duty existed turned on whether or not the interests of the two parties were "perfectly aligned." The Court framed the question as "whether there is such a sufficient 'clash of interests' between BCBSD and its participants that the legal relationship is purely a contractual one rather than a fiduciary one." *Id.*

Further, in *Petenbrink v. Superior Home Builders, Inc.*, 1999 WL 1223786 *2 (Del. Super.), this Court considered the nature of a fiduciary duty in the relationship between a builder and a landowner. In that case, this Court addressed the concerns of Bethany Forest raised here, that the relationship is contractual and arms' length, rather than fiduciary. The *Petenbrink* court stated that "[p]rimarily, the relationship between a builder and a landowner for whom he is to build is contractual in nature. These two parties come together for a specific purpose and a specific commercial project. Generally, this commercial relationship will not carry with it any fiduciary obligations. 37 C.J.S. Fraud § 6(b) (1997). However, 'the law will recognize a fiduciary duty arising out of a commercial contract if the transaction involved facts and circumstances indicative of the imposition of trust and confidence, rather than facts and circumstances indicative of an arms length commercial contract.' *Id."* at 2.

The Court went on to say, "[m]oreover, where the party in whom 'trust and confidence' is placed has superior knowledge of or a high degree of expertise in the matter covered by the contract, then the relationship between those parties is fiduciary in nature. 37 C.J.S. Fraud § 6(a) (1997). Under these common law principles, a builder would appear to owe the landowner for whom he is to build fiduciary duties. Most landowners are not schooled in the art of homebuilding and rely on the builder to build a

house that meets all their aesthetic and functional requirements; is habitable, sturdy, and safe; and is within the fiscal parameters established by their contract." *Id.*[2]

Based on the above, the *Petenbrink* court found that "[f]or these reasons, the landowner reposes a great deal of trust in the judgment and expertise of the builder. That builder would then be a fiduciary of the landowner and is charged with the duties that arise under such a relationship. The Court of Chancery of Delaware has also found that builders and landowners have a fiduciary relationship that is statutory in origin. *Maull v. Stokes,* Del. Ch., 68 A.2d 200, 202 (1949). The Chancery Court found this fiduciary relationship existed because the Delaware Code provides that payments made to a builder are held in trust. *Id.* ('While this language does not create a trust in the true sense of that term, the statute when read as a whole clearly creates a fiduciary relation of that nature between the contractor and the owner.')." *Id.*

Here, Plaintiffs made an initial payment of $21,000 on October 12, 1993, as a deposit on the house to be constructed. This money was given to Defendants and put into their complete control before construction began on the house. The contract expressly stated that although this was a deposit, it would be under Seller's control once total financing for the house had been confirmed and no interest earned on the deposit on any time. Plaintiffs did not obtain title to the lot and house until settlement on April 22, 1994.

The interests of Plaintiffs and Defendant are perfectly aligned when dealing with the subject matter of this litigation, the septic system. Although the overall matter may be one of contract, just like in *Petenbrink*, the facts and circumstances of the transaction

[2] In *Petenbrink*, the court footnoted here that "[i]n Delaware, the sale of a new home is accompanied by an implied warranty of good quality and workmanship. *See Council of Unit Owners of Breakwater House Condominium v. Simpler,* Del.Super., 603 A.2d 792 (1991)." In the present case, the necessary permits would have provided a similar warranty, had they been obtained.

are the determinative factors in a finding of a fiduciary duty. This Court has also held that the "[w]hether a duty exists is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court." *Hawthorn*, at 2, citing *Kilgore v. R.J. Kroener, Inc.*, 2002 WL 480944, *7 (Del. Super. Ct.).

Also of note in similar cases before this Court is the issue of control. It is clear from the contract between the two parties that Plaintiffs were barred from entering the property during the period when the Defendants were having the septic system installed.[3] The design, manufacture and installation of the home and the improvements, including the septic system, were completely controlled by Bethany Forest. The Plaintiffs had no input into the process at any time and were contractually prevented even from observing. However, the installation was still being done solely for the benefit of the Plaintiffs.

In *Johnson v. Chupp*, 2003 WL 292168 (Del. Super. Ct.), this Court ruled in a case involving negligence of a real estate agent to inspect dangerous conditions on a property that, because the "Defendants had no more control over the property than the Plaintiffs themselves had," there was no duty. The Court stated that "[w]ithout control of the property Moving Defendants had no duty to inspect...." By contrast, in the present case, Defendants had absolute control of the property and were acting on behalf of the Plaintiffs.

In the circumstances of this case, Plaintiffs gave total control over to Defendants, and therefore created a special relationship. When dealing with the concept of fiduciary duties, "Delaware courts have extended the concept and now recognize that a fiduciary relationship will arise 'where one person reposes special confidence in another, or where

[3] Purchase Agreement dated October 12, 1993, Clause 10.

a special duty exists on the part of one person to protect the interests of another, or where there is a reposing of faith, confidence, and trust, and the placing of reliance by one person on the judgment and advice of another.'" *Total Care Physicians, P.A. v. O'Hara, M.D.*, 798 A.2d 1043 (Del. Sup. 2001) (quoting *Lank v. Steiner*, 213 A.2d 848, 852 (Del. Ch. 1965)(quoting 36A C.J.S. Fiduciary p.385) *See also Milford Packing Co. Inc. v. Isaacs*, 90 A.2d 796 (Del. Super. 1952).

Defendants argue that contractual conflicts by definition do not involve fiduciary duties. However, the two are not mutually exclusive. There is ample precedent in this Court that "it is no answer to say the relationship was contractual, not fiduciary. When people contract to build a two million dollar house, they have a legitimate expectation to special treatment and special attention. It is not akin to an afternoon job replacing broken concrete in one slab of sidewalk." *Petenbrink*, at *2, quoting *Murphy v. Berlin Construction Co., Inc.*, 1999 WL 458796 (Del. Super. Ct.).

Considering the specific facts of this case, it is premature to dispose of this issue on summary judgment.[4] There are clearly material facts in dispute. Therefore, Defendant's Motion for summary judgment on this issue is denied.

3. Fraud

In order to plead common law fraud in Delaware, plaintiffs must aver facts supporting the following elements: "(1) the defendant made a false representation, usually one of fact; (2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; (3) the defendant

[4] The ruling on the fiduciary relationship argument should not be read too broadly. It is driven by and limited to the unique facts of this case. Truly arm's length contracts do not create claims based on alleged breaches of fiduciary relationships.

had the intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the plaintiff suffered damages as a result of such reliance. *Albert v. Alex Brown Management Services, Inc.*, 2005 WL 2130607, at *7 (Del. Ch.)." *Synder* ***v. Jehovah's Witnesses, Inc.*****, 2005 WL 2840285 (Del. Super Ct.), quoting** ***Unisuper Ltd. v. News Corp.*****,** 2005 WL 3529317 (Del.Ch.).

The crux of Plaintiffs' case for fraud is based on the supposition that Defendant either knew or should have known that the requisite permits had not been obtained; that Defendant falsely represented to Plaintiffs that the permits had been obtained and did so to induce Plaintiffs to go ahead with the settlement of the house. Plaintiffs state that they acted in reliance on the assurances of the Defendant that it had complied with all laws and regulations in connection with the construction of the dwelling, including obtaining the permits, and suffered damages as a result. In contrast, Defendants argue that the evidence is clear to show that no misrepresentations ever took place.

It is clear that in order for a septic system to be installed and a County Certificate of Occupancy to be issued, the State of Delaware requires a permit to be issued showing the septic system had been properly constructed, installed and inspected. In this case there is some disagreement about whether or not this permit was issued, and whether or not Defendant represented to Plaintiff that all permits were granted and that the Certificate of Occupancy was ready for settlement, when it in fact was not.

This is clearly an issue of material fact that warrants further investigation on this issue. As a result, summary judgment on this issue is denied.

4. Breach of Contract and Breach of Warranty

These issues are not addressed in Defendant's Motion for Summary Judgment. However, Defendants do move for a dismissal of the contract claims on the basis of substantial demonstrable prejudice.

The issues raised by Defendant were discussed in this Court's ruling of September 15, 2005. The extra prejudice Defendants now claim arises from the fact that it is disadvantaged by the fact that it relied upon subcontractors to perform this portion of the contract, and is now therefore in a position in which it must rely upon the memory of the subcontractors or the records which should have been obtained by them.

It is this Court's opinion that the issues of both prejudice to the Defendant and whether or not the contractual claims should be viewed as relating back to the original complaint were decided in the ruling of September 15, 2005. The Motion to Amend was allowed, and the contractual claims in the Amended Complaint are deemed to relate back to the original complaint. The purpose of Super. Ct. Civ. R. 15(a) is to "encourage the disposition of litigation on its merits." *See E.K. Geyser Co. v. Blue Rock Shopping Ctr., Inc.*, 229 A.2d 499 (Del. Super. Ct. 1967) (noting that the rule is given liberal construction).

The "extra prejudice" that Defendant claims is due to the length of time that has passed since the initial installation. This same argument was raised in *Kirby v. Kirby*, 1989 WL 111213 (Del. Ch.). In that case, Chancellor Chandler, (then Vice Chancellor Chandler), stated "[w]ith respect to prejudice caused by the Attorney General's delay in bringing this action, the defendants assert that it is 'self-evident,' because transactions occurred 'many years ago' and 'memories have faded.'...Apart from the bald allegation that 'memories have faded' the defendants have offered nothing to indicate that they

cannot recall the events connected with the transactions, or that this failure to recollect will detract from their ability to provide a defense."

It should also be noted that as the statute in the present case may well have been tolled until the discovery of the defective septic system, the issue of prejudice to the Defendants is not looked at in the context of the overall time between the installation of the system and the filing of the Amended Complaint. Instead the extra time granted between the filing of the original Complaint and the Amended Complaint must be shown to be prejudicial to the Defendant. As stated in the September 15, 2005, decision, any possible prejudice arising from the extension of time to amend the Complaint was ameliorated by the granting the Defendant time to supplement its briefs.

CONCLUSION

Considering the forgoing, Defendant Bethany Forest's Motions for Summary Judgment and Dismissal of the contract claims are denied.

IT IS SO ORDERED

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Richard F. Stokes, Judge

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