

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

<b>CHRISTOPHER A. ABILI and</b>	)	
<b>GULNARA ABILI</b>	)	CIVIL ACTION NUMBER
	)	
Plaintiffs	)	05C-12-011-JOH
v.	)	
	)	
<b>GEMCRAFT HOMES DELAWARE,</b>	)	
<b>INC., and CHESAPEAKE MORTGAGE,</b>	)	
<b>LLC</b>	)	
	)	
Defendants	)	

*Submitted: March 15, 2006*

*Decided: May 19, 2006*

***MEMORANDUM OPINION***

*Upon Motion of Defendant Gemcraft Homes Delaware Inc.  
to Dismiss the Complaint - **GRANTED***

Bayard J. Snyder, Esquire, of Snyder & Associates, Wilmington, Delaware, attorney for the plaintiffs

P. Clarkson Collins, Esquire, of Morris James Hitchens & Williams, Wilmington, Delaware, attorney for the defendants

HERLIHY, Judge

Gemcraft Homes Delaware, Inc., moves to dismiss the complaint of Christopher and Gulnara Abili. The Abilis sued Gemcraft and Chesapeake Mortgage, LLC, in connection with a house sales contract. The Abilis had previously sued just Gemcraft in connection with the same transaction, but that case was dismissed for lack of prosecution.

The Abilis contend that this dismissal was not prudently granted and that it was not granted with prejudice to them. But Gemcraft currently moves to dismiss on the grounds that the prior dismissal operates as an adjudication on the merits. It also argues that if there are defects in the earlier dismissal, those defects cannot be attacked in this proceeding.

### ***Facts***

On or about August 3, 2003, Christopher and Gulnara Abili contracted with Gemcraft to purchase a new home then under construction at 17 Spring Creek Drive, Townsend, Delaware for \$229,040.00. As contractually required, the Abilis obtained a mortgage from Chesapeake Mortgage within five days of signing the agreement, Chesapeake is a mortgagee which was recommended to them by Gemcraft employees or agents. They decided to terminate their relationship with Chesapeake, however, contending there was an apparent lack of good faith in providing an accurate estimate of closing costs and burdensome document requests. They asked Gemcraft for a refund of their deposit as it had recommended Chesapeake. Gemcraft agreed to do so upon the receipt of a letter of decline from Chesapeake but which Chesapeake declined to provide.

Gemcraft terminated the sales contract stating that the Abilis did not have a mortgage contract and refused to refund the deposit. The house was then sold for \$37,860.00 more than the original contract price.

The Abilis claim that Gemcraft wrongfully retained the deposit, by claiming liquidated damages, even after selling the house for more than their original contract purchase price. They contend that Gemcraft's action were taken in bad faith since it knew that they had obtained a mortgage commitment as required in the purchase agreement. These are the same claims which it made in the earlier, now dismissed, action.

### *Procedural History*

The Abilis' first complaint, filed against only Gemcraft, was filed on or about July 9, 2004,<sup>1</sup> asserted that Gemcraft wrongfully terminated the sales contract and refused to return the deposit. Gemcraft answered the complaint on September 10, 2004. The parties stipulated to the appointment of an arbitrator in December, 2004. There was no further action in the case. As a result of no action in the case, on or about October 25, 2005, under Superior Court Civil Rule 41(e), the Court issued to the Abilis a rule to show cause why the complaint should not be dismissed. When neither the Abilis nor their counsel appeared or otherwise did anything, the Court issued an order under Rule 41(e) dismissing the complaint on November 7, 2005. The dismissal order does not expressly say with or without prejudice.

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<sup>1</sup> 04C-07-065-CHT

On December 2, 2005, the Abilis filed the second complaint, this action, restating the same allegations against Gemcraft as in the first complaint but adding Chesapeake as co-defendant. They argue that Chesapeake's breach of contract and lack of good faith resulted in their inability to proceed with the purchase of 17 Spring Creek Drive. They ask the Court to award judgement against both Gemcraft and Chesapeake jointly and severally in the amount of \$48,860.00 with attorney's fees, punitive damages, pre-judgment and post-judgment interest, costs and such other and future relief as the Court deems just and equitable.

Gemcraft filed its motion to dismiss on January 9, 2006. The Abilis filed a response in opposition. Oral argument was held on March 15, 2006. Both sides addressed the fact that the time frame between the issuance of the rule to show cause and the date of dismissal was not in strict conformity with the times in Rule 41(e). The Abilis acknowledged, as a result, that they should have moved to reconsider the dismissal.

The Court on March 21st sent a letter to counsel noting that the dismissal in the earlier case had occurred in less than the 15 days between the notice and dismissal required by Rule 41(e). The letter is phrased to suggest a motion to vacate the earlier 41(e) dismissal might be an avenue to pursue. Gemcraft, of course, indicated it would oppose any such motion. To date no such motion has been filed in that action.

### *Applicable Standard*

In evaluating a Motion to Dismiss under Superior Court Civil Rule 12(b)(6), the

Court must assume all well pleaded facts in the complaint to be true.<sup>2</sup> A complaint will not be dismissed unless the plaintiff would not be entitled to recover under any reasonably set of circumstances susceptible of proof.<sup>3</sup> A complaint may not be dismissed unless it is clearly without merit, which may be a matter of law or fact.<sup>4</sup>

### *Discussion*

The Abilis' allegations against Gemcraft in this second lawsuit are the same as those they made in their earlier claim against Gemcraft alone. As noted, the difference in the two cases is the addition to this case of Chesapeake Mortgage, and the allegations made against it. The sufficiency of those allegations are not the issue in this motion to dismiss.

This Court has held that a dismissal under Rule 41(e) is with prejudice, or, in effect, is an adjudication on the merits.<sup>5</sup> This Court's order on November 7, 2005 dismissing the Abilis' earlier case, under the terms of Civil Rule 41(e), therefore, was with prejudice and an adjudication on the merits. It was an adjudication of the same allegations the Abilis have made in this current case.

They seek to avoid that result by attacking the validity of the prior dismissal order. Their attack, of course, is premised on the Court's failure, in that earlier matter, to adhere

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<sup>2</sup> *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

<sup>3</sup> *Nix v. Sawyer*, 466 A.2d 407, 410 ( Del. Super. 1983).

<sup>4</sup> *Diamond State Tel. Co. v. University of Del.*, 269 A.2d 52 (Del. 1970).

<sup>5</sup> *Nyce v. Stella*, 1996 WL 944887 (Del. Super.); *Wilmington Trust Co. v. Connors*, 1997 WL 127957 (Del. Super.).

to the 15 day provision. That provision requires or allows the party to whom the rule to show cause is sent to have 15 days to respond to the rule.

But the Abilis are attacking in this proceeding the order in a separate proceeding. It is, therefore, a collateral attack. Also, assuming a defect in the earlier dismissal process, it, at most, might make the dismissal voidable but not void:

As a general rule, judgments rendered by a court having jurisdiction of the parties and subject matter may not be attacked as invalid in any collateral proceeding. Collateral attack is allowed only where the judgment is void, a void judgment being a judgment rendered without jurisdiction. If a judgment is merely voidable because of some other type of defect, its validity may not be impeached in a collateral proceeding. 49 *C.J.S.*, “Judgments”, § 401.<sup>6</sup>

On that basis, too, the Abilis’ matter against Gemcraft in this action cannot proceed.

### *Conclusion*

For the reasons stated herein, the motion of defendant Gemcraft Homes Delaware, Inc., is GRANTED.

**IT IS SO ORDERED.**

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J.

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<sup>6</sup> *State v. Kamalski*, 429 A.2d 1315, 1320 (Del. Super. 1981).