SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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October 21, 2014

Stephen A. Spence, Esquire
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1200 N. Bloom Street
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Mr. John E. O'Brien
487 Brookfield Drive
Dover, DE 19904

RE: *Bank of Delmarva v. South Shore Ventures, LLC*
C.A. No. S13C-05-008 THG

Dear Parties:

This is yet another casualty of the boom-bust real estate economy of the last several years. Before the Court is the Bank of Delmarva's ("Bank") motion for summary judgment as to all of Defendant John E. O'Brien's ("Defendant") counterclaims. Defendant alleges Bank breached fiduciary duties owed to Defendant by failing to notify Defendant of its submission of a claim under Bank's title insurance policy regarding a defect in the property's title. Defendant also claims Bank breached the implied covenant of good faith and fair dealing by failing to inform Defendant of Bank's insurance claim. Lastly, Defendant asserts Bank was negligent because it failed to select a competent appraiser and improperly reviewed and verified the information contained in the appraisal of the property.[1] For the following reasons, Bank's motion for summary judgment is **GRANTED**.

[1] It should be noted Defendant's final counterclaim as to indemnification is moot as Defendant concedes it is without merit.

Facts

In 2005, Defendant, along with South Shore Ventures, LLC ("Shore") and Clayton Evans ("Evans) (collectively, "the Defendants") sought financing from Bank for a development project for property located in Greenwood, Delaware; the project was known as "The Cove." Defendants executed a bond in favor of Bank in the amount of $500,000, the original principal amount. Defendants also took out a title insurance policy in favor of Bank from Old Republic Title Insurance Company, as per the loan agreement. Bank and the Defendants began negotiating modifications to the loan agreement in 2010, but due to several discrepancies with the property's title, the modifications never were executed. The Defendants ultimately defaulted on their obligations under the loan agreement.

Procedural History

On May 13, 2013, Bank filed an action for breach of a promissory note against Shore, Defendant, and Evans. Bank amended its complaint, and default judgment was entered against Evans.Shore and Defendant answered Bank's amended complaint and asserted counterclaims. Bank then moved for summary judgment on its claims against Shore and Defendant, which this Court granted. Shore failed to prosecute its counterclaims and its defense counsel moved to withdraw from representation. The Court permitted the withdrawal only if Shore obtained new counsel. When Shore failed to obtain new counsel, the Court dismissed its counterclaims with prejudice. Bank now moves for summary judgment against Defendant's counterclaims.

Standard of Review

This Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[2] However, a motion for summary judgment should not be granted when material issues of fact are in dispute or if the record lacks the information necessary to determine the application of the law to the facts.[3] A dispute about a material fact is genuine "when the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[4] Therefore, the issue is "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law."[5]

Although the moving party for summary judgment initially bears the burden of demonstrating that the undisputed facts support his legal claims, once the movant makes this showing, the burden "shifts" to the non-moving party to demonstrate there are material issues of fact for resolution by the ultimate fact-finder.[6] When considering a motion for summary judgment, the Court must view the

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[2] Super. Ct. Civ. R. 56(c).

[3] *Bernal v. Feliciano*, 2013 WL 1871756, at *2 (Del. Super. May 1, 2013) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 468 (Del. 1986).

[4] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986).

[5] *Id.*

[6] *Hughes ex rel. Hughes v. Christina Sch. Dist.*, 2008 WL 73710, at *2 (Del. Super. Jan. 7, 2008) (citing *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005)).

evidence in the light most favorable to the nonmovant.[7]

Discussion

Counterclaim I: Breach of Fiduciary Duty

A fiduciary relationship is formed when one person bestows a special trust in another or where a special duty exists on the part of one person to protect the interests of another.[8] The relationship connotes one party's trust, reliance, and dependancy on another.[9] While Delaware case law has recognized that certain aspects of a commercial relationship implicate fiduciary duties between the parties, the mere existence of a commercial relationship does not mean a party owes such obligations.[10]

In Delaware, the Court of Chancery has exclusive jurisdiction to adjudicate claims for breach of a fiduciary duty.[11] Chancery maintains jurisdiction over such claims because equity, not law, is the source of the asserted right.[12] In *Reybold Venture Group XI-A, LLC v. Atl. Meridian Crossing, LLC*, plaintiff claimed it was entitled to $1,500,000 in deposits tendered by defendant under

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[7] *Joseph v. Jamesway Corp.*, 1997 WL 524126, at *1 (Del. Super. July 9, 1997) (citing *Billops v. Magness Const. Co.*, 391 A.2d 196, 197 (Del. Super. 1978)).

[8] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2010).

[9] *Prestancia Management Group, Inc. v. Virginia Heritage Foundation, II, LLC*, 2005 WL 1364616, at *6 (May 27, 2005).

[10] *Id.* ("[W]hile some cases in Delaware have found certain aspects of a commercial relationship implicate fiduciary duties, these cases should not be read so broadly as to engulf in fiduciary duties ordinary commercial relationships." *citing Wal-Mart Stores, Inc. v. AIG Life Insurance Co.*, 872 A.2d 611, 625 (Del. Ch. 2005)).

[11] *Reybold Venture Group XI-A, LLC v. Atl. Meridian Crossing, LLC*, 2009 WL 143107, at *2 (Del. Super. Jan. 20, 2009).

[12] *Id.*

contracts for the purchase of two residential communities.[13] Defendant counterclaimed it was entitled to a refund of those deposits because it was excused from closing due to plaintiff's breach of fiduciary duties.[14] As with Defendant's counterclaim in the instant case, defendant in *Reybold* argued that because it was only seeking monetary damages, a legal remedy, Superior Court had jurisdiction to hear the dispute.[15] Superior Court refused to exercise jurisdiction, finding that Delaware case law clearly established that a breach of a fiduciary duty is an equitable cause of action and Chancery Court has exclusive jurisdiction over such claims, regardless of the remedy sought.[16]

If a fiduciary relationship was formed between Bank and Defendant regarding the loan agreement and insurance policy, this Court is unable to entertain Defendant's claim. Summary judgment is appropriate as to Defendant's first counterclaim because the Court lacks subject matter jurisdiction. Violations of fiduciary relationships are purely equitable causes of actions, even if the only remedy sought is one of damages. The Court thus cannot exercise jurisdiction. As such, Bank is entitled to judgment as a matter of law.

Counterclaim II: Bad Faith

A promissory note is a variety of contract.[17] The covenant of good faith and fair dealing is implied in every contract and is interpreted to apply in a variety of scenarios.[18] The term "good

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[13] *Id.* at 1.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 3.

[17] *Beal Bank, SSB v. Lucks*, 791 A.2d 752, fn 13 (Del. Ch. 2000).

[18] *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("The covenant is 'best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments

faith" has no set meaning, acting to exclude a wide range of heterogeneous forms of bad faith with regard to parties carrying out their obligations under a contract.[19] However, the covenant cannot be used to circumvent the parties' bargain and does not create a "free-floating duty," unattached to the underlying legal document.[20] As such, an actual contract must exist and the contract cannot specifically address the complained of conduct in order for the doctrine to apply.

The covenant requires a party to a contract to "refrain from arbitrary or unreasonable actions which prevent the other party from receiving the fruits of the bargain."[21] Parties breach the covenant when their conduct frustrates the ultimate purpose of the contract by taking advantage of their position to control implementation of the contract's terms.[22]

Despite its presence in every contract, the implied covenant is rarely used to prescribe or proscribe additional obligations of the parties, and will only occur after a fact-intensive evaluation, dictated by "fairness," is conducted.[23] Thus, the doctrine only will be used when it is "clear from the [contract] that the contracting parties 'would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to the matter.'"[24]

Defendant argues Bank violated the implied covenant of good faith and fair dealing when it

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or to fill gaps in the contract's provisions.").

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

submitted its title insurance claim and did not inform Defendant, preventing him from being involved in the prosecution of the claim. The Bank of Delmarva Commitment Letter for South Shore, LLC, specifically states "[t]he Borrower must provide [Bank]'s coverage title insurance in the minimum amount of $500,000.00 at settlement."[25] This clause indicates that in order for Defendant and Shore to have obtained a loan from Bank, they had to take out an insurance policy and name Bank as an intended beneficiary.[26] As such, Bank did not need to inform Defendant of its intent to seek a claim under the insurance policy, since it could enforce the insurance contract against Old Republic Title Insurance Company without involving Defendant. Therefore, there was no violation of the implied covenant of good faith and fair dealing.

Assuming, *arguendo*, that Defendant's bad faith claim held merit, summary judgment is still appropriate because the counterclaim was filed outside the statute of limitations. In Delaware, claims of breach of contract are subject to a three year statute of limitations.[27] For breach of contract claims, accrual of the statute of limitations begins to run as of the date of the breach, absent tolling.[28] The cause of action begins to accrue at the time of the alleged breach, regardless of whether the plaintiff is aware of the potential claim.[29]

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[25] Bank's Complaint, Exhibit F.

[26] "[A] third-party may recover on a contract made for his benefit. However, in order for there to be a third-party beneficiary, the contracting parties must intend to confer a benefit. Where it is the intention of the promisee to secure a performance for the benefit of another, either as a gift or in satisfaction of an obligation to that person . . . then such a third person has the right to enforce the contract against the promisor." *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 534 (Del. Super. 1990).

[27] 10 *Del. C.* §8106.

[28] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *5 (Del. Ch., Jan. 24, 2005).

[29] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998).

On June 7, 2010, Bank asserted a title claim against Old Republic Title Insurance Company with regard to "The Cove" property. Defendant alleges that this claim breached a contractual obligation stated in the loan agreement because Bank failed to notify the Defendants of its insurance claim, preventing the Defendants from taking part in the litigation. If such a breach occurred, it occurred on June 7, 2010, meaning Defendant had three years from that date to file his breach of contract claim. Defendant, however, did not file this cause of action until July 31, 2013, three years, one month, and 24 days after the breach occurred and time accrued. As such, Defendant's second claim is time barred under 10 *Del. C.* §8106.

Counterclaim III: Negligence

In Delaware, claims of negligence are subject to a three year statute of limitations.[30] If a complaint alleging negligence is filed after the expiration of the three year statute of limitations, which typically begins to run on the date the alleged injurious act occurred,[31] it is time-barred and will not be entertained in court. However, the statute may be tolled under the "time of discovery rule" if the cause of action is inherently unknowable and the complainant is blamelessly ignorant of the cause of action.[32] For the doctrine to apply, a complainant must prove there were no observable or objective factors to alert him of the injury, and that he was "blamelessly ignorant" of the tortious conduct.[33] Thus, the statute of limitations will not begin to run until the victim discovered or should

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[30] 10 *Del. C.* §8106.

[31] *See Coleman v. PriceWaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004); *Lee v. Linmere Homes, Inc*, 2008 WL 4444552, at *3 (Del. Super. Oct. 1, 2008).

[32] *Lee*, 2008 WL 4444552 at *3.

[33] *Id.*

have discovered the alleged wrong.[34]

Defendant argues the time of discovery rule is appropriate as to his negligence counterclaim because he "was not aware of the negligence of [Bank] as to the appraisal as [Defendant] was never provided a copy of the appraisal in 2005" and "only became aware of this issue when [Bank] filed suit in May 2013."[35] However, the time of discovery rule does not only require the complainant be unaware of the injury it sustained, but also "blamelessly ignorant" of the injury. There is no evidence in the record showing Defendant was blamelessly ignorant. The Pretrial Stipulation and Order states Bank hired an appraiser to complete an appraisal of the property and that Defendant was the closing agent[36] that issued Bank a title binder and title policy. Defendant was the owner of the property, was the closing agent that sold Bank the title insurance, and at the time of the alleged tort, was a Delaware barred attorney. This indicates Defendant knew of the importance of an accurate appraisal of the property and therefore was aware or should have been aware of the injury caused by the "negligent" appraisal back in 2005. Thus Defendant cannot claim he was "blamelessly ignorant" of Bank's alleged negligence.

Conclusion

For the reasons stated above, Bank is entitled to summary judgment as to each of Defendant's counterclaims. There is no genuine dispute as to the facts of the case, and: (1) this Court cannot hear disputes regarding fiduciary duties; (2) Bank was a third party beneficiary of a title insurance policy

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[34] *Hodges v. Smith*, 517 A.2d 299, 300 (Del. Super. 1986).

[35] Defendant's Answer (hereinafter "DA").

[36] Defendant was an agent for Old Republic Title Insurance Company, and was the very agent that issued the insurance policy to Bank.

and did not act in bad faith by failing to notify Defendant that it made a claim to Old Republic Title Insurance Company; and (3) Defendant is time barred as to his negligence claim because he failed to raise the claim within Delaware's statute of limitations. Bank's motion for summary judgment is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves