

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

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Re: *Prestipino v. Balthaser General Contracting, Inc. and Jeffrey A. Balthaser v. Mid South Building Supply of Maryland and Bay Country Builders*<sup>1</sup>  
C.A. No. 99C-10-004-RFS

Submitted: August 13, 2002  
Decided: November 27, 2002

Dear Counsel:

This is the Court's decision on the plaintiffs' Motion for Summary Judgment on breach of contract, breach of express warranty, breach of warranty of good quality and workmanship, and Consumer Fraud claims. For the reasons set forth herein, plaintiffs' Motion for Summary Judgment is denied.

**FACTUAL BACKGROUND**

Plaintiffs Steve Prestipino and Lisa Prestipino (the "Prestipinos") entered into a construction contract with defendant Balthaser General Contracting, Inc. ("BGCI")<sup>2</sup> on September 14, 1998. Pursuant to this contract, BGCI agreed to construct a new three-story

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<sup>1</sup>The third-party defendants are not included in this motion for summary judgment. A judgment has been entered against Mid South Building Supply for failure to appear in accordance with the rules of this Court. Bay Country Builders has not received notice of this lawsuit.

<sup>2</sup>Defendant Jeffrey Balthaser owns BGCI.

home, according to plans provided by G.A. Hastings & Associates<sup>3</sup>, for the Prestipinos at 28 Black Duck Reach, The Glade, Rehoboth Beach, Delaware (the “Residence”). The contract between BGCi and the Prestipinos contained a warranty providing:

Workmanship has a ten year limited guarantee . . . We guarantee all material used in this contract to be as specified above and the entire job done in a neat, workmanlike manner. Any variations from plan or alterations requiring extra labor or material will be performed only upon written order and billed in addition to the sum covered by the contract.

The Prestipinos agreed to pay \$229,712.19 to BGCi for construction of the Residence.

The Prestipinos claim that the Residence was not constructed according to the contract or construction industry standards. BGCi admits that flaws with the Residence’s construction exist, however, it argues that certain defects are attributable to the Prestipinos’ inability to fund the project completely.

The Prestipinos hired two home inspection companies to examine the Residence to determine whether the structure adhered to the contract and industry standards. The reports of American Home Inspections (“AHI Report”) and Robert A. Chagnon, P.E. (“Chagnon Report”) describe numerous faults with the Residence’s construction.<sup>4</sup> BGCi’s expert, Harry Archinal, R.A. (“Archinal”), also inspected the property. Archinal’s report refutes many of the Prestipinos’ claims of improper construction. According to Archinal, some deficiencies alleged by the Prestipinos were industry-accepted substitutions and/or not BGCi’s responsibility under the construction contract.

The Prestipinos brought suit against BGCi for breach of contract, breach of express warranty, breach of warranty of good faith and workmanship, negligent construction, Consumer Fraud and common law fraud. Additionally, the Prestipinos allege that Jeffrey Balthaser, as

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<sup>3</sup>BGCi contends that the Prestipinos did not supply all of the plans.

<sup>4</sup>The Prestipinos and the AHI and Chagnon reports allege: the concrete footing below the center steel column carrying the steel I-beam, the concrete footings below the sundeck, the masonry piers below the main girders, and the piers below the sundeck do not comply with the Foundation Plan; the rear foundation does not comply with the Foundation Plan or Typical Wall Section; the rear foundation is not parged which does not comply with the Rear Elevation or Typical Wall Section; the trim, decking boards, porch wood finish, sky lights, decking membrane, doors, vinyl siding and soffit, garage doors, windows, deck, and sink counter were not installed in a workmanlike manner; the framing and stairs are not in compliance with the plans or industry standard; the rear deck’s notching, the joists, the beams supporting the steel-I beam, and metal roof’s installation were not completed according to plans; and tree stumps were not removed as required by the contract.

owner of BGCI, is liable for the fraud claims.<sup>5</sup> The Prestipinos believe that the cost of repairing the Residence alone is approximately \$173,393.00. They request summary judgment on the contract claims in the amount of \$196,414.20, together with an award of \$392,828.42, under the Consumer Fraud Act.

### DISCUSSION

Summary judgment may be granted only when material issues of fact do not 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, 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 Super. Ct. Civ. R. 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(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S. Ct. 1946 (1992); *Celotex Corp. v. Catrett*, *supra*. If, however, 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).

The Prestipinos allege numerous deficiencies with the Residence's construction, ranging from structural integrity problems to a counter top with unfilled edges. Through its own admissions and an expert's report, BGCI agrees that defects in the Residence's construction exist. BGCI has not conceded liability for all of the Residence's alleged flaws. For example, BGCI's witness Archinal alleges BGCI was not privy to all of the construction plans originally provided to the Prestipinos. Furthermore, Archinal adds that the Residence's plans were not professionally drawn. Summary judgment under Super. Ct. Civ. R. 56(a) is not appropriate at this time since questions of fact remain between the experts. Their credibility *vel non* is a jury function, not the Court's. *See Rose v. Davis*, Del. Super., C.A. No. 77C-OC-114, Bifferato, J. (May 31, 1979). The issue of the competency of BGCI's expert, should be decided through a motion *in limine* at trial.

Because Defendant admits several defects in the Residence's construction, partial summary judgment under Rule 56(d) can be considered. According to Super. Ct. R. 56(d), the Court may partially grant a motion for summary judgment under proper circumstances. This Rule directs the Court to "if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually, and in good faith, controverted." Partial summary judgment "empowers the court to withdraw sham issues from the case and to specify those facts that really cannot be controverted." 10B Charles Alan Wright, et al, *Federal Practice*

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<sup>5</sup>The motion for summary judgment seeks recovery on the breach of contract, breach of warranty and Consumer Fraud claims.

*and Procedure* § 2737 (3rd ed. 1998).

However, a court may deny partial summary judgment, even when otherwise appropriate, if “entering a partial summary judgment by identifying the facts that no longer may be disputed would not materially expedite the adjudication.” *Id.* (citation omitted). Multiple claims and counterclaims may be too complicated for partial summary judgment purposes and best left for a fully developed trial record. *See Murphy v. Berlin Const. Co.*, Del. Super., C.A. No. 98C-01-097, Quillen, J. (Jan. 22, 1999), at 8. When the presentation of a case requires uncontroverted facts to be introduced at trial, even if partial summary judgment could be granted, the court may refuse to grant it. The Court has this discretion because partial summary judgment “would neither remove ‘sham issues’ nor ‘limit the scope of the trial.’” *Meschino v. Int’l Telephone and Telegraph Corp.*, 563 F. Supp. 1066, 1073 (S.D.N.Y. 1983).

Moreover, in *Meschino*, the court found that presentation of the case would “be less confusing for the jury if these facts are established at trial in the normal presentation of evidence by both sides.” *Id.* Accordingly, partial summary judgment should be denied when “a part of the matter which is ripe for summary judgment is intertwined with additional claims that must be decided at trial.” *Toyoshima Corp. of Cal. v. General Footwear, Inc.*, 88 F.R.D. 559, 560 (S.D.N.Y. 1980); *see also Berman v. Royal Knitting Mills, Inc.*, 86 F.R.D. 124, 125 (S.D.N.Y. 1980). Denial of a motion for partial summary judgment was appropriate where “a considerable expenditure of judicial time and effort will be required ‘to sift out and piece together the undisputed facts essential to a summary judgment.’” *Id.* (citing *Perma Research & Dev. Co. v. Singer Co.*, 308 F. Supp. 743, 750 (S.D.N.Y. 1970)). In *Toyoshima*, the plaintiff alleged that uncontested facts in the case amounted to fifteen written pages consisting of ninety paragraphs. The defendant agreed that some facts were uncontested, but argued that genuine issues of fact existed in thirty-eight of the ninety paragraphs.

This case presents a Gordian knot that can only be severed by trial. Witnesses for the Prestipinos, BGCI, and Balthaser agree that elements of the Residence were improperly constructed. In this regard, the Prestipinos assert that 22 of 34 defects are established. Yet the various problems for breach of warranty and contract claims are intertwined and difficult to separate. Furthermore, the allegations of improper construction fit together like pieces of a puzzle that are inseparable for liability in the various claims.<sup>6</sup> It is also problematical to effectively enter a piecemeal judgment on two-thirds of any claims especially where the calculation of damages is not a ministerial function. In other words, it simply may not be a final judgment. *See Capitol Records, Inc. v. Progress Record Distrib.*, 106 F.R.D. 25, 28-30 (N.D. Ill. 1985). To facilitate a jury’s understanding of the situation, the parties will be required to provide a full explanation of alleged defects.

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<sup>6</sup>*Antenor v. D & S Farms*, 39 F. Supp. 2d 1372, 1375 n. 4 (S.D. Fla. 1999) (“The Court notes that it may not enter summary judgment on a portion of a claim.”); *New Jersey Auto. Ins. Plan v. Sciarra*, 103 F. Supp. 2d 388, 396 (D.N.J. 1998) (“Nothing in [Rule 56] can be read to allow partial summary judgment on only one portion of a claim.”).

For similar reasons, summary judgment is not appropriate on the Consumer Fraud count. The skill of BGCI and Balthaser to construct custom homes is a disputed factual question. The Prestipinos' level of sophistication, knowledge, and potential contribution to the problem, of possibly supplying incomplete plans to the builder, also requires clarification.

Considering the foregoing, the Prestipinos' Motion for Summary Judgment is ***DENIED.***  
***IT IS SO ORDERED.***

Very truly yours,

Richard F. Stokes

cc: Prothonotary