IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JOHN ELLIXSON and GRETCHEN ELLIXSON, Plaintiffs,	: :	**C.A. No. 01-09-101**
vs.	:	
GARY O'SHEA AND LYNN O'SHEA, Husband and Wife, AND TIMOTHY O'SHEA, Defendants.	 : :	

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DECISION AFTER TRIAL
Decided: November 20, 2003

Kenneth S. Clark, Jr., Judge

This is an action for construction damages filed by the purchasers of a new home against the builders and sellers of the home. After review of the testimony and evidence presented at trial, the Court finds and determines as follows.

FACTS

John and Gretchen Ellixson ("Plaintiffs") entered into a real estate sales agreement with builders Gary O'Shea, Lynn O'Shea, and Timothy O'Shea ("Defendants") on March 14, 2000. The Plaintiffs agreed to buy a house from Defendants at a price of $450,000. The house is

located at 811 S. Schultz Road, Fenwick Island, Delaware. The house was under construction by Defendants at the time the sales contract was signed. Settlement was to occur after completion of construction. An addendum to the standard-form residential sales contract provided, *inter alia*, the following: "Purchasers have the right to final inspection prior to settlement." "Seller to provide a new construction disclosure." "Builder to provide a one year builder warranty." Sellers did not provide a new construction disclosure, or a separate one-year builder warranty document, to Plaintiffs. Final settlement and transfer of possession occurred on June 17, 2000.

Plaintiffs allege that there were several defects in the house's construction and that they contacted Defendants on numerous occasions demanding the repair of the defects. Plaintiffs created a "punch list" of the items requiring repair and forwarded the list to the Defendants. Defendants have not repaired any of the items on Plaintiffs' list. In addition to the items on the punch list, Plaintiffs also allege that Defendants failed to install "riprap" along the canal portion of the property, and that such is required by Fenwick Island town ordinance. Plaintiffs allege that the total cost of repair, replacement and completion of work is $11,493.02.

Plaintiffs allege Defendants: 1) breached the implied warranty of good quality and workmanship; 2) breached an express one-year warranty within the sales agreement; 3) violated the Buyer Protection Act of 6 *Del. C.* § 2572; and 4) breached the contract of sale.

DISCUSSION

The terms of the contract obligated Defendants to provide Plaintiffs with a completed house in exchange for the purchase price. Plaintiffs allege that the house was not properly completed because the house contained several defects. Defendants did not address those defects. Therefore, according to Plaintiffs, Defendants breached the terms of the contract.

Plaintiffs assert that Defendants breached the contract, express and implied warranties contained therein, and the provisions of the Delaware Buyer Protection Act, 6 Del. C. § 2572. However, as to the Buyer Protection Act claim, Plaintiffs must prove that Defendants knew about the defects either at the time of sale or prior to settlement. *See Osciak v. Coppol,* 1998 WL 1557482 at * 3 (Del. Com. Pl.). Plaintiffs offered no evidence that Defendants were aware of the defects before settlement, and that claim therefore is dismissed.

Defendants seek to rely on the doctrine of merger to refute Plaintiffs' remaining contract and warranty claims. They argue that once settlement is complete and the deed is delivered and accepted the terms of the sales contract are no longer actionable. I disagree. The merger doctrine is only applicable to "questions of title, quantity, and land use." *Clarke v. Quist,* 560 A.2d 489 (Table) (Del. 1989) *citing Allied Builders, Inc. v. Heffron,* 397 A.2d 550, 552-553 (Del. 1979). This is especially true with new construction as is the case here. "When a newly constructed house is conveyed with the land, the agreement as to the house is considered collateral and not part of the covenants extinguished by the deed." *George v. Kuschwa,* 1986 WL 6588 at * 4 (Del. Super. Ct.) *citing Re v. Magness Construction Co.,* 117 A.2d 78 (Del. Super. Ct. 1955). Therefore, I find that the merger doctrine has no relevance to this dispute and the terms and warranties within the sales agreement are binding.

Whenever a residential home is sold in Delaware by a person in the business of selling homes, there exists an implied warranty of good quality and workmanship. *Smith v. Berwin Builders,* 287 A.2d 693, 695 (Del. Super. Ct. 1972) *citing Bye v. McCaulley & Son,* 76 A. 621 (Del. Super. Ct. 1908). Defendants in this case are builder-vendors. In Delaware, builder-vendors are said to impliedly warrant that their houses are built "in a workmanlike manner" and are "fit for habitation." *George v. Kuschwa,* 1986 WL 6588 at * 3 (Del. Super. Ct.) *citing e.g.,*

Krol v. York Terrace Building, Inc., 370 A.2d 589 (Md. Ct. Spec. App. 1977). I find by a preponderance of the evidence that Defendants were in the business of building and selling homes, particularly the one sold to Plaintiffs. Consequently, Defendants' work is covered by the implied warranty of good quality and workmanship.

Even if the Defendants were not bound by the implied warranty, Defendants promised in the sales contract to "provide a one year builder warranty." Defendants did not provide a separate warranty document or policy. Whether or not Defendants actually supplied Plaintiffs with a warranty document, however, is not determinative. When there is a written contract, the plain language of a contract will be given its plain meaning. *Phillips Home Builders v. The Travelers Ins. Co*., 700 A.2d 127, 129 (Del. Supr. 1997). The addendum statement is an express promise by Defendants to warrant the construction, as builders, for a period of one year. In not providing a written, detailed warranty document, Defendants did not leave Plaintiffs without a warranty, they only failed to limit or condition the terms of the express warranty granted to Plaintiffs. I find that Plaintiffs made Defendants aware of the alleged defects within the warranty period.

In determining whether a contract is in breach, the Court must look within the contract, including addendums, to make that determination. The Court is not permitted to consider outside evidence to interpret the intention of the parties unless the contract is ambiguous. *ISTI Delaware Inc. v. Townsend,* 1993 WL 189467 at *3 (Del. Super. Ct.) *citing Citadel Holding Corp. v. Roven,* 603 A.2d 818, 822 (Del. 1992); *Pellaton v. Bank of New York,* 592 A.2d 473, 478 (Del. 1991). The contract obligated Defendants to provide Plaintiffs with a completed house, and to warrant the workmanship of the house. I find that Defendants breached the contract, and both the express and implied warranties, in conveying a house with several significant construction

defects detailed below, and failing to cure those defects upon notice by Plaintiffs. The breaching defects were the result of Defendant's failure to build the house in a workmanlike manner.

Defects and Damages

Plaintiffs presented into evidence a "punch list" of damages. While some of the items on this list were shown to be the result of Defendants' breach, the Court is not convinced that other items sought resulted from the breach or are encompassed within the terms of the contract. The Court will not award damages regarding items that have not been adequately proven on the record by a preponderance of the evidence. Plaintiffs provided two estimates for most of the punch list items, and Defendants provided an estimate as well. Of the experts presented by both parties, the Court finds Plaintiffs' experts to be generally more credible. The Court accepts the average of Plaintiffs' estimates for most of the items. As to the carpeting, I find the Plaintiffs' expert more credible than Defendants' expert. Defendants improperly installed the carpeting, according to Plaintiffs' expert, and it requires replacement, not repair. However, Plaintiffs have not replaced the carpet, and have continued to use, and thus received some benefit from, the defective carpeting for the past three years. Thus, the Court will reduce the carpeting award by thirty percent, based upon the evidence in the record of a ten-year carpet warranty life. The Court finds the following damages proven by a preponderance of the evidence in the amounts specified:

1) Carpeting – $6,697.40, less 30% = $4,688.18
2) Foundation cracks - $334.89
3) Water faucets reversed - $150.00
4) Garage Ceiling & ductwork insulation- $1,100.00
5) Air conditioning support - $215.00
6) Deck door - $135.00
7) Second floor deck - $157.00
8) Patch and paint wall - $385.23

TOTAL	**$7,165.30**

The terms of the contract do not require the builder to provide guttering, nor did Plaintiffs establish that applicable building codes require guttering, or that a lack of guttering would prevent the house from meeting the minimum standards for receiving a certificate of occupancy.

Although the contract calls for "landscaping," it does not specifically require sodding or additional topsoil. Defendants provided seeding of the property. I find that Plaintiffs' problems with the results of the seeding were not a construction defect, or due to any failure on the part of Defendants.

Plaintiffs failed to establish that the local ordinance required the owners of the bayside property to have riprap installed. Plaintiffs also failed to establish that they were actually the owners of the property upon which they installed riprap.

The Court will not award damages for the remaining following items on the punch list because the evidence in the record is insufficient to determine that these items were in fact defective, or that Defendants were responsible for the alleged deficiencies:

1) Fireplace fan
2) Tub/whirlpool
3) Bathroom fixtures
4) Towel racks
5) Phone jacks
6) Dryer vent
7) Garage door opener
8) Door treads
9) Bathtub

Finally, Plaintiffs seek an award of attorneys' fees and court costs, including Plaintiff's expert witness fees of $415.00. Paragraph 15 of the parties' sales contract provides, in part, "in the event a dispute arises under this Contract between Seller(s) and Buyer(s) resulting in any litigation, Buyer(s) or Seller(s), whichever is unsuccessful, shall also be liable for the other parties' court costs and attorney's fees." Plaintiffs' Complaint sought $11,493.02 in damages. The testimony established that, both before and after filing suit, the parties disputed which alleged defects Defendants were obligated to remedy under the contract. The Court has found that some of the items claimed by Plaintiffs were not the result of Defendants' breach, or covered by an express or implied warranty. The parties have each partially prevailed in their respective claims and defenses. Therefore, the Court declines to award court costs and attorneys' fees.

CONCLUSION

Defendants breached the sales contract and both the implied warranty of good quality and workmanship and the express warranty contained in the contract addendum. Plaintiffs have proven damages resulting from the breach in the amount of $7,165.30, and judgment is entered in favor of the Plaintiffs and against each defendant in that amount. The parties shall bear their own respective costs of suit and attorneys' fees.

IT IS SO ORDERED.

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Kenneth S. Clark, Jr.
Judge