

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND  
FOR NEW CASTLE COUNTY

**WILLIAM ASHE, JR., and** )  
**CHERYL ASHE, Husband and Wife,** )

Plaintiffs, )

v. )

**BLenheim HOMES, L.P.,** )  
**a Delaware Limited Partnership, and** )  
**BLenheim BRENNAN, L.L.C.,** )  
**A Delaware Limited Liability Company,** )

Defendants. )

**C. A. No.: 06C-07-204 (CLS)**

*Upon Consideration of Defendants' Motion to Dismiss*

**GRANTED without prejudice as to Husband  
and**

**GRANTED with prejudice as to Wife.**

**ORDER**

George H. Seitz, III and Kevin A. Guerke, Esquires, Seitz, Van Ogtrop &  
Green, P.A., Wilmington, Delaware, Attorneys for Plaintiff.

Jeffrey M. Weiner, Esquire, Wilmington, Delaware, Attorney for  
Defendants.

**SCOTT, J**

## INTRODUCTION

Before the Court is Defendants Blenheim Homes L.P. and Blenheim Brennan L.L.C.'s (Defendants) Motion to Dismiss the Complaint for failure to state a claim and for lack of subject matter jurisdiction. Plaintiffs William Ashe, Jr. ("Mr. Ashe") and Cheryl Ashe ("Mrs. Ashe") collectively filed the underlying Complaint as husband and wife. Plaintiffs' claims generally arise from a land sale and construction contract with Defendants. This contract only bears the signature of Plaintiff Mr. Ashe.

First, Defendants seek to dismiss Plaintiff Mrs. Ashe's Complaint because she is not a party to the contract at issue. The Court generally finds that Mrs. Ashe's claims arise from the contract. As such, Defendants' Motion to Dismiss is **GRANTED** with prejudice in regard to Plaintiff Mrs. Ashe.

In addition, Defendants seek to dismiss Plaintiff Mr. Ashe's claims pursuant to a binding arbitration clause in the contract. Because of this clause, the Court finds that it lacks subject matter jurisdiction. Plaintiff Mr. Ashe must first present his claims to an arbitrator. Defendants' Motion to Dismiss for lack of subject matter jurisdiction is, therefore, **GRANTED** without prejudice in regard to Plaintiff Mr. Ashe.

## FACTS

Defendants file this Motion to Dismiss in opposition to Plaintiffs' claims for breach of contract, negligent construction, negligent repair, negligent design and consumer fraud relating to water leaks and damage to their home. These claims arise from an Agreement of Sale signed by Plaintiff Mr. Ashe and Defendants to purchase land and a new structure known as 3 Aster Court, Lot 117, Brennan Estates, Bear, Delaware. Defendants executed and delivered the deed on February 20, 1998.

According to the July 26, 2006 Complaint, water has leaked at least eight times into the home in the front foyer/portico entrance area and family room area. Plaintiffs, therefore, contend that the home is "defective" because the "brick veneer, vinyl siding, roofs, flashing, sealing and design contribute to a structure that is neither weather-sealed nor water-proof..."<sup>1</sup> These defects result in water penetration and migration throughout the home that causes damage to the walls, structures, ceilings and floors.

Plaintiffs further allege that Defendants have attempted to correct and repair the problems numerous times, "including repairing the roof, replacing the windows, and repairing the exterior wall."<sup>2</sup> On each occasion,

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<sup>1</sup> Pl. Compl. ¶8.

<sup>2</sup> Pl. Compl. ¶10.

Defendants represented to Plaintiffs that the repairs would correct the foregoing problems, but the problems continued to cause damage.

Specifically, after relying on a representation by Defendants to have completely repaired a problem in late 2002, Plaintiffs installed Brazilian cherry wood hardwood floors throughout the front of the home. Another leak subsequently occurred in November 2003 destroying the new hardwood floor. According to Plaintiffs, Defendants replaced a portion of the floors in March 2004. Thereafter, Plaintiffs had another leak and must completely replace the floor again. On July 12, 2006, a significant amount of water also leaked into the home from a window in the family room.

Plaintiffs' claims arise from facts alleged in the July 26, 2006 Complaint as set forth above. First, Plaintiffs claim breach of contract because Defendants "failed to construct the Home in a workmanlike manner, which caused water leaks into the Home."<sup>3</sup> Second, Plaintiffs claim negligent construction because "Defendants owed Plaintiffs a duty to construct and deliver to Plaintiffs a Home that was built in a workmanlike manner, free of leaks and water penetration."<sup>4</sup> Third, Plaintiffs argue negligent repair, alleging that, "Defendants owed Plaintiffs a duty, and agreed to repair the problems with the Home that caused numerous water

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<sup>3</sup> Pl. Compl. ¶18.

<sup>4</sup> Pl. Compl. ¶22.

leaks in a workmanlike manner.”<sup>5</sup> Finally, Plaintiffs claim negligent design stating that, “Defendants owed Plaintiff a duty to design the Home in a professional and workmanlike manner, free of water leaks.”<sup>6</sup> Defendants’ breach of these duties has caused Plaintiffs to suffer damages “including loss of use, loss of value, property damage, and repair and cleaning costs.”<sup>7</sup>

On August 24, 2006, Defendants responded to these claims by electing to submit the contract dispute to arbitration pursuant to an arbitration provision in the Agreement of Sale. Defendants now ask the Court to dismiss Plaintiffs’ Complaint on grounds of failure to state a claim and lack of subject matter jurisdiction.

### **PARTIES’ CONTENTIONS**

In reference to Plaintiff Mrs. Ashe, Defendants contend failure to state a claim because she was not a party to the Agreement of Sale in contention. Plaintiffs respond to this contention by arguing that Mrs. Ashe’s claims do not arise from this agreement. As such, the “agreement does not bar her claims.”<sup>8</sup>

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<sup>5</sup> Pl. Compl. ¶26.

<sup>6</sup> Pl. Compl. ¶30.

<sup>7</sup> Pl. Compl. ¶24, 28, 32.

<sup>8</sup> Pl. Resp. to Def. Mot. to Dismiss ¶2.

As to Plaintiff Mr. Ashe, Defendants also contend failure to state a claim on two grounds. First, Defendants argue that, “The Limited Warranty, Representations and Disclaimer executed by Plaintiff (Mr.) Ashe, bars any claim for consequential damages.”<sup>9</sup> Second, Defendants specifically allege failure to state a claim against Defendant Blenheim Brennan because the Agreement of Sale provided that Plaintiff Mr. Ashe “shall have no claims, causes of action, rights or remedies against landowner, either before or after settlement, regardless of any alleged default or breach by seller...”<sup>10</sup> Finally, Defendants contend that this Court lacks subject matter jurisdiction over Plaintiff Mr. Ashe’s claims because the Agreement of Sale at issue demands binding arbitration for any claims arising from it. In response to this contention, Plaintiff argues that, “The Court has jurisdiction over all claims in the Complaint that are not subject to the arbitration provision.”<sup>11</sup>

### **STANDARD OF REVIEW**

In assessing the merits of a motion to dismiss for failure to state a claim pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded facts in the complaint are assumed to be true.<sup>12</sup> “A complaint[,] attacked by a

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<sup>9</sup> Def. Mot. to Dismiss ¶4.

<sup>10</sup> Def. Mot. to Dismiss ¶3 (quoting Agreement of Sale).

<sup>11</sup> Pl. Resp. to Def. Mot. to Dismiss ¶4.

<sup>12</sup> *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 169 (Del. 1976).

motion to dismiss for failure to state a claim[,] will not be dismissed unless it is clearly without merit, which may be either a matter of law or of fact.”<sup>13</sup>

Likewise, a complaint will not be dismissed for failure to state a claim unless “[i]t appears to a certainty that, under no set of facts which could be proved to support the claim asserted, would the plaintiff be entitled to relief.”<sup>14</sup> That is to say, the test for sufficiency is a broad one. It is measured by whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible to proof under the complaint.<sup>15</sup> If the plaintiff may recover, the motion must be denied.

Similarly, when a defendant who attacks a complaint for failure to state a claim upon which relief could be granted, and who moves to dismiss the complaint, offers affidavits, depositions, or other supporting documentation, in addition to pleadings, the motion will be considered a motion for summary judgment.<sup>16</sup> Here, the Defendants have relied upon other supporting documentation outside the pleadings by referring to the Agreement of Sale, the Construction addendum, the Limited Warranty, Representations and Disclaimer, the Application of Warranty Form and the

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<sup>13</sup> *Diamond State Telephone Co. v. University of Del.*, 269 A.2d 52, 58 (Del. 1970).

<sup>14</sup> *Id.*

<sup>15</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

<sup>16</sup> *Venables v. Smith*, 2003 WL 1903779 at \*2 (Del. Super.); *Shultz v. Delaware Trust Co.*, 360 A.2d 576, 578 (Del. Super. Ct. 1976).

Limited Warranty. Therefore, the motion will be considered a motion for summary judgment.

The Court's function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of fact exist.<sup>17</sup> Summary judgment will be granted if, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the party is entitled to judgment as a matter of law.<sup>18</sup> If, however, the record indicates there is a material fact in dispute, or if judgment as a matter of law is not appropriate, then summary judgment will not be granted.<sup>19</sup>

## DISCUSSION

### **I. Plaintiff Mr. Ashe Must First Submit His Claims to Arbitration**

Pursuant to 10 *Del. C.* §5701, this Court finds that it cannot review cases involving contracts which require arbitration.<sup>20</sup> Previous courts in

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<sup>17</sup> *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973). *See also* Super. Ct. Civ. R. 56.

<sup>18</sup> *Id.*

<sup>19</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

<sup>20</sup> 10 *Del. C.* §5701 reads in part:

A written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of the controversy, and confers jurisdiction on the Chancery Court of the State to enforce it and to enter judgment



Delaware have held that whether a plaintiff “is barred from arbitrating its claim” is an issue that must be decided in arbitration and not by the Superior Court.<sup>21</sup>

In *Tekmen & Co. v. Southern Builders Inc.*, the plaintiff filed a Complaint with the Delaware Superior Court in reference to problems arising from a contract for construction of a hotel.<sup>22</sup> The defendant responded by filing a motion to dismiss. In this motion, defendant claimed that the Court lacked subject matter jurisdiction because the plaintiff failed to initiate an action for arbitration as required by the contract.<sup>23</sup> The *Tekmen* Court granted the motion and found that an arbitrator must first decide whether the submitted claims are arbitrable before the Superior Court retains jurisdiction over them.<sup>24</sup> As such, the Court granted defendant’s motion to dismiss and dismissed the case without prejudice.<sup>25</sup>

The *Tekmen* Court based this decision on Delaware public policy regarding arbitration.<sup>26</sup> According to the Delaware Court of Chancery:

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on an award. In determining any matter arising under this chapter, the Court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

<sup>21</sup> *Tekmen & Co. v. Southern Builders Inc.*, 2005 Del. Super. LEXIS 181 at \*20.

<sup>22</sup> 2005 Del. Super. LEXIS 181 at \*1-2.

<sup>23</sup> *Id.* at \*2.

<sup>24</sup> *Id.* at \*20.

<sup>25</sup> *Id.*

<sup>26</sup> 2005 Del. Super. LEXIS 181 at \*20-21.

The Uniform Arbitration Act reflects a policy designed to discourage litigation, to permit parties to resolve their disputes in a specialized forum more likely to be conversant with the needs of the parties and the customs and usages of a specific industry than a court of general legal or equitable jurisdiction, and to provide for the speedy resolution of disputes in order that work may be completed without undue delay.<sup>27</sup>

Like the plaintiff in *Tekmen*, Plaintiff Mr. Ashe and Defendants Blenheim entered into an Agreement of Sale that contains a binding arbitration clause. Plaintiff has similarly tried to bypass arbitration by first filing his claims for breach of contract, negligent construction, negligent repair, negligent design and consumer fraud in the Superior Court. It is not within the jurisdiction of this Court to decide whether Plaintiffs are “barred from arbitrating” any of these claims. As such, the Court cannot decide the merits of Defendants’ Motion to Dismiss with regard to Mr. Ashe’s alleged failure to state a claim. Plaintiff Mr. Ashe must first submit his claims to an arbitrator. For this reason, Mr. Ashe’s claims are dismissed without prejudice.

## **II. Plaintiff Mrs. Ashe Lacks Standing to Assert Her Claims**

Plaintiff Mrs. Ashe bases her claims for breach of contract, negligent construction, negligent repair, negligent design and consumer fraud on an alleged breach of duty by Defendants for construction and repair of the

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<sup>27</sup> *Id.* (citing *Pettinaro Contrs. Co. v. Partridge Jr. & Sons Inc.*, 408 A.2d 961 (Del. Ch. 1979)).

house. All of these claims generally concern problems with fixtures in the house. None of these claims involve a tort action for personal injury on behalf of Mrs. Ashe. As such, the Court finds no genuine issue of material fact regarding the nature of her claims.

Because Plaintiff Mrs. Ashe's claims concern problems with fixtures in the house, the Court finds that she lacks standing in the current matter. All duties of Defendants in connection with the land sale and construction of Plaintiff Mr. and Mrs. Ashe's home arise from the Agreement of Sale at issue.<sup>28</sup> Mrs. Ashe is not a party to this agreement because she did not sign the contract. Consequently, she lacks standing to make claims arising from this contract. Only her husband, Plaintiff Mr. Ashe, can maintain a cause of action against Defendants for any alleged breach of duty relating to the construction and subsequent repair of their home.

## CONCLUSION

Based on the foregoing reasons, Defendants' Motion to Dismiss Plaintiff Mr. Ashe's claims is **GRANTED** without prejudice. Plaintiff Mr. Ashe must first submit his claims to arbitration.

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<sup>28</sup> The Court also finds that Defendants' duties under the Agreement of Sale include construction, as well as any subsequent repairs that may result from faulty construction.

In addition, Defendants' Motion to Dismiss Plaintiff Mrs. Ashe's claims is **GRANTED** with prejudice. The Court finds that Mrs. Ashe lacks standing because her claims arise from the contract at issue to which she is not a party. No genuine issue of fact exists regarding the nature of her claims.

**IT IS SO ORDERED**

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**Judge Calvin L. Scott, Jr.**

**March 12, 2007**