IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN M. ROHRBACH, *et al.*, **Plaintiffs,** **v.** **NVR, INC., *et al.*,** **Defendants.**	**CIVIL ACTION NO. 19-5847**

MEMORANDUM OPINION

Rufe, J. **June 24, 2020**

Plaintiffs Kevin and Analia Rohrbach filed this suit in state court against Defendant NVR, Inc., a construction company from which they purchased a new home. Based on what they describe as serious defects in the home, Plaintiffs asserted claims for breach of contract, fraudulent inducement, breach of implied warranty, negligence, negligent supervision, and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. NVR removed the case here on the basis of diversity jurisdiction and moved to dismiss the entire case except for the breach-of-contract claim.

I. BACKGROUND

Defendant NVR is a builder and seller of new homes.[1] In reliance on NVR's "public representations" as well as personal assurances offered by representatives of NVR that its homes were high-quality, safe, and built with care,[2] Plaintiffs entered into an Agreement of Sale with NVR for a home in a development in Pottstown, Pennsylvania for $340,385.[3]

[1] Compl. [Doc No. 1, Ex. A] ¶ 26.

[2] *Id.* ¶¶ 22-29.

[3] *Id.* ¶¶ 24-25. The copy of the Agreement attached to the Complaint is incomplete. NVR has attached a complete copy of the Agreement to its Motion to Dismiss. The Court may consider the full version of the Agreement at this

After the agreement was signed, however, Plaintiffs allege that NVR began "cutting corners" in an effort to maximize its profit.[4] They allege that NVR went to great lengths to cover up the defects in the home that resulted from its cost-cutting efforts and that over their concerns, NVR "bullied" them into closing on the home.[5] After Plaintiffs moved into the home, they allege, their fears were realized: They discovered extensive, significant problems in its construction, including inadequate sealing that apparently caused flooding throughout the property.[6] Plaintiffs retained a building moisture expert and a hydrologist who agreed with their assessment that the home was seriously defective.[7] Plaintiffs allege that NVR has refused to fix the problems Plaintiffs have identified or has offered only minimal, superficial fixes.[8] They also allege that NVR employees harassed Plaintiffs for insisting that problems with the home be remedied.[9]

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate where a plaintiff's "plain statement" lacks enough substance to demonstrate that he is entitled to relief.[10] In determining whether a motion to dismiss should be granted, the court must consider only those facts alleged in the complaint, accepting the allegations as true and drawing all logical inferences in favor of the

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stage because Plaintiffs' Complaint is based on it. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

[4] Compl. ¶ 30; *see also id.* ¶¶ 31-35.

[5] *Id.* ¶¶ 36-39, 72, 74-75.

[6] *Id.* ¶¶ 41-46.

[7] *Id.* ¶¶ 57-63.

[8] *Id.* ¶¶ 48-54.

[9] *Id.* ¶¶ 55-56, 64, 66.

[10] *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557 (2007).

non-moving party.[11] Courts are not, however, bound to accept as true legal conclusions framed as factual allegations.[12] Something more than a mere *possibility* of a claim must be alleged; a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."[13] The complaint must set forth "direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory."[14] The Rule 12(b)(6) inquiry is generally limited to the material in the complaint itself, but courts may also consider exhibits attached to the complaint, undisputedly authentic documents upon which the complaint is based, and matters of public record.[15]

III. DISCUSSION

A. Economic Loss Doctrine

NVR argues that Plaintiffs' tort claims are barred by the economic loss doctrine, under which "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical or property damage."[16] Economic loss is "damage for inadequate value, costs of repair and replacement of defective product, [or] consequential loss of property, *without any claim of personal injury or damage to other property*."[17] "Other property" cannot include the property that is the "basis of the bargain of the contract."[18] According to NVR,

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[11] *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994); *Fay v. Muhlenberg Coll.*, No. 07-4516, 2008 WL 205227, at *2 (E.D. Pa. Jan. 24, 2008).

[12] *Twombly*, 550 U.S. at 555, 564.

[13] *Id.* at 570.

[14] *Id.* at 562 (quoting *Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

[15] *Mayer v. Belichick*, 605 F.3d 223, 230 (3rd Cir. 2010).

[16] *Roundhill Condo. Assoc. v. NVR, Inc.*, No. 19-442, 2019 WL 3288103, at *7 (E.D. Pa. July 22, 2019) (quoting *Pansini v. Trane Co.*, No. 17-3948, 2018 WL 1172461, at *4 (E.D. Pa. Mar. 6, 2018)).

[17] *Am. Stores Props., Inc. v. Spotts, Stevens & McCoy, Inc.*, 648 F. Supp. 2d 707, 713 (E.D. Pa. 2009) (quoting *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1276 (M.D. Pa. 1990)).

[18] *Roundhill*, 2019 WL 3288103, at *8 (quoting *Developers Sur. & Indem. Co. v. Mathias*, No. 12-2216, 2013 WL 6504751, at *7 (M.D. Pa. Dec. 11, 2013)).

"Plaintiffs do not allege physical injury or damage to property distinct from their house," so their tort claims are barred and any recovery available to them must be solely under the contract.[19]

Plaintiffs' only response is that they have "pled a plethora of examples of permanent and ongoing damage to their property as a result of Defendants' conduct, including water damage to the Home, cracked foundation, a crumbling driveway and significant water flow which is slowly eroding the foundation of the Home."[20] This is all damage to the property that is the subject of the contract, however, and Plaintiffs cannot avoid the economic loss doctrine. Accordingly, Plaintiffs' negligence and negligent supervision claims will be dismissed without prejudice.[21]

B. Parol Evidence Rule

NVR also argues that Plaintiffs' claim for fraudulent inducement, as well as their claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), are barred by the parol evidence rule. Plaintiffs' UTPCPL and fraudulent inducement claims are both based on the public and personal representations that NVR made about the quality of its homes before the execution of the Agreement.[22] But Pennsylvania's "parol evidence rule bars alleged prior representations 'where the written agreement (1) contains terms which directly deal with the subject matter of the alleged . . . representation; and (2) represents the entire contract between the parties, particularly where the written agreement also contains an integration clause.'"[23]

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[19] *See* Defs.' Mem. Supp. Mot. to Dismiss [Doc. No. 3-1] at 7.

[20] Pls.' Mem. Opp. Mot. to Dismiss [Doc. No. 7] at 13.

[21] Because the Court holds that Plaintiffs' negligence and negligent supervision claims are barred by the economic loss rule, the Court need not consider NVR's alternative argument that those claims are also barred by the gist of the action doctrine.

[22] Compl. [Doc. No. 1, Ex. A] ¶¶ 79-94, 104-111.

[23] *Roundhill*, 2019 WL 3288103, at *4 (quoting *Peruto v. Santander Bank*, No. 16-4092, 2016 WL 6190964, at *3 (E.D. Pa. Oct. 24, 2016)).

The Agreement expressly provides, in bold capital letters, "THE LIMITED WARRANTY OF THIS AGREEMENT IS THE ONLY WARRANTY BY SELLER APPLICABLE TO THE PROPERTY." This is a "term[] which directly deal[s] with the subject matter of the alleged . . . representation"[24]—Plaintiffs' claim is that NVR offered other warranties of quality beyond the limited warranty in the Agreement. The Agreement also contains a merger clause[25] and "represents the entire contract between the parties."[26] As a result, the parol evidence rule applies squarely.

Plaintiffs seem to argue that the parol evidence rule should not bar their claims because the allegedly fraudulent representations were not part of a formal contract negotiation, but rather were made to induce Plaintiffs to begin negotiations on a mistaken understanding.[27] Under Pennsylvania law, however, the parol evidence rule applies to claims of fraud in the inducement as well as claims under the UTPCPL.[28] Accordingly, both these claims will be dismissed with prejudice.[29]

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[24] *Id*. (quoting *Peruto*, 2016 WL 6190964, at *3).

[25] Agreement [Doc. No. 3-2] ¶ 27.

[26] *Roundhill*, 2019 WL 3288103, at *4 (quoting *Peruto*, 2016 WL 6190964, at *3).

[27] *See* Pls.' Mem. Opp. Mot. to Dismiss [Doc. No. 7-1] at 17.

[28] *Peruto*, 2016 WL 6190964, at *3-4 (first citing *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300 (3d Cir. 1996), then citing *Toy v. Metro Life Ins. Co.*, 928 A.2d 186, 206 (Pa. 2007)). Plaintiffs cite one Pennsylvania Supreme Court case, *Yocca v. Pittsburgh Steelers Sports, Inc.*, for the proposition that the parol evidence rule applies only to contract "negotiations." 854 A.2d 425, 436-37 (Pa. 2004). But *Yocca* is quoted misleadingly in Plaintiffs' brief. *Yocca* merely reiterated the well-established rule that "evidence of any previous oral or written negotiations *or agreements involving the same subject matter as the contract* is almost always inadmissible to explain or vary the terms of the contract." *Id.* (emphasis added).

[29] Again, because the Court holds that Plaintiffs' UTPCPL and fraudulent inducement claims are barred by the parol evidence rule, the Court need not consider NVR's alternative arguments that those claims are barred by the economic loss rule and the gist of the action doctrine, respectively.

C. Available Remedies

Finally, NVR argues that the remedies Plaintiffs seek in the Complaint exceed those available under the limited warranty of the Agreement and should therefore be stricken.[30] Because the Agreement disclaims any implied warranties, NVR argues, the remedies available under the limited warranty of the Agreement are the only remedies Plaintiffs can pursue here.

Implied warranties "may be limited or disclaimed only by clear and unambiguous language in a written contract between the builder-vendor and the home purchaser."[31] Language that bears some similarity to the limited warranty in the Agreement here has been upheld by Pennsylvania courts. In this case, however, it is not clear that the appropriate response is to strike all noncontractual remedies at the pleading stage. In *Tyus v. Resta*, one of the two cases NVR cites for this proposition, the court held that the contract language was not sufficiently "clear and unambiguous" to disclaim implied warranties.[32] In the other, *Streiner v. Baker Residential*, the court held that the contract language did successfully disclaim implied warranties, but did so at the summary judgment stage.[33] As a result, the Court is not persuaded that based on the limited argument NVR has presented, striking all noncontractual remedies would be appropriate at this early juncture.

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[30] NVR's Motion seeks dismissal of five of the six counts of Plaintiffs' Complaint. *See* Defs.' Mot. to Dismiss [Doc. No. 3]. Although no argument in support of dismissing the breach-of-implied-warranty claim appears in NVR's briefing, the remedies argument could perhaps be read as suggesting that the disclaimer of implied warranties in the Agreement is enough to bar any claim of breach of implied warranty. *See* Defs.' Mem. Supp. Mot. to Dismiss [Doc. No. 3-1] at 13-15. It is sufficiently unclear, however, that it would not be appropriate to dismiss Plaintiffs' claim at this early stage and based on such a cursory treatment in NVR's briefing.

[31] *Tyus v. Resta*, 476 A.2d 427, 432 (Pa. Super. Ct. 1984).

[32] *Id.* at 432-434.

[33] No. 1253 EDA 2015, 2016 WL 3198162, *2-3 (Pa. Super. Ct. June 9, 2016).

IV. CONCLUSION

Plaintiffs' claims for negligence and negligent supervision will be dismissed without prejudice. Plaintiffs' claim for fraudulent inducement, as well as their claim under the UTPCPL, will be dismissed with prejudice. Plaintiffs' other claims may proceed. An appropriate Order follows.

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ORDER

AND NOW, this 24th day of June 2020, upon consideration of Defendant's Motion to Dismiss [Doc. No. 3] and the responses and replies thereto, and for the reasons explained in the accompanying Memorandum Opinion, it is hereby **ORDERED** that the Motion is **GRANTED in part and DENIED in part** as follows:

1. The Motion is **GRANTED** as to Count I (Unfair Trade Practices and Consumer Protection Law claim) and Count III (fraudulent inducement claim), which are **dismissed with prejudice**.
2. The Motion is **GRANTED** as to Count IV (negligence claim)[1] and Count V (negligent supervision claim), which are **dismissed without prejudice**.
3. The Motion is **DENIED** as to Count IV (breach of implied warranty) and as to the remedies Defendant sought to strike.
4. Plaintiffs may file an amended complaint, only as to those claims that the Court dismisses without prejudice, no later than **July 8, 2020**.

[1] Two of the counts in Plaintiffs' Complaint are labeled "Count IV." The Court dismisses Plaintiffs' negligence claim, labeled Count IV, but not Plaintiffs' breach of implied warranty claim, also labeled Count IV.

5. If Plaintiffs do not file an amended complaint, Defendant shall file an answer as to the remaining claims no later than **July 22, 2020**.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.