IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY CACIOLO, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
MASCO CONTRACTOR SERVICES	:	No. 04-962
EAST, INC.	:	

MEMORANDUM

Baylson, J. **November 22, 2004**

I. Introduction

Presently before the Court is Defendant Masco Contractor Services East, Inc.'s ("Masco") Motion to Dismiss Counts III, IV and V of Anthony and Penny Caciolo's ("Plaintiffs") complaint, which allege, respectively, breach of contract, breach of unfair trade practices and consumer protection law, and successor liability.

Prior to this Motion, on May 13, 2004, the Court issued a Memorandum and Opinion, denying a Motion for Remand filed by Plaintiffs and finding that only one of the corporate entities named in the original Complaint, Masco, remained in existence. Accordingly, the Court Ordered Plaintiffs to file an Amended Complaint, setting forth their claims against Masco.

Plaintiffs then filed a motion for Clarification and/or Reconsideration on May 24, 2004, followed by an Amended Complaint on May 27, 2004. The Court denied Plaintiffs' Motion for Reconsideration on June 17, 2004.[1]

II. Legal Standard

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Id. A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Id.

III. Factual Allegations

Based on the allegations set forth in the Amended Complaint, at all material times Plaintiffs owned property located at 6366 Robin Lane in Cooperburg, PA. (Amended Complaint

[1] Plaintiffs argue that Masco's Motion to Dismiss should be denied as untimely because it was filed more than twenty days after the filing of Plaintiffs' Amended Complaint. This argument is not persuasive. Although Plaintiffs filed their Amended Complaint on May 27, 2004, Plaintiffs made this filing conditionally and reserved the right to file a Second Amended Complaint if the Court granted them the relief they sought in their previously filed Motion for Clarification and/or Reconsideration. The Court therefore does not find untimely Masco's filing of its Motion to Dismiss on July 8, 2004 – twenty-one days after the Court's denial of Plaintiffs' Motion for Clarification and/or Reconsideration validated Plaintiffs' Amended Complaint. While technically this delay exceeds the time allowed to file by one day, the Court notes that although the Order on Plaintiffs' Motion for Clarification and/or Reconsideration was filed on May 27, 2004, the Order was not actually entered until May 28, 2004. In any event, the Court finds that a one-day delay causes Plaintiffs no prejudice. See In re Cendant Corp. Prides Litigation, 234 F.3d 166, 170-171 (3d Cir. 2000) (noting that courts possess broad discretion based on equitable principles to permit late filings even when "caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond a party's control.").

¶ 13.) On or around March of 2001, Monogram Custom Homes ("Monogram"), of which Plaintiff Anthony Caciolo was president, contracted with Defendant, its predecessors and successors, for the sale and installation of a stove pipe/vent, chimney, fire stop and related items for a wood burning pizza oven located in a dwelling at the aforementioned address. (Id. ¶¶ 14-15.) Subsequently, in the months of March, April, or May, 2001, the above mentioned items for a wood burning pizza oven were installed by the agents, servants, employees and/or subcontractors of the defendant. (Id. ¶ 17).

On December 31, 2001 a fire broke out at the dwelling located at 6366 Robin Lane "including but not limited to the area of the wood framing and wall structure between and within the chimney used for the wood burning pizza oven." (Id. ¶ 18). This allegedly caused Plaintiffs injuries including but not limited to damages to the structure and contents of the aforementioned property located at 6366 Robin Lane. (Id.)

Plaintiffs allege that Masco bears responsibility for this fire due to faulty installation of the aforementioned items for a wood burning pizza oven and seeks damages on the following counts:

Count I:	Negligence;
Count II:	Breach of Warranty and Breach of Warranty of Habitability;
Count III:	Breach of Contract;
Count IV:	Breach of Unfair Trade Practices and Consumer Protection Law;
Count V:	Successor Liability.

Masco seeks to dismiss Counts III, IV and V.

As discussed more fully in the Court's previous Memoranda, jurisdiction over this case is

based on diversity of citizenship. The parties cite to Pennsylvania law and do not dispute its applicability. Additionally, the Court notes that the contract at issue in this case was allegedly negotiated to benefit a property which is located in Pennsylvania and owned by Pennsylvania residents. As such, Pennsylvania law appears to control.

IV. Discussion

A. Breach of Contract

Masco contends that Plaintiffs cannot assert a claim for breach of contract because there never existed a contract between Masco and Plaintiffs, and therefore there is no privity of contract. Plaintiffs contracted with Monogram to build their home, and Monogram in turn contracted with Masco to install the stove pipe/vent, chimney, fire stop and related items. Masco argues that, as a subcontractor, it is shielded from liability for Plaintiffs' breach of contract claim. Plaintiffs concede that Monogram contracted with Masco, but contend that Monogram did so on Plaintiffs' behalf and that Plaintiffs were the intended beneficiaries of the contract.

As Masco points out, "[t]ypically, privity of contract is a mandatory prerequisite for a party to bring a breach of contract claim." Unique Techs., Inc. v. Micro-Stamping Corp., 2003 WL 21652284 *2 (E.D. Pa. 2003) (applying Pennsylvania law). This rule is not ironclad, however, and parties who lack privity can bring a cause of action for breach of contract if they can show themselves to be intended third party beneficiaries of the contract.

When the parties to a contract do not specifically express an intention to benefit a third party, Pennsylvania law has adopted the Restatement (Second) of Contracts § 302 (1979) to determine whether the circumstances are such to indicate an intended third party beneficiary:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intentions of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Restatement (Second) of Contracts, § 302 (1979); Scarpitti v. Weborg, 530 Pa. 366, 370-71 (Pa. 1992)(recognizing the adoption of the Restatement as Pennsylvania law). In Scarpitti, the Pennsylvania Supreme Court summarized the standard as follows:

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, *unless* the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Scarpitti, 530 Pa. at 372-73 (citations omitted). Here, neither party asserts that the contract itself expressed an intention to benefit Plaintiffs, but Plaintiffs argue that the recognition of their right to performance is appropriate to effectuate the intentions of Monogram and Masco in negotiating their oral contract, and that the circumstances indicate that the promisee intended to give Plaintiffs the benefit of the promised performance.

Masco relies on Pierce Associates, Inc. v. Nemours Foundation, 865 F.2d 530 (3d Cir. 1988) and Altoona City Authority v. L. Robert Kimball & Assoc., 1995 WL 870770 (Pa. Com. Pl. 1995) for the proposition that a property owner is not typically an intended third party beneficiary of a contract between a general contractor and a subcontractor. In both Pierce and Altoona, however, the court found that the contracts in question contained provisions clearly indicating that the parties did not intend to create third party beneficiary rights. Pierce, 865 F.2d

at 535-39; Altoona, 1995 WL 870770 at *5-*7. Here, there is no such contractual provision, and Plaintiffs argue that the alleged fact that Plaintiff Anthony Caciolo was both the owner of the property and the President of Monogram when Monogram contracted with Masco creates circumstances that are "so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties" and "indicate that the promisee intend[ed] to give the beneficiary the benefit of the promised performance." Scarpitti, at 373.

Therefore, accepting as true the Plaintiff's allegations in the Amended Complaint and viewing them in the light most favorable to the plaintiff, the Court cannot decide, on the record before it, that there is no relief that could be granted to Plaintiffs for breach of contract on the basis of intended third party beneficiary status. Defendant's Motion to Dismiss Count III is therefore denied.

B. Breach of Unfair Trade Practices and Consumer Protection Law

Masco moves to dismiss Count IV, which alleges breach of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq. (the "CPL"). The CPL provides that

> [a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of [unfair or deceptive acts or practices] may bring a private action, to recover [damages].

73 P.S. § 201-9.2(a). Masco asserts that, as a threshold matter, Plaintiffs did not "purchase or lease" any product or service from Masco as required to bring a claim under the Act.

Additionally, Masco contends that Plaintiffs have failed to plead any actions by Masco in violation of the Act.

The CPL does not provide a definition of "purchaser." While the Third Circuit has noted that "[t]he CPL contemplates as the protected class only those who purchase goods or services, not those who may receive a benefit from the purchase," Gemini Physical Therapy and Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance Co., 40 F.3d 63, 65 (3d Cir. 1994), Pennsylvania courts have made it clear that strict privity is not required to bring a private cause of action under the CPL. Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc., 574 A.2d 641, 647 (Pa. Super. 1990). Instead, liability extends "to those in privity, those specifically intended to rely upon the fraudulent conduct, and those whose reasonable reliance was specially foreseeable." Id. This construction of the statute has been found "more consonant with the remedial focus of the [CPL] on eradicating fraudulent business practices." Id.

When faced with the issue of who is a "purchaser" under the CPL, the Third Circuit has refused to extend the right to bring a claim under the CPL to plaintiffs suing a third party's insurance company for concealment of excess policy, on the grounds that the plaintiffs lacked any commercial dealings with the defendant. Katz v. Aetna Cas. & Sur. Co., 972 F.2d 53, 57 (3d Cir. 1992). Similarly, a plaintiff who claimed to represent purchasers who themselves had no interest in the litigation was found to lack standing under the CPL. Balderston v. Medtronic Sofamor Danek, Inc., 285 F.3d 238, 240 (3d Cir. 2002).

Here, however, the same alleged facts discussed above in relation to the Plaintiffs' alleged status as intended third party beneficiaries of the contract between Monogram and Masco

indicate that Plaintiffs' lack of privity with Defendant does not foreclose a possible finding that Plaintiffs were "specifically intended to rely upon the fraudulent conduct" or that Plaintiffs' "reasonable reliance was specially foreseeable." Valley Forge, 574 A.2d at 647. The Third Circuit has noted the Pennsylvania court's conclusion in Valley Forge that "if it were to require strict privity, disreputable contractors would be able to evade liability, leaving their reputable counterparts to pay outstanding judgments." Katz, 972 F.2d at 57 (quoting Valley Forge, 574 A.2d at 646-47). Therefore, viewing the facts in the light most favorable to Plaintiffs, the Court cannot dismiss the claim under the CPL on the grounds that Plaintiffs did not "purchase or lease" from Masco.

Masco also challenges Plaintiffs' claim under the CPL on the grounds that the Amended Complaint fails to plead facts demonstrating that Masco violated the Act. Specifically, Masco asserts that to state a cause of action under the CPL's "catch-all" provision, 73 P.S. § 201-2(4)(xxi), which prohibits "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding," plaintiffs must plead the elements of common-law fraud and must meet the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

Plaintiffs assert that their claims under the CPL allege violations of both the "catch-all" provision and of 73 P.S. § 201-2(4)(vii), which prohibits "[r]epresenting that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another." Plaintiffs' brief relies on Horizon Unlimited, Inc. v. Richard Silva & SNA, Inc., 1998 WL 88391 *7 (E.D. Pa. 1998) for the proposition that a claim under the latter provision can survive without satisfying the elements of fraud. (Pls' Response to Defendant's

Motion to Dismiss, p. 15). In Horizon Unlimited, the court stated that the fact that the common law fraud and deceit claims were barred did not preclude the plaintiffs' CPL claim. Id.

Although the pleading requirements under the CPL have been unclear for many years, see Sheppard v. GMAC Mortgage Corp., 299 B.R. 753, 764-67 (E.D. Pa. 2003), the Pennsylvania Supreme Court recently clarified that "[t]o bring a private cause of action under the [CPL], a plaintiff must show that he justifiably relied on the defendant's wrongful conduct or representation and that he suffered harm as a result of that reliance." Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 438 (July 20, 2004). To be entitled to relief, therefore, Plaintiffs must allege that they justifiably relied on Masco's wrongful conduct or representation and were harmed as a result. Plaintiffs contend that discovery will bring to light evidence that Masco made representations as to the safe and correct installation of the stove pipe and that Plaintiffs were harmed by their reliance on these representations. (Pls' Response to Defendant's Motion to Dismiss, p. 15).

Plaintiffs cite to a passage in Commonwealth v. Burns, 663 A.2d 308, 311 (Pa. Commonw. 1995), in which the court states that "[w]here a contractor agreed in writing to perform a contract with workmanship of good quality but is shown to have performed with substandard and inferior work, the Section 2(4)(xvi) violation is established." Here, however, Plaintiffs' claims arise under Sections 2(4)(vii) and 2(4)(xxi), not Section 2(4)(xvi), and there was no written contract involved.

Still, Plaintiffs argue that they should be allowed to develop the record on these claims because "[t]he work was not of the quality represented" and "Plaintiff relied on these representations of quality in using the pizza oven [and] subsequently sustained damages when the

Defendants' defective and deceptive actions allowed a fire to result and caused physical damage to Plaintiffs' home and contents." (Pls' Response to Defendant's Motion to Dismiss, p. 17-18). While noting the meager factual allegations provided by plaintiff on this Count, the Court must accept as true the Plaintiffs' allegations in the Amended Complaint that "Plaintiffs relied upon the representations of defendant" (Amended Complaint ¶ 42) and that "as a direct and proximate result ... sustained damages and losses" (Id. ¶ 44), and viewing the facts in the light most favorable to plaintiffs, the Court cannot decide, on the record before it, that there is no relief that could be granted to Plaintiffs for violation of the CPL. Defendant's Motion to Dismiss Count IV is therefore denied.[2]

C. Successor Liability

Masco argues that Count V should be dismissed in accordance with the Court's June 17, 2004 Memorandum, where the Court noted that "[t]he previous corporations all ceased to exist through a series of mergers and a name change." As the Court stated, as a result of these mergers under the law of Delaware, where Masco is incorporated, "the companies become one corporation and the rights and obligations of each of the constituent corporations continues to exist under the one surviving corporation. Thus, Plaintiffs can obtain full relief from Masco."

[2]Defendants contend that Plaintiffs' Amended Complaint does not meet the requirements of Federal Rules of Civil Procedure Rule 9(b), which requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud shall be stated with particularity." Given the Pennsylvania Supreme Court's recent statement that a plaintiff alleging violations of the CPL "must show that he justifiably relied on the defendant's wrongful conduct or representation and that he suffered harm as a result of that reliance," without reference to the other elements of common-law fraud, the Court cannot assume that the requirements of Rule 9(b) should be applied to claims under the CPL. Yocca, 854 A.2d at 438.

Count V is therefore dismissed as moot.

V. Conclusion

From the allegations of the Amended Complaint, the Court perceives Counts I and II to be the principal focus of this case. It is possible that discovery will cause Plaintiffs to narrow their claims, or may allow Defendant to renew its arguments in a summary judgment motion. However, the Court declines to deny Plaintiffs the right to develop facts to support the theories stated in Counts III and IV of the Amended Complaint. For the foregoing reasons, defendant's motion to dismiss Counts III, IV, and V of the Amended Complaint is denied as to Counts III and IV, and granted as to Count V, which is dismissed as moot.

An appropriate order follows.

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

ANTHONY CACIOLO, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
MASCO CONTRACTOR SERVICES EAST, INC.	:	No. 04-962

ORDER

AND NOW this 22nd day of November, 2004 upon consideration of Defendant's Motion to Dismiss Count III, IV, and V of Plaintiffs' Amended Complaint, and the responses thereto, it is ORDERED that the motion is DENIED as to Counts III and IV, and GRANTED as to Count V, which is dismissed as moot.

BY THE COURT:

s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.

C:\Inetpub\www\documents\opinions\source1\$ASQ04D0500P.pae