

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

ROBERT LUTZKY and JOAN LUTZKY,	:	
	:	
Plaintiffs,	:	
	:	CIVIL ACTION NO. 06-2229
v.	:	
	:	
JACK PETCOVE and MARSHA PETCOVE,	:	
	:	
Defendants/ Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
PRUDENTIAL, FOX & ROACH REALTORS,	:	
	:	
Third Party Defendant.	:	

**MEMORANDUM**

BUCKWALTER, S. J.

August 21, 2006

Presently before the Court is Third Party Defendant's Motion to Dismiss (Docket No. 6) and Third Party Plaintiffs' Response thereto (Docket No. 7). For the reasons stated below, Third Party Defendant's Motion to Dismiss is denied.

**I. FACTUAL BACKGROUND**

In late 2005, Third Party Plaintiffs ("Petcoves") began working with real estate agents of Third Party Defendant ("Prudential") to find a home in Pennsylvania.<sup>1</sup> According to

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1. The Petcoves began their search with real estate agents Linda Brouse and/or Sheila Alper. These agents put the Petcoves in contact with Connie Berg, an agent in Prudential's Rydal office.

the Petcoves, they explained to Prudential agents that they intended to use the new house to care for their disabled grandson and that any property would have to be “a safe and pleasant environment.” (Third Party Compl. ¶12.) Prudential found a property (“Property”) on Pond View Road in Rydal, Pennsylvania owned by Robert and Joan Lutzky (“Lutzkys”). The Petcoves made an offer for the Property which the Lutzkys accepted.

In December 2005, the Petcoves, the Lutzkys and the Prudential real estate agents met at the Property to review and sign the “Standard Agreement for the Sale of Real Estate” (“Agreement”).<sup>2</sup> Prior to signing the Agreement, the Lutzkys gave the Petcoves a tour of the Property. The Petcoves allege that upon inquiring about the area and explaining to the Lutzkys that they were moving from Florida to care for their disabled grandson, Mr. Lutzky volunteered that there were no geese problems on the Property. Though “surprised by this admission” as they “had never questioned whether the Lutzkys had a geese problem,” the Petcoves signed the Agreement. (Third Party Compl. ¶ 22.) Additionally, the Lutzkys “completed a Seller’s Property Disclosure Statement . . . apparently in conjunction with Ms. Berg [a Prudential real estate agent] that made no reference to the geese problem in the area.” Id. ¶ 44.

Several weeks after signing the Agreement, a former co-worker of Mr. Petcove informed Mr. Petcove about an ongoing problem with geese on Pond View Drive in Rydal. In an attempt to gain further information, Mr. Petcove spoke to Doug Wendell, an official at Alverthorpe Park in Rydal. Mr. Wendell confirmed that there was a well-known, ongoing problem with geese in the community. In the meantime, the Petcoves met with contractors at the Property to get an estimate for a fence to enclose the backyard. During this appointment, the

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2. The parties agreed to the application of Pennsylvania law under the Agreement. (Agreement ¶ 26(A)-(B).)

Petcovs observed geese on the Property and observed geese droppings all over the yard and driveway.

Worried about potential geese attacks and that geese droppings may carry infectious diseases, the Petcovs terminated the Agreement. In response, the Lutzkys filed a complaint against the Petcovs in the Montgomery County Court of Common Pleas. The Petcovs removed to this Court, and filed a counter-claim against the Lutzkys and a Third Party Complaint against Prudential. The Third Party Complaint against Prudential alleges breach of contract, fraud and a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”). Prudential now moves to dismiss the Petcovs’ fraud and UTPCPL claims.

## **II. STANDARD**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) allows the Court to dismiss the complaint for failure to state a claim. The purpose of Rule 12(b)(6) is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. Johnsrud v. Carter, 620 F.2d 29, 33 (3d Cir. 1980) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). All reasonable inferences that can be drawn from the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) (citing Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985)). The Court may dismiss a complaint “only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Swin Res. Sys., Inc. v. Lycoming County, 833 F.2d 245, 247 (3d Cir. 1989) (citing Hishon v. King & Spalding, 467 U.S. at 69, 73 (1984)).

### III. DISCUSSION

#### A. Fraud Count

1. Sufficiency of Fraud Count under Pennsylvania Law and Federal Rule of Civil Procedure 9(b)

Under Pennsylvania law, in order to state a claim for fraud a plaintiff must plead:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by reliance. Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994). Additionally, as this case is in federal court, the Petcoves must comply with the Federal Rule of Civil Procedure 9(b) which requires plaintiffs to plead fraud with particularity.<sup>3</sup> Fed. R. Civ. P. 9(b).

Prudential asserts that the Petcoves “fail to set forth with particularity any fraudulent conduct.” (Mot. to Dismiss at 5.) Specifically, Prudential argues that the Petcoves failed to adequately plead a representation by Prudential, Prudential’s knowledge of the geese problem, or the Petcoves’ justifiable reliance on any alleged representation. Id. at 5-6.

Regarding representation element, the Petcoves argue that their fraud claim is based “on Prudential’s withholding material information – i.e., the geese problems.” (Resp. at 8) (citing Third Party Compl. ¶¶ 28, 34, 44-46, 50 and 53.) “While a concealment may constitute

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3. Since this is a diversity case, even though Pennsylvania law provides the elements of fraud, the Petcoves must plead the circumstances constituting the fraud with particularity under Rule 9(b). 2 Moore’s Federal Practice, § 9.03[1][e] (Matthew Bended 3d ed.); see also Christidis v. First Pa. Mortgage Trust, 717 F.2d 96, 99 (3d Cir. 1983) (stating that Rule 9(b) applies to fraud claims based on state law). Thus, under Federal Rule of Civil Procedure 9(b) a plaintiff must plead: (1) a specific false statement or omission of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity; (4) the intention that it should be acted on; and (5) that the plaintiff acted upon it to his damage. In re Suprema Specialties, Inc. Sec. Litig., 438 F.3d 256, 270 (3d Cir. 2006).

fraud, mere silence is not sufficient in the absence of a duty to speak.” Smith v. Renault, 564 A.2d 188, 192 (Pa. Super 1999) (citation omitted). Here, Prudential’s duty arises under Pennsylvania’s Real Estate Disclosure Law. This law obligates Prudential to disclose that material information regarding the Property of which it has actual knowledge in the Disclosure Statement.<sup>4</sup> 69 Pa.C.S. § 7310.<sup>5</sup> Further, legal precedent in Pennsylvania establishes that a seller’s agent may be held liable for failure to disclose to the buyer a material defect on a property. See e.g., Smith, 564 A.2d at 305 (“Where a broker employed to sell real estate misrepresents or conceals a material fact, he may be found liable to the purchaser in damages.”) (citation omitted). Finally, given the applicability of Federal Rule of Civil Procedure 9(b), the Petcoves can plead “a specific false statement or omission of material fact.” In re Suprema Specialties, 438 F.3d at 270; see also supra fn. 3. Thus, the Court concludes that the Petcoves adequately plead a representation.

Further, the Court agrees with the Petcoves that the Third Party Complaint alleges several times that Prudential had knowledge of the alleged geese problem on the Property. (Third Party Compl. ¶¶ 39, 50, 51). Thus, the Court concludes that the Petcoves adequately plead knowledge.

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4. “A misrepresentation will be deemed material where ‘it is of such character that had it not been made . . . the transaction would not have been consummated.’” Skurnowicz v. Lucci, 798 A.2d 788, 794 (Pa. Super. 2002) (citing Sewak v. Lockhart, 699 A.2d 755, 760 (Pa. Super. 1997)). The Court finds that the Petcoves adequately plead that the nondisclosure was material. The Petcoves plead that they informed Prudential that they intended to use the home to care for their disabled grandson; that any property would have to be a safe and pleasant environment; and, that upon confirming the alleged geese problem, the Petcoves terminated the Agreement due to potential geese attacks and potentially infectious geese droppings.

5. Under 68 Pa.C.S. § 7310, “[a]n agent of a seller or buyer shall not be liable for any violation of this chapter [regarding seller disclosures] unless the agent had actual knowledge of a material defect that was not disclosed to the buyer or of a misrepresentation relating to a material defect.” As discussed in the next paragraph, the Court finds that the Petcoves adequately plead that Prudential had actual knowledge of the alleged geese problem.

Finally, the Court concludes that the Petcoves adequately plead “justifiable reliance.” “To be justifiable, reliance upon the representation of another must be reasonable.” Porreco v. Porreco, 811 A.2d 566, 571 (Pa. 2002). Further, reliance is not justified where the party claiming reliance had an adequate opportunity to verify the allegedly fraudulent statements. Id. Here, the Petcoves allege that their reliance that the Property did not have a geese problem was reasonable because they signed the Agreement and Disclosure Statement only after reviewing the documents (Third Party Compl. ¶¶ 19, 23), and because the “Seller’s Disclosure affirmative[ly] stated at paragraph 5(a) that the Lutzkys were not aware of any pests affecting the property.” Id. ¶ 46. Further, drawing all reasonable inferences from the Third Party Complaint in favor of the Petcoves, despite a tour of the Property in December, the Petcoves first observed geese on the Property after they signed the Agreement and during their appointment with the contractors. Id. ¶¶ 21-22, 32. Thus, the Court concludes that the Petcoves adequately plead justifiable reliance.

2. Parol Evidence Rule<sup>6</sup>

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6. The Petcoves argue that the Disclosure Statement is incorporated into the Agreement and therefore the parol evidence rule is inapplicable. (Resp. at 14) (citing Agreement ¶ 34.) **The Court declines to rule at this stage of the proceedings that the Disclosure Statement is incorporated into the Agreement.**

Prudential also argues that the parol evidence rule bars the Petcoves' fraud claim.<sup>7</sup>

The parol evidence rule applies when prior statements and representations (1) contradict, conflict, add, modify or vary the terms of a contract and (2) fall within the scope of the integrated agreement.<sup>8</sup> Capital Funding, VI, LP v. Chase Manhattan Bank USA, N.A., No. 01-6093, 2003 U.S. Dist. LEXIS 12102, \*9 (E.D. Pa. Mar. 21, 2003) (citing Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Inv., 951 F.2d 1399, 1407 (3d Cir. 1991)).

**In Pennsylvania, an exception to the parol evidence rule exists for “real estate inspection cases.”** LeDonne v. Kessler, 389 A.2d 1123 (1978). This exception requires the Court to balance “the extent of the party’s knowledge of objectionable conditions derived from a reasonable inspection against the extent of the coverage of the contract’s integration clause in order to determine whether that party could justifiably rely upon oral representations without

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7. Prudential relies on Blumenstock v. Gibson, 811 A.2d 1029, 1036 (Pa. Super. 2002), where the Pennsylvania Superior Court stated “that the theory holds that since fraud induced the agreement, no valid agreement came into being and parol evidence is admissible to show that the alleged agreement is void.” Yet, seemingly contradicting itself, the Blumenstock court added: “[n]evertheless, the case law clearly holds that a party cannot justifiably rely upon prior oral representations yet sign a contract denying the existence of those representations.” Id. The Pennsylvania Superior Court attempted to clear up any confusion concerning the applicability of the fraud in the inducement exception to the parol evidence rule in Youndt v. First National Bank, 868 A.2d 539 (Pa. Super. 2005), by concluding that “parol evidence is inadmissible where the contract contains terms that deny the existence of representations regarding the subject matter of the alleged fraud. But when the contract contains no such term denying the existence of such representations, parol evidence is admissible to show fraud in the inducement.” Youndt v. First Nat’l Bank, 868 A.2d 539, 546 (Pa. Super. 2005). **The Court notes that the nowhere in the Agreement or Disclosure Statement is the word geese mentioned. However, the Court declines to rule at this stage of the proceedings whether other language in the Agreement or Disclosure Statement addresses the alleged geese problem.**

8. The integration clause is found in paragraph 28 of the Agreement:

All representations, claims, advertising, promotional activities, brochures or plans of any kind made by the Seller, Brokers, their licensees, employees, officers or partners are not part of this Agreement unless expressly incorporated or stated in this Agreement. This Agreement contains the whole agreement between Seller and Buyer, and there are no other terms, obligations, covenants, representations, statements or conditions, oral or otherwise, of any kind whatsoever concerning this sale. This Agreement will not be altered, amended, changed or modified except in writing executed by the parties.

insisting upon further contractual protection or the deletion of an overly broad integration clause.” Id. at 1130.

Applying the balancing test to the facts of this case, the Court concludes that the exception applies and therefore the parol evidence rule is inapplicable. Although the integration clause is quite broad, viewing the Third Party Complaint in the light most favorable to the Petcoves, the Court concludes that the Petcoves sufficiently allege that they lacked knowledge of the geese problem after a tour of the Property. (Thirty Party Compl. ¶¶ 20-23.)

Accordingly, Prudential’s Motion to Dismiss the Petcoves’ fraud claim is denied.

**B. Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”) Count**

The Petcoves argue that “the allegations in the third-party complaint make clear that, at a minimum, Prudential’s conduct falls within the so-called catchall provision of the UTPCPL, which prohibits ‘engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.’” (Resp. at 20) (quoting 73 Pa.C.S. § 201-2(4)(xxi)). The Petcoves agree with Prudential that in relying on the UTPCPL’s catchall provision, they are required to plead all the elements of fraud.<sup>9</sup> (Resp. at 20) (citing Mot. to Dismiss at 9).) As noted above, the Court finds that the Petcoves adequately plead the requisite

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9. The Court recognizes that courts are divided as to the requisite elements a plaintiff must plead for fraud under the catchall provision of the UTPCPL. Jones v. Aames Funding Corp., No. 04-4799, 2006 U.S. Dist. LEXIS 11119, at \*29 (E.D. Pa. Mar. 8, 2006) (stating that some courts require a plaintiff asserting a claim under the catchall provision to assert all of the elements of common law fraud while, others require a “less rigorous level of proof that falls short of actual fraud”). Like the Jones case, “this Court need not conclusively determine whether a claim under the catchall provision of the UTPCPL requires proof of common law fraud, as compared to a less stringent standard of proof.” Id. at \*30-31. As mentioned in the section discussing the sufficiency of the Petcoves’ fraud allegation, supra, the Court concludes that the Petcoves sufficiently allege all elements of common law fraud thereby satisfying either standard of proof under the catchall provision.

elements of fraud. Accordingly, Prudential's Motion to Dismiss the Petcoves' claim under Pennsylvania's UTPCPL is denied.

#### **IV. CONCLUSION**

For the foregoing reasons, Prudential's Motion to Dismiss is denied. An appropriate order follows.

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Plaintiffs,	:	
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Defendants/ Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
PRUDENTIAL, FOX & ROACH REALTORS,	:	
	:	
Third Party Defendant.	:	

**ORDER**

**AND NOW**, this 21<sup>st</sup> day of August, 2006, upon consideration of Third Party Defendant's Motion to Dismiss (Docket No. 6) and Third Party Plaintiffs' Response thereto (Docket No. 7), it is hereby **ORDERED** that Third Party Defendant's Motion to Dismiss is **DENIED**.

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.  
RONALD L. BUCKWALTER, S.J.