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Re: *Smith v. Donald L. Mattia, Inc.*
C.A. No. 4498-VCN
Date Submitted: November 21, 2011

Dear Counsel:

Plaintiffs David R. and Barbara T. Smith (the "Plaintiffs") continue to assert claims arising out of the construction of their home against Donald L. Mattia, Inc. ("DLM"), Donald L. Mattia ("Donald"), and Barbara Joseph ("Barbara" and, collectively with DLM and Donald, the "Defendants").[1] The Defendants have moved for summary judgment on those claims. The

[1] Nomenclature has been adopted from an earlier decision in this case, *Smith v. Mattia* ("*Mattia I*"), 2010 WL 412030 (Del. Ch. Feb. 1, 2010). First names were originally used for simplicity. Now, they are used for consistency. Their use is not meant as a sign of disrespect.

Defendants have also asserted a counterclaim against the Plaintiffs, and Barbara has moved for Rule 11 sanctions. The Plaintiffs have moved for summary judgment on the Defendants' counterclaim, and oppose the Rule 11 motion. This is the Court's decision on the Defendants' motion for summary judgment, the Plaintiffs' motion for summary judgment, and Barbara's Rule 11 motion.

I. CONTENTIONS[2]

The Plaintiffs have clarified that if this case proceeds to trial, they will assert: (1) a breach of contract claim against DLM and Donald, as trustee for DLM;[3] (2) a claim against DLM and Donald, individually and as trustee for DLM, for misappropriation of the Plaintiffs' backfill and $20,123.93 paid to DLM that was not applied to their project; (3) a claim against the Defendants for fraudulent inducement and the misappropriation of $8,836.87 used to

[2] The relevant background facts of this case were laid out in *Mattia I*. The Court presumes familiarity with those facts.

[3] DLM's corporate charter was declared forfeit by the State of Maryland. Under Maryland law, when a corporation's charter is declared forfeit, that corporation's directors become trustees charged with winding up the affairs of the corporation. MD. CODE ANN., Corporations and Associations, § 3-515 (2011); *Hill Constr. v. Sunrise Beach, LLC*, 952 A.2d 357, 363 (Md. Ct. Spec. App. 2008).

procure excess lumber that was used for purposes other than their project; (4) a claim of civil conspiracy against Donald and Barbara in connection with the purchase of excess lumber; and (5) that to the extent damages are awarded against DLM or Donald, as DLM's trustee, DLM's corporate veil should be pierced and the Plaintiffs should be able to recover from Donald.[4]

The Defendants have moved for summary judgment on the first four claims.[5] The Defendants argue that any claims against DLM are barred by the construction contract between DLM and the Plaintiffs (the "Construction Contract"), which provides that any action against DLM for breach of contract must be brought within one year from when the cause of action accrued. The Defendants also argue that all of the Plaintiffs' claims are barred by the statute of limitations. Moreover, Barbara contends that all claims against her fail as a matter of law because the Plaintiffs have failed to produce any evidence supporting those claims.

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[4] Pls.' Answering Br. in Opp. to Defs.' Mot. for Summary Judgment ("Pls.' Answering Br.") at 15-16.

[5] The Defendants have admitted that the issue of whether DLM's corporate veil should be pierced involves genuine issues of material fact. *See* Defs.' Reply to Pls.' Answering Br. at 8 ("Defendants withhold any response to the argument to pierce the corporate veil since that inquiry admittedly contains genuine issue[s] of material fact.").

The Plaintiffs respond that DLM should be estopped from asserting the Construction Contract's one-year limitations period and that their claims are not barred by the statute of limitations. Moreover, with regard to Barbara, the Plaintiffs point to evidence that she was involved in the purchase of excess lumber.

In addition to moving for summary judgment, the Defendants have asserted a counterclaim against the Plaintiffs, arguing that this action was filed "solely for purposes of harassing Donald . . . and Barbara . . . and interrupting their profession."[6] The Plaintiffs have moved for summary judgment on that counterclaim, arguing that it does not state a viable cause of action.

The last motion before the Court is Barbara's Rule 11 motion seeking sanctions against the Plaintiffs. Barbara argues that the claims asserted against her lack any evidentiary support, and therefore, that the Plaintiffs violated Rule 11 by asserting those claims. The Plaintiffs oppose Barbara's motion.

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[6] Defs.' Counterclaim ¶ 7.

II. ANALYSIS

A. *The Defendants' Motion for Summary Judgment*

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[7] "[I]f the moving party puts facts into the record supporting its motion, 'the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight.'"[8]

1. DLM and Donald, as Trustee for DLM

The Plaintiffs have conceded that their remaining claims against DLM are for: (1) breach of contract; (2) the misappropriation of backfill; (3) the misappropriation of $20,123.93 paid to DLM; (4) fraudulent inducement in

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[7] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)) (other citation omitted).
[8] *ClubCorp, Inc. v. Pinehurst, LLC*, 2011 WL 5554944, at *9 (Del. Ch. Nov. 15, 2011) (quoting *Bank of N.Y. Mellon v. Realogy Corp.*, 979 A.2d 1113, 1119 (Del. Ch. 2008)).

connection with the purchase of excess lumber; and (5) the misappropriation of $8,836.87 used to purchase excess lumber.[9]

With regard to the breach of contract claims, the Construction Contract has a "Limitations of Actions" provision, which provides that "[a]ny action for breach of the . . . [Construction] Contract by the Owner against the Contractor must be commenced within one (1) year after the action has accrued, or the same shall be barred."[10] "It is well-established in Delaware that, 'in the absence of [an] express statutory provision to the contrary, a statute of limitations does not proscribe the imposition of a shorter limitations period by contract.'"[11] The Plaintiffs have not pointed to any express statutory provision requiring that they have three years to file their breach of contract claims. Thus, the Construction Contract's one-year limitations period is presumably a valid and enforceable provision. The

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[9] Pls.' Answering Br. at 15-16. Some of the Plaintiffs' claims arising out of DLM's conduct have been asserted against DLM; other claims arising out of that conduct have been asserted against Donald, in his capacity as DLM's trustee. For simplicity, the Court will only refer to DLM in addressing the claims that arise out of DLM's conduct.

[10] The Construction Contract may be found in the Appendix to Plaintiffs' Answering Brief.

[11] *Mattia I*, 2010 WL 412030, at *3 (quoting *Rumsey Elec. Co. v. Univ. of Del.*, 358 A.2d 712, 714 (Del. 1976)) (other citation omitted).

Plaintiffs do not contend that their contract claims accrued within the year before they asserted them.[12] Therefore, the Plaintiffs' claims against DLM for breach of contract fail as a matter of law.

With regard to the backfill claim, the one argument that the Defendants make in support of their motion for summary judgment on that claim is that it was not brought within the three year period prescribed by the statute of limitations that would apply by analogy.[13] Specifically, the Defendants argue that the backfill was taken from the Plaintiffs' property

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[12] The Plaintiffs' original complaint was filed on April 9, 2009, and the Plaintiffs argue that "[s]ometime between . . . [April 10, 2006] and May 2, 2006 . . . the contractual relationship between Plaintiffs and DLM ended." Pls.' Answering Br. at 21. The Plaintiffs argue that "Defendants' should not get the benefit of any contractual limitations defense" because they "engaged in fraudulent self-dealing while acting as fiduciaries." *See* Pls.' Answering Br. at 19. This Court will not adhere to the statute of limitations applicable at law when it would be inequitable to do so. *See Yaw v. Talley*, 1994 WL 89019, at *5 (Del. Ch. Mar. 2, 1994) ("[I]n actions seeking damages or essentially legal relief the statute of limitations is not inflexibly applied. . . . [F]iduciaries who benefit personally from their wrongdoing, especially as a result of fraudulent self-dealing, will not be afforded the protection of the statute."). The Plaintiffs, however, have not shown why it would be inequitable to adhere to the contractual limitations period here. The Plaintiffs did not make any effort to seek redress for DLM's actions within the year *after they learned of* those actions.

[13] *See Wittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 9 (Del. 2009) ("A statute of limitations period at law does not automatically bar an action in equity because actions in equity are time-barred only by the equitable doctrine of laches. Where the plaintiff seeks equitable relief, however, the Court of Chancery applies the statute of limitations by analogy.") (citations and internal quotations omitted).

more than three years before this action was filed.[14] The Plaintiffs admit that the backfill was taken more than three years before this action was filed, but they contend that they did not learn that the backfill would not be replaced until later. The Plaintiffs further contend that they filed this action within the three year period after they learned that their backfill would not be replaced.[15] The Plaintiffs have submitted a letter to the Court from Donald to Mr. Smith dated June 7, 2006, which suggests that Donald was planning to replace the Plaintiffs' backfill.[16] Thus, there are material fact issues as to whether the claim that Donald misappropriated the Plaintiffs' backfill should be deemed to have been timely filed.

The Plaintiffs have also brought a claim against DLM for the misappropriation of $23,123.93 paid to DLM. The Defendants have moved for summary judgment on that claim, arguing that it was not brought within the three year period prescribed by the statute of limitations that would apply by analogy. The Plaintiffs, however, contend that the misappropriation did

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[14] Defs.' Br. in Supp. of Mot. for Summ. J. ("Defs.' Br. in Supp.") at 12-13.
[15] Pls.' Answering Br. at 21.
[16] *See* Appendix to Pls.' Answering Br. at A-99.

not occur until DLM abandoned the Construction Contract on April 10, 2006, and therefore, that their original complaint filed on April 9, 2009 was timely. The Defendants can point to some evidence, which suggests that any misappropriation occurred before April 9, 2006, but that merely shows that there is an issue of material fact.

The Plaintiffs bring two claims against DLM arising out of the alleged purchase of excess lumber. The first claim is for fraudulent inducement in connection with the purchase of excess lumber. The second claim is for misappropriation of $8,836.87 used to purchase excess lumber. This Court has already determined that the Plaintiffs' claim for fraudulent inducement was not brought within the period prescribed by the statute of limitations that would apply by analogy.[17] Similarly, a claim for misappropriation in connection with the purchase of excess lumber would seem to have arisen at the time the lumber was purchased, which was before April 9, 2006. The Court, however, has recognized that "the statute of limitations may have

[17] *Mattia I*, 2010 WL 412030, at *5.

been tolled due to fraudulent concealment."[18] For the fraudulent concealment exception to apply, the Plaintiffs would have to show "some affirmative act by the defendant 'that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth.'"[19] In the First Amended Complaint ("Complaint" or "Compl."), the Plaintiffs allege that the Defendants represented that bank draws would be used for the construction of the Plaintiffs' home, that they were never

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[18] *Mattia I*, 2010 WL 412030, at *5. The Plaintiffs also argue that their lumber claims should be tolled under the time of discovery rule. Pls.' Answering Br. at 21-22. "[W]hen a plaintiff seeks to excuse a late filing by invoking a tolling exception to the statute of limitations, the plaintiff bears the burden to plead facts demonstrating the applicability of the exception." *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005). "Under the 'discovery rule' the statute is tolled where the injury is 'inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of.'" *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (quoting *Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004)). It is not clear that the Plaintiffs pled facts demonstrating the applicability of the time of discovery rule in the Complaint. Assuming they did, the rule is inapplicable here. The Plaintiffs argue that "it was not until after April 10, 2006, that . . . [Plaintiff David Smith tallied] the lumber invoices and realize[d] that . . . [lumber] had been over-purchased by a significant amount." Pls.' Answering Br. at 22. An injury is not "inherently unknowable" where a plaintiff possesses all of the tools to discover it, but simply waits a while.

[19] *Mattia I*, 2010 WL 412030, at *5 (quoting *In re Tyson Foods, Inc. Consol. S'holders Litig.*, 919 A.2d 563, 585 (Del. Ch. 2007)).

actually intended for that purpose, and that the Plaintiffs relied on those representations.[20]

As stated above, the burden on summary judgment is initially on the moving party. The one argument that the Defendants make in favor of their motion for summary judgment on the lumber claims is that "it is important to recall Mr. Smith's testimony that he reviewed all invoices and authorized their payment."[21] Assuming that is true, it might be difficult for the Plaintiffs to show that any act by the Defendants led the Plaintiffs "away from the truth." At this stage, however, the Court cannot credit DLM's interpretation of Mr. Smith's testimony. The Plaintiffs continue to assert that they relied on the Defendants' representations regarding bank draws, and no one provided the Court with Mr. Smith's deposition. The Court simply cannot tell if DLM's characterization of Mr. Smith's testimony is accurate. Therefore, the Defendants are not entitled to summary judgment on the claims that DLM fraudulently induced the Plaintiffs to purchase

[20] Compl. ¶¶ 44-46.
[21] Defs.' Br. in Supp. at 13.

excess lumber and misappropriated $8,836.87 in connection with the purchase of excess lumber.

2. Donald in his Individual Capacity

The Plaintiffs' remaining claims against Donald in his individual capacity are for: (1) the misappropriation of Plaintiffs' backfill; (2) the misappropriation of $20,123.93 paid to DLM; (3) the misappropriation of $8,836.87 used to purchase excess lumber; (4) fraudulent inducement in connection with the purchase of excess lumber; and (5) conspiring with Barbara to purchase excess lumber. The Court will address the first four claims in this subsection, and will address the conspiracy claim in the next subsection.

The Plaintiffs' first claim against Donald is for the conversion of backfill. Again, the one argument that the Defendants make in support of their motion for summary judgment on the backfill claim is that it was not brought within the three year period prescribed by the statute of limitations that would apply by analogy. As discussed in the subsection above, that argument fails because the Plaintiffs have raised a material fact issue as to

whether the limitations period applicable to this claim should be equitably tolled.

With regard to the claim against Donald for the misappropriation of $20,123.93 paid to DLM, "DLM remained in existence until at the earliest October 2007, and Residential Construction [a company now operated by Donald] was formed on June 5, 2006. There was therefore ample time for the Defendants to transfer the funds from DLM to either themselves or Residential Construction after construction had been abandoned."[22] The Defendants contest that that is what occurred, but all they do is raise a material fact issue.

With regard to the claims arising out of the purchase of excess lumber, those claims survive for the reasons mentioned in the subsection above: namely, that the only evidence the Defendants point to in favor of their motion for summary judgment on these issues is a contested interpretation of a deposition that was not provided to the Court. Therefore, the Defendants are not entitled to summary judgment on the claim that

[22] *Mattia I*, 2010 WL 412030, at *5.

Donald fraudulently induced the Plaintiffs to purchase excess lumber and misappropriated $8,836.87 by purchasing excess lumber.

3. Barbara

The Plaintiffs' remaining claims against Barbara are for: (1) the misappropriation of $8,836.87 used to purchase excess lumber; (2) fraudulent inducement in connection with the purchase of excess lumber; and (3) conspiring with Donald to purchase excess lumber. The Defendants argue that the Plaintiffs have failed to proffer any evidence against Barbara. In particular, they cite a quote from Mr. Smith's deposition, in which he admits that the Plaintiffs have no evidence against Barbara. Although, as mentioned above, Mr. Smith's deposition was not provided to the Court, the Plaintiffs do not dispute that Mr. Smith made the statements that the Defendants cite. The Plaintiffs, however, argue that Barbara "acted as an agent for DLM and participated in the activity that is the basis of the . . . [misappropriation] and fraudulent inducement claims."[23] In support of that argument, the Plaintiffs point to the fact that Barbara sometimes ordered

[23] Pls.' Answering Br. at 29.

lumber for the Smiths home and sometimes sought payment for that lumber.[24] Such ministerial acts do not raise a material fact issue as to whether Barbara misappropriated money or committed fraud. Therefore, the Plaintiffs' claims against Barbara for fraud and misappropriation fail as a matter of law.

As for the Plaintiffs' conspiracy claim, "[t]o make a case for civil conspiracy, a plaintiff must show '(1) a confederation or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damage.'"[25] Again, the ministerial acts that Barbara engaged in are insufficient to raise a material fact issue as to whether she was involved in a conspiracy. Because there is no issue of material fact that Barbara was not involved in misappropriating money or committing fraud, there is no one for Donald to have conspired with. Therefore, the Defendants are entitled to summary judgment on the Plaintiffs' conspiracy claim.

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[24] *Id.* at 28.
[25] *N.K.S. Distributors, Inc. v. Tigani*, 2010 WL 2178520, at *5 (Del. Ch. May 28, 2010) (quoting *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 n.8 (Del. 2005)) (other citations omitted).

B. *The Plaintiffs' Motion for Summary Judgment*

The standard this Court uses in determining whether to grant summary judgment was set forth above.[26] The Plaintiffs have moved for summary judgment on the Defendants' counterclaim. The Court is not sure what cause of action the Defendants are asserting in their counterclaim.[27] Nowhere do the Defendants articulate a specific cause of action. Moreover, the Defendants have provided no citations—no statutes, no cases, nothing—for the Court to look to, to help it determine what the Defendants are arguing. No viable cause of action appears on the face of the counterclaim, and therefore, it fails as a matter of law.

C. *Barbara's Motion for Rule 11 Sanctions*

Barbara argues that the Plaintiffs violated Court of Chancery Rule 11 by asserting claims against her. Rule 11(b) provides, in relevant part:

> By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief,

[26] *See supra* notes 7-8 and accompanying text.
[27] At oral argument, counsel for the Defendants did not seem to know either.

> formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose . . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law . . . [, and] (3) the allegations and other factual contentions have evidentiary support . . . .

Although Barbara mentions all three of the above requirements under Rule 11, her only argument seems to be that the Plaintiffs violated Rule 11(b)(3) because Mr. Smith admitted in his deposition that the Plaintiffs have no evidence against her.[28] Despite Mr. Smith's apparent admission, Plaintiffs' attorney was able to point to some evidence implicating Barbara.[29] That evidence, however, is admittedly weak, and was found insufficient to withstand summary judgment. Nevertheless, "Rule 11 sanctions should be reserved for those instances where the Court is reasonably confident that an attorney does not have an objective good faith belief in the legitimacy of a claim or defense."[30] Although the evidence against Barbara is scant, the Court is not persuaded that the Plaintiffs'

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[28] Again, Mr. Smith's deposition was not provided to the Court, but the Plaintiffs do not dispute that Mr. Smith made the statements that the Defendants cite.
[29] *See supra* note 24 and accompanying text; Appendix to Pls.' Answering Br. at A-181, 334, 336-47.
[30] *Xen Investors, LLC v. Xentex Techs., Inc.*, 2003 WL 25575770, at *3 (Del. Ch. Dec. 8, 2003).

attorney did not have a good faith belief in the legitimacy of the claims asserted against Barbara. Therefore, Barbara's motion for Rule 11 sanctions is denied.

III. CONCLUSION

For the foregoing reasons, the Defendants' motion for summary judgment is granted in part and denied in part; the Plaintiffs' motion for summary judgment is granted; and Barbara's motion for Rule 11 sanctions is denied. An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K