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OF THE
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Re: Smith v. Mattia, et al.
C.A. No. 4498-VCN
Date Submitted: October 28, 2009

Dear Counsel:

I. INTRODUCTION

This letter opinion involves the unhappy and failed construction of a personal residence. The contractor is a forfeited Maryland corporation. The owners allege that the contractor failed to complete the residence within a reasonable period of time, and also misappropriated funds that were to be used in its construction. They allege breach of contract, fraudulent conveyance and inducement, conversion, and

related conspiracy charges. They seek to pierce the corporate veil and hold the seller's principals, employees, and corporate affiliate liable for the alleged wrongdoing. Based upon the facts alleged in the Complaint, the Court cannot yet determine whether the one-year limitations period prescribed in the Contract bars the buyers' claims. Moreover, it is not unreasonable to conclude, in the context of the pending motion to dismiss, that the claims accrued on or after April 9, 2006, and were therefore brought within the applicable three-year statute of limitations.

II. FACTUAL BACKGROUND

The Plaintiffs are David R. Smith and Barbara T. Smith, husband and wife (the "Smiths"). The Defendants are Donald L. Mattia ("Donald"), Michael Mattia ("Michael"), Barbara Joseph ("Barbara"), and Residential Construction Services, LLC ("Residential Construction").[1] Donald was a shareholder and/or director and President of Donald L. Mattia, Inc. ("DLM"), a Maryland corporation, which engaged in custom home construction in Delaware under the name of Chapel Homes Custom Builders.[2] Michael, who is Donald's son, was a shareholder and/or director

[1] Complaint (the "Compl.") ¶¶ 1-5.
[2] DLM is not a party to this action.

and Vice President of DLM while Barbara was its Construction Coordinator. Residential Construction was formed by Donald and Michael on June 13, 2006 allegedly for the purpose of allowing them to engage in custom home construction in Delaware.[3]

On November 1, 2004, the Smiths entered into a contract with DLM for the construction of a new home in Lewes, Delaware.[4] The total sum to be paid under the Contract was $453,500, with the Smiths paying a deposit of $15,000 at the signing of the Contract, and another $10,000 at some point thereafter.

DLM agreed to complete the home by July 1, 2005. It had, however, completed only an estimated 6% of the work by that date.[5] Construction continued to lag, due in part to failed inspections and defective framing work performed by DLM's subcontractors. These delays caused the Smiths to extend the maturity date of their construction loan four times.[6] Finally, on April 10, 2006, DLM abandoned the Contract after performing only approximately 58% of the total construction. As

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[3] Compl. ¶ 5.
[4] *Id.* at ¶ 6. The parties agreed that the Contract would be governed by Delaware law. Compl., Ex. A. (the Contract) ¶ 23.
[5] Compl. at ¶ 8.
[6] *Id.* at ¶ 12.

a result, the Smiths were forced to complete work on the home by themselves with the help of another construction company.[7]

III. CONTENTIONS

The Smiths filed the Complaint on April 9, 2009. In it, they allege that DLM did not complete their home by July 1, 2005 as required in the Contract, and further failed to finish the home within a reasonable amount of time thereafter. As a result, the Smiths had to finish the work under the Contract themselves at an additional cost of $104,999.11; they contend that there still remains roughly $31,000 of work left incomplete by the Defendants.[8] In addition, they claim that DLM failed to make reasonable attempts to cure defects in the work performed by subcontractors and that it breached a contract with a subcontractor, which forced the Smiths to pay severance costs in the amount of $3,620.

The Smiths also argue that DLM was obligated, under the Contract, to pay the interest of the Smiths' construction loan from July 1, 2005 until the Smiths obtained

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[7] *Id.* at ¶ 15.
[8] *Id.* at ¶ 26. The Plaintiffs also claim consequential damages, but it appears that they intend to abandon this claim. *See* Pls.' Mot. to Am. Compl. & Add Parties ¶ 7 (seeking to "clarify that they are not seeking consequential damages for the costs of moving and for loss of use of their residence prior to April 10, 2006").

a certificate of occupancy. DLM allegedly did not pay this amount, which totaled $13,817.61; instead, the Smiths paid the interest that accrued in the interim between July 1, 2005 and October 6, 2006, when the certificate of occupancy was obtained.[9] Lastly, they claim that $99,171.87, which was paid to DLM from the Smiths' construction loan, cannot be accounted for in terms of either construction materials or labor, and that backfill removed from the Smiths' property has not been replaced.[10]

The Smiths allege that DLM breached the Contract because of its conduct, or lack thereof, as described above. They also assert, on similar grounds, that DLM breached the implied covenant of good faith and fair dealing. Moreover, the Smiths contend that Donald, Michael, and Barbara are each personally liable for fraudulently and intentionally converting the construction funds due to their active involvement in managing and coordinating construction. They further argue that

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[9] *Id.* at ¶¶ 13-14.

[10] *Id.* at ¶ 25. The Smiths, however, were able to account for some of these misappropriated funds and it appears as though they have obtained relief for the backfill. Specifically, they claim that the loan was used to purchase an estimated $8,965.04 of excess lumber, which was neither accounted for nor left at the job site. *Id.* at ¶ 19. As for the backfill, Donald pled guilty to one misdemeanor count of misappropriation of proceeds greater than $1,000 and ordered to pay restitution for the backfill's theft in the amount of $10,876.50. *Id.* at ¶ 23.

these same individuals fraudulently induced the Smiths to approve payment of funds that were never intended for the construction of their home. Moreover, they claim that Donald, Michael, and Barbara civilly conspired to commit these transgressions.

Additionally, the Smiths contend that DLM was Donald's alter ego with no genuine or separate corporate existence; DLM was instead used, and existed solely, to permit Donald and Michael to transact a portion of their business under a corporate guise. Thus, the Smiths seek to pierce the corporate veil and hold Donald and Michael liable for DLM's breaches and misappropriation. They also contend that DLM's assets were transferred to Donald and Michael's "new alter ego," Residential Construction, and that this conveyance should be set aside because it was part of the Defendants' fraudulent scheme.[11]

The Defendants have moved to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). Specifically they argue that the Smiths failed to comply with applicable time-bar limitations. Paragraph 19 of the Contract requires that any action for breach of the Contract "by the Owner against the Contractor" be "commenced within one (1) year after the cause of action has accrued, or the same

[11] *Id.* at ¶¶ 61-65.

shall be barred." Thus, the Defendants argue that the Complaint should have been filed no later than one year from the accrual of the cause of action, which they maintain "could not have been later than April 10, 2006 . . . ."[12]

Alternatively, they claim that even if the Court applies the three year statute of limitations period prescribed by 10 *Del. C.* § 8106, the Smiths still failed to file timely. They argue that the Smiths needed to bring their action for breach of contract within three years of the date of breach, and their action for fraud and conversion within three years of the time of the wrongful act. Accordingly, for the Smiths to have filed within the statutory period the wrongful acts would have had to have occurred no earlier than April 9, 2006—exactly three years before the Complaint was filed. The Defendants claim that the facts as alleged do not reasonably support the conclusion that both the breaches and fraudulent wrongdoing occurred at the earliest on either April 9, 2006 or April 10, 2006.

IV. ANALYSIS

The Motion to Dismiss effectively raises two separate issues: 1) whether the one-year limitations provision in the Contract bars the Smiths' claims for breach of

[12] Defs.' Am. Mot. to Dismiss ¶ 7.

contract and misappropriation; and if not, 2) whether those causes of action accrued before April 9, 2006, and are therefore barred by the three-year statute of limitations found in 10 *Del. C.* § 8106.[13] The Court concludes that the Contract's one-year limitation is inapplicable because the Defendants were neither parties to, nor intended third-party beneficiaries of, the Contract. Moreover, whether the claims are barred by the three-year statute of limitations involves questions best resolved after fuller development of the facts.

A. *The Applicable Standard*

On a motion to dismiss under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the Court must accept the factual allegations stated in the complaint as true, and draw all reasonable inferences from those facts in favor of the plaintiff.[14] The motion will fail if the facts as pled would entitle the Smiths to ultimate relief.[15]

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[13] This Court recently noted that judgment on a statute of limitations defense is generally sought in a summary judgment motion or a motion for judgment on the pleadings. *Vichi v. Koninklijke Philips Elec. N.V.*, 2009 WL 4345724, at *15 (Del. Ch. Dec. 1, 2009). Nonetheless, motions to dismiss have been granted on statute of limitations grounds. *Id.* (citing *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *14 (Del. Ch. Dec. 23, 2008)).
[14] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 880 (Del. Ch. 2009).
[15] *Id.*

B. *The Contractual Provision*

Paragraph 19 of the Contract, titled "Limitations of Actions," provides that "any action for breach of the Building Contract by the Owner against the Contractor must be commenced within one (1) year after the cause of action has accrued, or the same shall be barred." 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."[16] Under Delaware law, however, only parties to a contract and intended third-party beneficiaries may enforce its terms.[17] Merely incidental beneficiaries to a contract have no legally enforceable rights under it, and unless the parties to the contract

[16] *Rumsey Elec. Co. v. Univ. of Del.*, 358 A.2d 712, 714 (Del. 1976); *see also Johnson v. DaimlerChrysler Corp.*, 2003 WL 1089394, at *3 (D. Del. Mar. 6, 2003). The Smiths contend that ¶ 19 of the Contract is abrogated by ¶ 24, which provides for the automatic amendment or invalidation of any contractual provision or clause that conflicts with Delaware law. They argue that the contractual limitation period conflicts with the three-year limit provided by 10 *Del. C.* § 8106. The Court is not persuaded. Section 8106 provides a default limit that, given the authority cited, may be shortened contractually.

[17] *See e.g.*, *Brown v. Falcone*, 976 A.2d 170, 2009 WL 1680855, at *2 (Del. 2009) (TABLE); *Nama Holdings LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 434 (Del. Ch. 2007).

intended to benefit a third-party beneficiary, its status as such will be only incidental.[18]

Despite the apparent validity of the Contract's one-year limitation period, the Defendants are not protected either as parties or as intended third-party beneficiaries of the Contract.[19] The Contract was between the Smiths and their contractor, DLM. It makes no express or implied mention of Donald, Michael, Barbara, or Residential Construction, and it does not suggest that paragraph 19 is for the benefit of anyone other than DLM. Therefore, the one-year limitations period prescribed in the Contract cannot be applied to bar the Smiths' claims against the Defendants under the framework described above.

C. *The Three-Year Statute of Limitations*

Pursuant to 10 *Del. C.* § 8106, no action based on a promise, and no action to recover damages caused by an injury unaccompanied with force "shall be brought

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[18] *Nama Holdings*, 922 A.2d at 434.

[19] Whether the Defendants may derive the benefit of the one-year limitation from DLM—as they may derive their potential liability—if the corporate veil is in fact pierced was not argued in the Defendants' motion. Indeed, whether or not the Complaint adequately pleads a corporate veil claim has not yet been put before the Court, but will have to be resolved at some point. Thus, the one-year limitation provision in the Contract may be revisited.

after the expiration of 3 years from the accruing of the cause of such action."[20] For breach of contract, a cause of action accrues "at the time the contract is broken, not at the time when actual damage results or is ascertained."[21] For a claim based on fraud, the cause of action accrues at the time of the wrongful act, "even if the plaintiff is unaware of the cause of action."[22] Lastly, the statute of limitations begins to run in a tort claim, such as conversion, when the injury occurs to the plaintiff.[23]

There are, however, several circumstances in which the running of the statute of limitations can be tolled. These exceptions include: 1) fraudulent concealment; 2) inherently unknowable injury; and 3) equitable tolling.[24] Each exception rests on the premise that the statute of limitations should be tolled where the facts underlying a claim were so hidden that they could not have been discovered by a reasonable plaintiff. Indeed, if one of these exceptions applies, the statute will only begin to

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[20] The parties agree that 10 *Del. C.* § 8106 governs the Smiths' breach of contract and fraud claims.
[21] *Worrel v. Farmers Bank of Del.*, 430 A.2d 469, 472 (Del. 1981).
[22] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).
[23] *See, e.g.*, *Winner Acceptance Corp.*, 2008 WL 5352063, at *14; *Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 425 (Del. Super. 1971).
[24] *Krahmer v. Christie's Inc.*, 903 A.2d 773, 778 (Del. Ch. 2007).

run upon the "discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery [of the injury]."[25]

Turning first to the Smiths' breach of contract claims, the Defendants argue that the statute of limitations began to run on July 1, 2005 when DLM failed to construct the home by the date specified in the Contract. Although a cause of action for breach of contract occurs on the date of the breach, a statute of limitations will not generally bar a continuing cause of action until the contract's termination.[26] Thus, in "cases of continuous contract and continuing breach, the statute begins to run only when full damages can be ascertained and recovered."[27] Whether the obligations under a contract are continuous or severable turns on the parties' intent, which may be ascertained through the contract's terms and subject matter, "taken together with the pertinent facts and circumstances" surrounding its formation.[28]

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[25] *Id.* at 778-79 (quoting *Wal-Mart Stores*, 860 A.2d at 319).
[26] *Guerrieri v. Cajun Cove Condo. Council*, 2007 WL 1520039, at *6 (Del. Super. Apr. 25, 2007).
[27] *Id.* (citing *Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co. of N.Y.,* 484 F. Supp. 1375, 1390 (D. Del. 1980)).
[28] *Kaplan v. Jackson*, 1994 WL 45429, at *3 (Del. Super. Jan. 20, 1994).

The critical inquiry is whether the obligations under the contract are all done for the "same general purpose."[29]

Whether a duty under a contract and whether a breach of a contract are continuous or severable are questions of fact, and cannot fairly be resolved here upon the Defendants' motion to dismiss.[30] Indeed, it is reasonable to infer that DLM's failure to complete the house by July 1, 2005 constituted a continuing breach, and was simply part of its broader, overriding obligation to build the home and do so by within some reasonable time contemplated by the parties.[31] In addition, the extent of damages caused by DLM's failure to complete the contract by July 1, 2005 could not be determined until it finally completed the contract, or as in this case, abandoned the project.[32] In any event, ultimate resolution of whether both

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[29] *Joseph Rizzo & Sons v. Christina Momentum L.P.*, 1992 WL 51850, at *3 (Del. Super. Feb. 21, 1992).

[30] *See Bridgestone/Firestone, Inc. v. Cap Gemini Am., Inc.*, 2002 WL 1042089, at *7 (Del. Super. May 23, 2002) (citing *Joseph Rizzo & Sons*, 1992 WL 51850, at *4 ("[W]hether a continuous contract is present, is a question of fact at trial.").

[31] Indeed, as with many construction contracts, the parties recognized that the home might not be completed by the target date. They agreed that if a certificate of occupancy was not obtained by July 1, 2005, DLM would pay the construction loan interest until one was obtained. Compl., Ex. A (Contract Addendum) ¶ 4.

[32] There is an alternate means of viewing this issue. The Court could assume that the failure to complete the contract by July 1, 2005 started the statute of limitation as to that specific claim, but did not run the statute as to the Smiths' arguably separate claim that DLM simply failed to

the duty and the failure to complete the contract by the specified date were continuing or severable cannot be resolved at this point in the proceeding.[33]

As for the interest payments, no cause of action would have accrued until the payments became due.[34] The Smiths allege that the maturity date on the loan, which was originally August 10, 2005, had to be extended four times, the last of which being to September 1, 2006.[35] They contend that they paid the interest that had accrued from July 1, 2005 until a certificate of occupancy was obtained on

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complete the house altogether. Indeed, the failure to complete the home by the target date may fairly be considered an immaterial breach, whereas its abandonment was most certainly material. *See HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *10-12 (Del. Ch. May 2, 2007) (finding that failure to strictly adhere to eight month target date for project completion would not be a material breach, but failure to complete the project for twenty-seven months was unreasonable, and thus material). This issue was not raised by the parties; other jurisdictions have found that an immaterial breach will not start the statute of limitations against later, material breaches. *See Independence Ins. Serv. Corp. v. Hartford Life Ins. Co.*, 472 F. Supp. 2d 183, 188 (D. Conn. 2007) (interpreting Connecticut law); *Cary Oil Co., Inc. v. MG Ref. & Mktg., Inc.*, 90 F. Supp. 2d 401, 409 (S.D.N.Y. 2000) ("[I]f the breach is not material or if the party aggrieved by a material breach elects not to terminate, the breach is deemed partial, and the contract remains in force. In consequence, only those claims arising out of the partial breach accrue at that time."); *K-Mart Corp. v. Todd & Co.*, 1995 WL 236761, at *3 (Wis. App. Apr. 25, 1995) (same). *But see Archdiocese of San Salvador v. FM Int'l, Inc.*, 2006 WL 437493, at *4 n.6 (D.N.H. Feb. 23, 2006) (interpreting New Hampshire law and holding that "[w]hether a breach is material, however, does not affect the running of the statute of limitations, provided the breach injures the plaintiff.")

[33] The same may be said for the Smiths' good faith and fail dealing claim.

[34] *See Worrel*, 430 A.2d at 474 (finding that defendant was not in contractual default, and thus the statute of limitations did not begin to run, until funds owed under an installment sales contract became due and payable).

[35] Compl. ¶ 12.

October 6, 2006, but did not allege when the payments were made. Because it must view the allegations of the Complaint in a light most favorable to the Smiths and because it cannot ascertain when the interest payment were first due and payable, the Court cannot yet say when the cause of action on this claim accrued.[36]

Turning to the fraudulent inducement claim, the Smiths allege that Donald, Michael, and Barbara fraudulently induced them to approve draws upon the construction loan for funds that were never intended for the Smiths' home. The fraudulent inducement, and thus the wrongful act, could not possibly have occurred on or after April 9, 2006, which was only one day before DLM abandoned the contract.[37] That said, as to this claim, the statute of limitations may have been tolled due to fraudulent concealment.

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[36] *See Eller v. Bartron*, 2007 WL 4234450, at *4-5 (Del. Super. Nov. 27, 2007) (denying motion for summary judgment for failure to sue within the statutory period because the Court "could not say as a matter of law" when the injury occurred).

[37] The elements of fraudulent inducement are the same for those of common law fraud:

> 1) a false representation of material fact; 2) the defendant's knowledge of or belief as to the falsity of the representation or the defendant's reckless indifference to the truth of the representation; 3) the defendant's intent to induce the plaintiff to act or refrain from acting; 4) the plaintiffs action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance.

Haase v. Grant, 2008 WL 372471, at *2 (Del. Ch. Feb. 7, 2008).

When a plaintiff seeks to apply a tolling exception to the statute of limitations, it "bears the burden to plead facts demonstrating the applicability of the exception."[38] To toll the statute of limitations under the fraudulent concealment exception, the plaintiff must allege 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."[39] Here, the Smiths pleaded fraudulent inducement with particularity, and the factual basis for this allegation further supports the fraudulent concealment exception.[40] On a motion to dismiss, the Court must accept that the Defendants' allegedly fraudulent representations not only induced the Smiths into approving the misappropriated bank draws, but also concealed the Defendants' wrongdoing.[41]

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[38] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005).
[39] *In re Tyson Foods, Inc. Consol. S'holders Litig.*, 919 A.2d 563, 585 (Del. Ch. 2007).
[40] Specifically, the Complaint alleges that the Defendants represented that bank draws would be used for the construction of the Smiths' home, that they were never actually intended for that purpose, and that the Smiths relied on these representations. Compl. ¶¶ 42-44.
[41] The Smiths also argue that the statute of limitations should be equitably tolled. This exception applies while a plaintiff "has reasonably relied upon the competence and good faith of a fiduciary." *Tyson Foods*, 919 A.2d at 585. The Smiths contend that the Defendants, or at least DLM, stood in a fiduciary relationship with the Smiths by virtue of 6 *Del. C.* § 3502. While that fund preservation provision deems money received by a contractor in connection with the construction to be trust funds in the contractor's hands, it has been interpreted narrowly, although it is not so clear whether that interpretative approach continues, or should continue. *See State v.*

The Defendants, however, claim that DLM's failure to complete the home by July 1, 2005, and the fact that the home was only 6% complete by that date, would have placed a reasonable person in the Smiths' position on inquiry notice of the misappropriation as of that date or shortly thereafter, and thus the injuries could have subsequently been discovered by exercise of reasonable diligence.[42] Without a more substantial factual record, the Court cannot accept this conclusion.[43] The relationship between DLM and the Smiths continued after July 1, 2005, and in fact,

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Pierson, 86 A.2d 559, 560-61 (Del. Super. 1952); *see also Creswell v. Robino-Ladd*, 1977 WL 23819, at *2 (Del. Ch. Sept. 19, 1977).

In addition, the Smiths claim that the Defendants fraudulently later concealed DLM's ongoing existence by misrepresenting that it had been declared bankrupt. They cite to a letter attached to their response in which they claim that Donald informed the Smiths that "[DLM] was unable to recover from its Chapter 11 reorganization and [had] ceased to exist." This letter is misquoted; in fact, Donald informed the Smiths that DLM had "ceased to function." Pls.' Response to Defs.' Mot. to Dismiss, Ex. E (the "Backfill Letter"). While a statement that an entity ceases to exist, especially in this context, may lead one to believe that the entity is bankrupt and thus not amenable to suit, a statement indicating that it has ceased to function does not carry the same connotation. Thus, the Court cannot infer from the facts put before it that the Defendants fraudulently concealed DLM's ongoing existence.

[42] *See Tyson Foods*, 919 A.2d at 585 (finding that, under any of the tolling theories, relief extends only until the plaintiff is put on inquiry notice . . . "[t]hat is to say, no theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong.").

[43] *See Reid v. Thompson Homes at Centreville, Inc.*, 2007 WL 4248478, at *8 (Del. Super. Nov. 21, 2007) (declining to grant Defendant's motion after concluding that, although the Complaint "does not provide any specificity" as to the Plaintiffs' knowledge regarding the alleged breach and thus when or whether there was inquiry notice, the "claim has been raised . . . [and] hence, the factual matters should be developed)."

substantial work was performed on the home between that date and the Contract's abandonment on April 10, 2006. Considering the amount of work accomplished in that interim, and based solely upon the allegations found in the Complaint, it is not unreasonable to infer that the Smiths' reasonably believed their funds were in fact being applied to the construction of their home.[44] Until contrary facts are adduced, the Court must accept that the statute of limitations was tolled until at least April 9, 2006.

This inference could also be applied to toll the statute of limitations on the alleged fraudulent conveyance and conversion claims; however, tolling need not be considered because with those claims, the wrongful act or injury may not have occurred until at least April 9, 2006. DLM remained in existence until at the earliest October 2007, and Residential Construction 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

[44] Regarding the removed backfill, Donald explained in the Backfill Letter to David Smith, dated June 7, 2006, that it was common in the home construction industry to remove the backfill to create working room at the job site. The backfill would then be replaced from other job sites. David Smith, who works in construction, Compl. ¶ 26, presumably knew this industry practice, and thus a reasonable person in his position would likely not have believed that the backfill was misappropriated until the project was abandoned without its return.

abandoned. Thus, once again, after viewing the facts in a light most favorable to the Smiths, the Court cannot reasonably conclude that either the fraudulent conveyance or conversion claim accrued before April 9, 2006, and was therefore filed after the statutory period.[45]

V. CONCLUSION

For the reasons stated above, the Defendants' Motion to Dismiss is denied. The issues addressed in this letter opinion may be revisited upon the development of a more robust factual record.[46]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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[45] As with the breach of contract claims, the fraudulent inducement, conveyance and conversion claims may be dependent upon DLM's liability and the Defendants' personal liability may therefore be entirely dependent on the Smiths' ability to pierce the corporate veil. *See supra* note 19. Again, these issues have not been raised; the Court need not resolve them now, although it seems likely that, at some point, their resolution will be necessary.

[46] Although the Smiths' claims have survived the early assertion of the Defendants' time-bar defenses, those defenses present substantial issues for additional evaluation. It is not so much that they are without merit as it is that a motion to dismiss is not the most useful device for presentation of affirmative defenses.