

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

GRAY DAWN ACRES, LLC,	:	
	:	C.A. No. K11C-07-007 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
DARIN LOCKWOOD,	:	
	:	
Defendant.	:	

Submitted: October 28, 2011  
Decided; January 26, 2012

**ORDER**

Upon Defendant's Motion to Dismiss.  
*Granted.*

Charles E. Whitehurst, Jr., Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorney for the Plaintiff.

Richard E. Berl, Jr., Esquire of Smith Feinberg McCartney & Berl, LLC, Georgetown, Delaware; attorney for the Defendant.

WITHAM, R.J.

Defendant has moved to dismiss with prejudice under Superior Court Civil Rule 12(b)(6), which is effectively a motion for summary judgment, and will be treated as such.

### FACTS

\_\_\_\_\_ On July 7, 2011, Gray Dawn Acres, LLC (hereinafter “Plaintiff”) brought suit against Darin Lockwood (hereinafter “Defendant”) for fraud. Plaintiff, a limited liability company incorporated in Delaware, was created for the purpose of real estate development. Plaintiff purchased property in Harrington for the purpose of developing it and entered into a note with First National Bank of Wyoming to finance the development, signing a note for \$1,015,000 on December 28, 2007. Earlier, on August 9, 2006, Plaintiff retained the services of Meridian Architects & Engineers, LLC (hereinafter “Meridian”), to provide engineering services to assist in bringing the project to fruition. Defendant is alleged to be a former member of Meridian. Meridian is now apparently defunct.

Plaintiff received preliminary approval for the development on July 13, 2006. On June 12, 2008, final conditional approval was obtained subject to seven conditions. Plaintiff alleges that the final plans submitted were not consistent with applicable county codes and regulations. Kent County Levy Court denied final approval on July 8, 2008 citing five areas of deficiency in Plaintiff’s application. Plaintiff alleges fraud by Defendant in his inducement and misrepresentations as to the scope and ability of Meridian to perform the work it was contracted to do. Plaintiff alleges meetings in which Defendant reassured Plaintiff that it was unnecessary to obtain other engineering firms to complete approval of the development. Further, Plaintiff alleges deliberate concealment of Defendant’s imminent sale of assets to Artesian. Plaintiff states it was damaged in that it spent

\$347,000 on engineering services, it incurred unnecessary interest on its loan, and it paid lump sums to prevent foreclosure. Plaintiff alleges a loss in net profit of \$3,870,000. Plaintiff also alleges punitive damages.

### ***Standard of Review***

A Rule 12(b)(6) motion to dismiss that relies on materials beyond the pleadings shall be treated as a motion for summary judgment.<sup>1</sup> Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The facts must be viewed in the light most favorable to the non-moving party.<sup>3</sup> Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.<sup>4</sup> However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.<sup>5</sup>

Superior Court Civil Rule 9(b) requires, in pertinent part, “In all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity.”

### **DISCUSSION**

Defendant moves to dismiss under Superior Court Civil Rule 12(b)(6). Because Defendant’s motion relies on a contract, outside the pleadings, entered into

---

<sup>1</sup>Super. Ct. Civ. R. 12(b).

<sup>2</sup>Super. Ct. Civ. R. 56(c).

<sup>3</sup>*Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 780 (Del. Super. 1995).

<sup>4</sup>*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

<sup>5</sup>*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

by the Plaintiff and Meridian,<sup>6</sup> the motion must be treated as a motion for summary judgment pursuant to Superior Court Civil Rule 56(c).<sup>7</sup>

Under Superior Court Civil Rule 9(b), a complaint for fraud must be pleaded with particularity. Specifically, a complaint for fraud must “refer to ‘the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.’”<sup>8</sup> The complaint, in pertinent part, states as follows:

From the inception of the contract [in July 2006] until July 8, 2008, Defendant Lockwood indicated that the engineering services provided to the Plaintiff would be sufficient to ensure approval . . . .

. . . .

During the course of rendering services, Defendant Lockwood has affirmatively misrepresented to the Plaintiff that the conditions required to be satisfied would, in fact, be satisfied. Furthermore, Defendant Lockwood fraudulently induced the Plaintiff to continue to obtain the services of Meridian by making misrepresentations as to the scope and ability of Meridian to do the work stated. Finally, Defendant Lockwood was secretly negotiation [sic] the sale of Meridian, LLC to Artesian Resources and the sale was completed on June 8, 2008. Defendant Lockwood fraudulently concealed this sale from Plaintiff Gray Dawn in order to get them to rely on Meridian and forebear from obtaining services from another engineering firm and suing Meridian for negligence at all. Meridian was unable to resolve the deficiencies stated in June 2008 in a timely and efficient manner.<sup>9</sup>

---

<sup>6</sup>Ex. A.

<sup>7</sup>*Venables v. Smith*, 2003 WL 1903779, at \*2 (Del. Super. Mar. 14, 2003).

<sup>8</sup>*Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 23 (Del. Super. 1983) (quoting *Autrey v. Chemtrust Indust. Corp.*, 362 F.Supp. 1085, 1092 (D. Del. 1973)).

<sup>9</sup>Compl. paras. 6, 9.

Plaintiff's fraud allegations are not pleaded with particularity in that Plaintiff avers neither the specific time nor the place of Defendant's statements. Nor does Plaintiff aver the specific content of those representations which give rise to fraud.<sup>10</sup> Vaguely outlining the start date of Plaintiff's dealings with Defendant, the date of sale of some of Meridian's contracts, the date of the project's initial rejection, and the date that final approval of the project was denied are not specific enough. The specific time, place, and content of Defendant's alleged fraudulent misrepresentations are critical to Plaintiff's fraud claim because these aspects are necessary to inform Defendant of charges so he may prepare a defense.<sup>11</sup> This complaint, therefore, does not comply with Superior Court Civil Rule 9(b).<sup>12</sup>

---

### **CONCLUSION**

On the grounds stated above, Defendant's motion for summary judgment is hereby granted without prejudice.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh

---

<sup>10</sup>As is noted in the Court's quotation of Plaintiff's complaint, Plaintiff simply states that "Defendant Lockwood affirmatively misrepresented to the Plaintiff that the conditions required to be satisfied would, in fact, be satisfied." Compl. para. 9.

<sup>11</sup>*See C & P Tel. Co. v. Chesapeake Utils. Corp.*, 436 A.2d 314, 338 (Del. 1981).

<sup>12</sup>Indeed, the alleged statements by Defendant are central to Plaintiff's claim. Plaintiff has no cognizable claim for fraud without these statements. Mere silence in the face of Meridian's sale of certain unrelated contracts to Artesian does not sound in fraud without further specific facts.