

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

ANTHONY LARKINS

Plaintiff,

v.

A & A BUILDERS, LLC,

Defendant.

Case No.: 2018 CA 003355 B

Judge José M. López

ORDER

Before the Court is Defendant A&A Builder, LLC’s (“Defendant”) Motion for Summary Judgment filed on January 23, 2019, Plaintiff Anthony Larkin’s (“Plaintiff”) Opposition filed on February 12, 2019, and Defendant’s Reply filed on February 19, 2019. For the reasons that follow, the motion is **GRANTED**.

FACTUAL BACKGROUND

On December 30, 2017, Defendant and Plaintiff executed a contract for the sale and purchase of a single family home (“Sales Contract”) located at 5739 9th Street N.W., Washington, D.C. (“Property”).¹ Mot. at Ex. 1. Also on December 30, 2017, Plaintiff was provided with, and signed, Defendant’s Seller’s Disclosure Statement.² Mot. at Ex. 2. The Seller’s Disclosure Statement required the Defendant to disclose known conditions of the Property at the time the statement was completed.³ *Id.*

¹ The Sales Contract contains an integration clause stating that “unless amended in writing,” the contract “contains the final and entire agreement of the parties.” Mot. Ex. 1 at 8.

² The Seller’s Disclosure Statement expressly states that it is “a disclosure only and is not intended to be a part of any contract between Buyer and Seller.” Mot. at Ex. 2.

³ The Defendant signed the disclosure statement on December 26, 2017. Relevant to the present matter, Defendant stated in the disclosure that it was not aware of the roof leaking, any plumbing system defects, any structural defects in the walls or ceiling, any defects with the heating or air conditioning systems, or any electrical system defects. Mot. Ex. 2 at 3-6.

On December 31, 2017, Plaintiff had the Property inspected and the inspector produced a report (“Inspector’s Report”) that identified items that needed repair.⁴ Mot. at Ex. 4. Two days later, on January 2, 2018, Plaintiff’s real estate agent emailed Defendant’s real estate agent thanking Defendant for allowing Plaintiff to inspect the property. The email also mentioned that the roof would need some maintenance, but that Plaintiff would not be requesting Defendant to address those concerns. Mot. at 4, *see also* Mot. at Ex. 5. Pursuant to the Inspectors Report, the parties executed a Home Contingency Addendum on January 4, 2018, which identified repairs the Defendant would need to complete prior to closing. Mot. at Ex. 6.⁵

On February 5, 2018, Plaintiff’s real estate agent emailed Defendant’s real estate agent a “General Addendum,” which indicated Plaintiff conducted a walk-through and discovered some items on the Home Contingency Addendum were not resolved. Mot. at Ex. 7. Plaintiff requested a \$15,000 seller credit at settlement for the uncompleted items. *Id.* On February 6, 2018, the parties signed a document (“As-is Addendum”) which states,

A and A Builder, LLC agree [sic] to pay Anthony C. Larkins \$8,000.00 to satisfy home inspection contingency items and accepts property as is.

Mot. at Ex. 8.

After closing, Plaintiff moved into the Property and began to discover defects. The roof leaked. Opp. at ¶ 4. The interior walls did not have insulation Opp. at ¶ 6. The electrical system needed extensive repairs. Opp. at ¶ 7. The piping from the furnace had inadequate clearance from combustibles, the vent pipe had a negative pitch and was in contact with the drywall, and the sealant used was not fire retardant. Opp. at ¶ 9. The insulation around furnace pipes were not fire

⁴ The Inspector’s Report was completed on December 31, 2017. Mot. at Ex. 6.

⁵ The Home Contingency Addendum was incorporated into the Sales Contract and contains a list of 26 items Defendant needed to repair before closing, repairs to the roof was not included. Mot. at Ex. 6.

retardant. Opp. at ¶ 10. There was a persistent sewage smell emanating from the basement and first level bathrooms. Opp. at ¶ 11. The incorrect piping was used in the master and guest bathroom. Opp. at ¶ 12. A portion of the basement was left unenclosed. Opp. at ¶ 13.

Plaintiff filed the instant action against Defendant on May 11, 2018, asserting (1) breach of implied warranty of good faith and fair dealing, (2) breach of contract, (3) negligence, (4) violations of the District of Columbia Consumer Protection Procedures Act, and (5) negligent misrepresentation. The Defendant seeks summary judgment for all claims being asserted on the basis that Defendant made no assurances about the condition of the Property, Plaintiff failed to support his contention that Defendant actually knew about defects at the time the Seller's Disclosure Statement was completed, and that some claims are duplicative of the breach of contract claim.

LEGAL STANDARD

To prevail on a motion for summary judgment, the moving party must demonstrate, based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." Super. Ct. Civ. R. 56(c). A court considering a motion for summary judgment must view the pleadings, discovery, and affidavits in the light most favorable to the non-moving party. *Cormier v. District of Columbia Water and Sewer Auth.*, 959 A.2d 658, 663 (D.C. 2008). However, "[c]onclusory allegations by the nonmoving party are insufficient to establish a genuine issue of material fact or to defeat the entry of summary judgment." *Hollins v. Fed. National Mortgage Ass'n*, 760 A.2d 563, 570 (D.C. 2000) (citation omitted). A motion for summary judgment should only be granted if, when considering all the evidence as true, a trier of fact could not find for the non-moving party. *See*

Allen v. District of Columbia, 100 A.3d 63, 67 (D.C. 2014). To defeat the motion, “the opposing party need only show that there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties differing versions of the truth at trial” taking into account applicable burdens of proof. *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346, 347 (D.C. 1987) (citing *Nader v. Toledano*, 408 A.2d 31, 41 (D.C. 1979)).

ANALYSIS

The motion for summary judgment is granted because in reviewing all evidence and submissions in favor of Plaintiff, Plaintiff has failed to demonstrate the existence of any genuine issue of material fact for the claims against Defendant.

I. Breach of Implied Warranty of Good Faith and Fair Dealing

Summary judgment is granted in favor for Defendant for the claim of breach of implied warranty of good faith and fair dealing because Plaintiff has failed demonstrate a genuine dispute of material fact with regard to Defendant’s actual knowledge of the defects Plaintiff discovered after moving into the property.

Every contract has an “implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.” *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988) (citing *Uproar v. National Broadcasting Co.*, 81 F.2d 373, 377 (1st Cir. 1936) (citations omitted)), *cert. denied*, 298 U.S. 670, 56 S. Ct. 835, 80 L. Ed. 1393 (1936). “This duty prevents a party from evading the spirit of the contract, willfully rendering imperfect performance or interfering with the other party’s performance.” *Id.*

Plaintiff contends defendant made a “series of affirmative misrepresentations” on the Seller Disclosure Statement, regarding the condition of the property, and that he discovered the roof leaked, the electrical was improperly installed, the interior walls did not have insulation, a portion of the basement was unenclosed, and there were plumbing issues. Opp. at 2-3, 11. Plaintiff claims that his right to receive the fruits of the Sales Contract was injured due to the misrepresentations. *Id.* Plaintiff has failed to cite to any evidence in the record that establishes the existence of a factual dispute regarding Defendant’s actual knowledge of the defects and that it was Defendant’s intent to injure Plaintiff’s right by making the representations. Plaintiff merely asserts, in a conclusory manner, that because he found the defects after moving in Defendant must have known about them. *Id.* Without evidence to support this assumption the Court cannot find that a factual dispute exists. Thus, summary judgment in favor of the Defendant is granted as to the breach of implied warranty of good faith and fair dealing.

II. Breach of Contract

The Court grants summary judgment for the breach of contract claim because the Sellers Disclosure Statement was not incorporated into the Sales Contract and Plaintiff and Defendant entered into a secondary contract, the As-is Addendum, which satisfied Defendant’s obligations under the Home Contingency Addendum.

To prevail on a claim of breach of contract, the Plaintiff must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach. *See Tsintolas Realty Co. v. Mendez*, 984 A.2d 181 (D.C. 2009). "It is a longstanding principle in civil law that there can be no monetary recovery unless the plaintiff has suffered harm." *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 473 (citing *Brock v. Robbins*, 830 F.2d 640, 647 (7th Cir.

1987)). "[M]ere breach without proof of monetary loss is *injuria absque damno*," *Cagle v. Southern Bell Tel. & Tel. Co.*, 143 Ga. App. 603, 604, 239 S.E.2d 182, 183 (Ga. Ct. App. 1977) i.e., "a wrong which results in no loss or damage, and thus cannot sustain an action." *Mira*, 107 F.3d at 473 n.7 (citing Black's Law Dictionary 785 (6th ed. 1990)).

Plaintiff contends that the Seller's Disclosure Statement was incorporated into the Sales Contract because it was delivered before the execution of the Sales Contract, that the disclosure statement created a duty to make accurate representations of the Property's condition, and that Plaintiff relied upon those representations in entering into the Sales Contract. Opp. at 7. Plaintiff argues that since the Seller's Disclosure Statement is part of the Sales Contract Defendant is in breach for not representing the condition of the property correctly. *Id.* While Defendant contends that the Seller's Disclosure Statement was not incorporated into the Sales Contract per its express language and that Plaintiff accepted the property pursuant to the As-is Addendum. Mot. at 7. The Court is persuaded that the express language of the Seller's Disclosure Statement precludes its integration into the Sales Contract.

Plaintiff relies upon *Levick v. Riser*, stating the court denied a motion to dismiss and permitted the incorporation of a seller disclosure statement so long as the statement was delivered before execution of the sales contract. 206 F. Supp. 3d 337, 343 (D.D.C. 2016). However, the *Levick* Court makes clear the defendant's brief was "devoid of any argument that the Disclosure Statement, which was signed the same day as the Sales Contract, may not be properly considered part of that contract," and that in accepting the allegations of the complaint as true it had to deny dismissal. *id.* at 343. *Levick* is sufficiently distinct from the instant matter.

First, Defendant A&A has put forth the very argument the *Levick* court stated their defendant failed to make. A&A points to express language found in the Seller's Disclosure

Statement notifying Plaintiff that “[t]his information is a disclosure only and is not intended to be part of any contract between Buyer and Seller.”⁶ Mot., Ex. 2 at 3. Furthermore, the Sales Contract contains an integration clause which states, “[t]his contract, unless amended in writing, contains the final and entire agreement of the parties and the parties will not be bound by any terms, conditions, oral statements, warranties or representations not herein contained.” Mot., Ex. 1 at 8. Therefore, based upon the integration clause and express language the Seller’s Disclosure Statement is not incorporated into the Sales Contract.

Second, the *Levick* matter and this matter are at two separate stages of litigation. The *Levick* matter was at the motion to dismiss stage, where before the court was the complaint and motion to dismiss. This matter is at the summary judgment stage, in which the parties have had plentiful time to conduct discovery, and the Court has more submissions to take into consideration. Plaintiff has not made reference to any other writings between the parties that demonstrates the Seller’s Disclosure Statement was to be made part of the Sales Contract.

Finally, Plaintiff and Defendant executed the As-is Addendum. The Home Inspection Contingency Addendum was incorporated into the Sales Contract. Mot., Ex. 6 at 1 (stating the addendum supersedes contrary provisions of the Sales Contract). As such, the As-is Addendum was incorporated into the Sales Contract. Plaintiff agreed to accept \$8,000 and the property as-is, in exchange for Defendant’s release from remedying the 26 items listed on the Home Inspection Contingency Addendum. Plaintiff neither contends that the As-is addendum is not an enforceable contract nor does he contend that it was not made part of the Sales Contract. Plaintiff’s only contention is that the Seller’s Disclosure Statement was incorporated into the contract. As

⁶ Plaintiff loosely contends the Sellers Disclosure Statement was incorporated pursuant to the Jurisdictional Disclosure and Addendum to the Sales Contract for Washington, DC. Opp. at 7-8. The Court reviewed Plaintiff’s Exhibit 1, pages 16-17 and finds that the Jurisdictional Disclosure and Addendum to the Sales Contract for Washington, DC merely incorporates itself into the Sales Contract, not the Sellers Disclosure Statement.

explained above, the Seller's Disclosure Statement was not incorporated into the Sales Contract. to the extent Defendant had a duty and breached that duty. Therefore, Defendant did not have a duty arising from the Sales Contract with regard to representations in the Seller's Disclosure Statement and could not breach that duty. The Court does not find there is a genuine dispute of material fact as it pertains to Plaintiff's breach of contract claim and grants summary judgment in favor of Defendant.

III. Negligence

The Court grants summary judgment in favor of Defendant for Plaintiff's claim of negligence because Plaintiff has not supported his claim with sufficient evidence to create a dispute of material fact.

It is well-established in the District of Columbia that a claim alleging negligence must show: "(1) that the defendant owed a duty to the plaintiff, (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011). The Defendant contends that the independent duty rule precludes Plaintiff's claim for negligence as it recasts the breach of contract claim. Mot. at 12. Defendant asserts that the negligence claim relies upon the same facts and seeks the same relief, compensation to make repairs, as the breach of contract claim. *Id.* Plaintiff argues that negligence claim is distinct from the breach of contract claim because the allegations stem from Defendant's defective work which creates a fire hazard and risk of carbon monoxide. Opp. at 12.

The independent duty rule provides that a "tort must stand as a tort even if the contractual relationship did not exist." *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1089 (D.C. 2008). "[T]he injury to the plaintiff must be an independent injury over and above the mere disappointment of plaintiff's hope to receive his contracted-for benefit." *Id.* (internal citation

omitted). The Court is not persuaded the Plaintiff has made a distinction between the breach of contract claim and negligence claim.

Plaintiff relies up *Jefferson v. Collins* in support of his contention that the negligence claim is distinct from the breach of contract claim. 210 F. Supp. 3d 75 (D.D.C. 2016). In *Jefferson*, the Court permitted the plaintiff to proceed on a claim for negligence although the only injury alleged was for economic loss. *Jefferson*, 210 F. Supp. 3d at 86. The Court determined that the economic loss rule did not preclude plaintiff's negligence claim because a "special relationship," existed due to the scope of work contracted and the probability that negligent performance would pose serious risk of death or personal injury, thus creating a duty of reasonable care to perform. *Id.* Based upon *Jefferson*, a duty to perform in a non-negligent manner in order to prevent the risk of death or personal injury is appropriate where it is foreseeable that an injury, beyond economic injury, may occur. *Id.* Even in raising such contention, *Jefferson* and the present matter are distinct from one another to preclude Plaintiff's negligence claim.

The *Jefferson* court found defendant's duty existed because of the contract between the parties that required defendant to perform certain construction work. Plaintiff contends Defendant's breached their duty of care by selling the property with defects. *Jefferson* does not support Plaintiff's contention that a seller of real property must sell a property without defects. The record in this matter is deficient of evidence that Defendant was contracted by Plaintiff to repair the roof, install insulation behind the walls, enclose the basement, properly install the furnace, correct the plumbing, repair doors that did not lock properly, and properly install electrical prior to selling the property. Moreover, Plaintiff accepted the terms of the As-is

Addendum to accept the property knowing there were still some defects in exchange for \$8,000. Mot. at Ex. 8.

The Court finds that the Defendant has no duty arising under *Jefferson*. The Defendant was not contracted with Plaintiff to perform construction work creating a special relationship to reasonably perform in a non-negligent manner. Rather the contract between the parties was for the sale of real property. Defendant did not have any additional duties to Plaintiff in which Plaintiff could proceed with his claim for negligence. Therefore, the independent duty rule precludes Plaintiff's negligence claim because Defendant's only duty to Plaintiff was to fulfill its duties pursuant to the Sales Contract. Therefore, summary judgment as to the claim for negligence is granted in favor of Defendant.

IV. Violation of District of Columbia Consumer Protection Procedures Act

The Court grants summary judgment in favor of Defendant with regard to Plaintiff's claim for violation of the District of Columbia Consumer Protection Procedures Act (DC CPPA).

D.C. Code § 28-3904 sets forth the requisite standards for determining if a claim for violation of the CPPA exists. To prove a violation of the relevant subsections of the CPPA, the plaintiff must prove a misrepresentation or omission of a material fact that has a "tendency" or "tends to" mislead. D.C. Code § 28-3904 (e) - (f). Plaintiff need not prove reliance, since he need not prove that the misrepresentation misled or deceived the consumer. § 28-3904. Nor need he prove an intent to deceive. *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1073 & n.20 (D.C. 2008) (intent to deceive and scienter not elements of § 28-3904 (e) and (f)).

Defendant argues that Plaintiff "has failed to provide any documents or other evidence demonstrating what misrepresentations" Defendant made to Plaintiff or that Defendant "had

actual knowledge of the defects when it signed the Seller's Disclosure Statement." Mot. at 13. Plaintiff contends that "Defendant had to know of [the] problems, as it performed the shoddy work." Opp. at 13. Plaintiff also contends that Defendant "did not have the required permits for installation of the plumbing and electrical inspections or obtained the required DCRA inspections of these systems after installation." *Id.*

Once again, Plaintiff has failed to cite to any submissions in the record that establishes the existence of a factual dispute regarding Defendant's actual knowledge of the defects. Plaintiff merely asserts, in a conclusory statement, that "Defendant had to know of [the] problems, as it performed the shoddy work." *Id.* Plaintiff's other contention, that Defendant did not have the proper permits for plumbing and electrical inspections, does not create a factual dispute. With regard to both arguments, Plaintiff fails to provide supporting evidence that demonstrates Defendant in fact did any work related to the defects Plaintiff discovered. It appears to the Court Plaintiff assumes Defendant did the work. Without evidence to support Plaintiff's arguments the Court cannot find that a factual dispute exists. Thus, in the absence of a factual dispute, the Court grants summary judgment in favor of Defendant for violation of the CPPA.

V. Negligent Misrepresentation

The Court grants summary judgment in favor of Defendant with regard to Plaintiff's negligent misrepresentation claim. A claim alleging negligent misrepresentation must show that: "(1) the defendant negligently communicated false information, (2) the defendant intended or should have recognized that the plaintiff would likely be imperiled by action taken in reliance upon his misrepresentation, and (3) the plaintiff reasonably relied upon the false information to his detriment." *Hall v. Ford Enterprises, Ltd.*, 445 A.2d 610, 612 (D.C. 1982). "When a person undertakes to make a statement in a business transaction, either voluntarily or in response to

inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which would materially qualify those stated.” *Ehrlich v. Real Estate Comm'n*, 118 A.2d 801, 802 (D.C. 1955).

Defendant contends that summary judgment for the negligent misrepresentation claim should be granted because Plaintiff has not provided evidence of Defendants intent or recognition that misrepresentations were made. Mot. at 13-14. Plaintiff contends that he has “identified numerous misrepresentations.” Opp. at 14. The Court is not satisfied that Plaintiff has supported his claim for negligent misrepresentation with evidence.

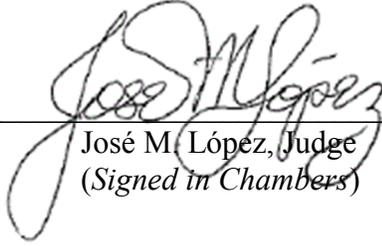
Plaintiff wholly stands on the contention that Defendant’s Seller’s Disclosure Statement contains misrepresentations of the condition of the property. *See* Mot. at Ex. 2. It appears to the Court that Plaintiff is simply arguing that because Defendant was the builder they must have known about the defects. "Conclusory allegations by the nonmoving party are insufficient to establish a genuine issue of material fact or to defeat the entry of summary judgment." *Hollins*, 760 A.2d at 570 (citation omitted). Plaintiff does not cite to any evidence in the record to support this contention. Moreover, Plaintiff does not provide evidence that questions the legitimacy of Defendant’s responses on the disclosure statement. Furthermore, Defendant had no other opportunity to make misrepresentations to Plaintiff because Plaintiff admitted that he never directly communicated with Defendant, “I have never spoken to the builder [A&A] ever.” Mot. at Ex. 10. Therefore, even in reviewing the submissions in favor of Plaintiff, there is no evidence supporting Plaintiff’s argument that there is a dispute of fact regarding Defendant making misrepresentations upon which Plaintiff relied upon.

In conclusion, in reviewing all evidence and submissions in favor of Plaintiff, Plaintiff has failed to demonstrate the existence of any genuine issue of material fact for the claims against Defendant. Accordingly, it is this 20th day of August, 2019, hereby:

ORDERED that Defendant A&A Builders, LLC, Motion for Summary Judgment is **GRANTED**; it is further

ORDERED that summary judgment is entered in favor of Defendant A&A Builders, LLC; and it is further

ORDERED that the matter is closed and all future hearings are vacated.



José M. López, Judge
(Signed in Chambers)

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