

STATE OF VERMONT

SUPERIOR COURT
Lamoille Unit

CIVIL DIVISION
Docket No. 11-1-20 Lecv

MICHAEL F. FEENEY et al.,
Plaintiffs
v.

SALVAS, INC. et al.,
Defendants

FILED

APR 24 2020

VERMONT SUPERIOR COURT
LAMOILLE UNIT

DECISION

Defendants' Motion to Dismiss, filed February 18, 2020

Plaintiffs in this Rule 80.11 Expedited Action seek \$16,000 for costs for replacement of a failed septic system shared by three properties owned by Plaintiffs, plus interest, costs, and legal fees. They allege three causes of action: negligence, misrepresentation, and “quantum valebant.” Defendants are the installer of the septic system and the engineer who certified that it was installed as designed. Plaintiffs claim that it failed because it was not installed as designed. Defendants have moved to dismiss all claims for both failure to state a claim upon which relief can be granted (Rule 12(b)(6)) and lack of subject matter jurisdiction (Rule 12(b)(1)).

The court will not grant a motion to dismiss for failure to state a claim unless it is “beyond doubt” that there are “no facts or circumstances” that would entitle plaintiffs to relief. *Powers v. Office of Child Support*, 179 Vt. 390, 395 (2002). As to both claimed grounds for dismissal, Defendants argue that Plaintiffs’ claims are actually contract claims and that Plaintiffs were not party to the pertinent contract, nor do they have a third party relationship that would entitle them to relief as a third party beneficiary of a contract. Defendants rely on *Glassford v. Dufresne*, 2015 VT 77, 199 Vt. 422. Both parties have submitted two memoranda of law.

As argued by Defendants, the Vermont Supreme Court case of *Glassford v. Dufresne* provides controlling law as the factual claim is quite similar and the Supreme Court analyzed the facts under both of the two primary theories of Plaintiffs’ case: negligent misrepresentation and consumer fraud misrepresentation. 2015 VT 77. The facts were much more developed in *Glassford*, as a summary judgment decision was under review, not a motion to dismiss. Nonetheless, the opinion provides clarity as to the necessary elements for these causes of action.

Count I: Negligence

One of the significant elements of this cause of action as laid out in *Glassford* is that plaintiffs must show actual reliance on the representations of the defendants.¹ *Id.* ¶¶ 12-29. In *Glassford*, the Court concluded based on specific facts developed through the summary

¹ If a claim is established for this cause of action, it qualifies as an exception under Restatement (Second) of Torts § 522 to the general rule that economic loss is not available as a tort remedy. *Glassford*, 2015 VT 77, ¶ 12.

judgment process that the plaintiffs were unable to show actual reliance. *Id.* ¶¶ 23-24. That point is not developed in this case. Rather, there is a dispute of material fact as to the extent to which Plaintiffs actually relied on what Defendants did. Because there is a dispute as to this material fact, the motion to dismiss cannot be granted as to this cause of action. See *Powers*, 179 Vt. at 395. Similarly, the court declines to dismiss on the grounds that Plaintiffs were not party to the original contract for services, since, if Plaintiffs can establish actual reliance, they will establish an interest sufficient to confer subject matter jurisdiction for a negligent misrepresentation claim. See *Glassford*, 2015 VT 77, ¶ 18 (explaining that privity is not required under § 522 but “the element of reliance” is “key”).

Count II: Misrepresentation based on 9 V.S.A. §2453 (Consumer Protection Act)

On this claim, the Court in *Glassford* affirmed summary judgment for the defendants on the ground that the plaintiffs could not show that they had direct involvement in the transaction forming the basis for the claim and thus the defendant did not qualify as an “other violator” under the Act. *Id.* ¶¶ 30-37. In this case, the facts are clear that Plaintiffs were not involved at the time of the original permitting or construction or certification of their shared septic system, and these activities form the basis for the claim that the CPA was violated. The party involved at that time was the developer and these activities took place prior to Plaintiffs’ purchases of their lots.

While Plaintiffs, in their Sur-Reply, allude to facts about possible relationships that might create a connection, those facts have not been pled and are only generally described and are not supported by affidavit. The court declines to consider them or convert the motion to one of summary judgment pursuant to V.R.C.P. Rule 12 (c). *Wentworth v. Crawford & Co.*, 174 Vt. 118, 121 (2002) (“The motion [to dismiss] tests whether the complaint adequately states a claim; thus, the court must restrict its inquiry to the facts alleged in the complaint”); V.R.C.P. 12(c)(motion converts to one for summary judgment if the court considers matters outside the pleadings). Because Plaintiffs cannot show direct involvement in the transaction, they cannot show that Defendants were “violators” under the Consumer Protection Act, and this cause of action must be dismissed.


Count III: “Quantum Valebant”

Plaintiffs have shown neither a legal nor factual basis for such a cause of action. The motion to dismiss is granted as to this claim.

ORDER

Based on the foregoing, the Defendants Motion to Dismiss (MPR 1) is *denied* except that it is granted as to Counts II and III. The case will proceed on Count I.

Dated this 24th day of April 2020.



Mary Miles Teachout
Superior Judge