

STATE OF VERMONT
ORANGE COUNTY, SS.

ORANGE SUPERIOR COURT
DOCKET NO. 129-6-03 OeCv

WILLIAM J. MEEHAN, I and
THEODORE J. PLawecki,
Plaintiffs

GARY M. CAPONIGRO and
MICHAEL M. MADOR,
Defendants

SIEGFRIED & WALDRUD RENNER,
Third-Party Defendants

MICHAEL P. HEMOND,
Third-Party Defendants

CHARLES W. COLLIER,
Third-Party Defendants

SUSAN PACILLIO,
Third-Party Defendants

FILED
ORANGE COUNTY
AUG - 9 2004
VERMONT SUPERIOR COURT

Third-party defendants Hemond, a surveyor, and Pacillio, a real estate broker, have filed motions to dismiss the third-party plaintiffs' consumer fraud claims against each of them. Third-party defendant Collier, an attorney, also requested in his answer that the court dismiss the consumer fraud claim and asked for dismissal in his prayer for relief. The Court considers Collier's prayer for relief as a motion under V.R.C.P. 12(b)(6). A counterclaim was asserted against the plaintiffs by the defendants and the plaintiffs, in response, filed third-party complaints. The plaintiff are thus also third-party plaintiffs pursuant to V.R.C.P. 14(b) but will be referred to hereafter as the plaintiffs for ease of reference. It is plaintiffs' third-party complaints which are the subject of these motions to dismiss.

"Motions to dismiss for lack of a cognizable legal claim are not favored and are rarely granted." *Wentworth v. Crawford and Co.*, 174 Vt. 118, 120 (2002). "A motion to dismiss for failure to state a claim upon which relief can be granted, V.R.C.P. 12(b)(6), should not be granted unless 'it appears beyond doubt' that there exist no facts or circumstances that would entitle the plaintiff to relief." *Amiot v. Ames*, 166 Vt. 288, 291 (1997). "[W]e must assume as true all

factual allegations pleaded by the nonmoving party.” *Id.* And further, “[w]e accept as true all reasonable inferences that may be derived from plaintiff’s pleadings and assume that all contravening assertions in defendant’s pleadings are false.” *Richards v. Town of Norwich*, 169 Vt. 44, 49 (1999).

Applying this standard, the factual allegations and reasonable inferences are as follows:

Plaintiffs own property in South Corinth. The original defendants in the action, Capionigro and Mador, are neighboring property owners. Plaintiffs brought the initial action to regain title to the five-acre portion of their land that Capionigro and Mador claim as their own. Plaintiffs became aware of the five-acre discrepancy in 1999, when they were unable to sell their property because of it. Capionigro and Mador counterclaimed for declaratory judgment on the disputed parcel.

Plaintiffs then brought claims against several third-party defendants for their actions in a prior land transfer, in 1988, in which Capionigro and Mador initially obtained their land from the Renners. Mr. Renner had instructed his broker, Pacillio, and his attorney, Collier, to sell some land to the defendants. Pacillio and Collier exaggerated the acreage in the deed in order to “enhance the purchase,” and arranged for a favorable survey to comply with the deed description. Between the June sale and the October closing, third-party defendant Hemond conducted a survey that helped finalize the sales transaction. While the warranty deed conveying title to the Renners described the land as containing 20 acres, the warranty deed conveying title to Capionigro and Mador described 25 acres of land. In 1972, plaintiffs had hired Hemond to conduct a land survey for them, which was also inaccurate. Plaintiffs claim that the actions of Pacillio, Collier, and Hemond constitute consumer fraud.

Vermont’s Consumer Fraud Act provides: “Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.” 9 V.S.A. § 2453(a). The Act provides a private remedy for violations:

Any consumer who . . . sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title . . . may sue for appropriate equitable relief and may sue and recover from the seller, solicitor or other violator the amount of his damages, or the consideration or the value of the consideration given by the consumer, reasonable attorney’s fees, and exemplary damages not exceeding three times the value of the consideration given by the consumer.

Id. § 2461(b). The Act defines “consumer” as:

[A]ny person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for his or her use or benefit or the use or benefit of a member of

his or her household, or in connection with the operation of his or her household or a farm whether or not the farm is conducted as a trade or business, or a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for the use or benefit of his or her business or in connection with the operation of his or her business.

Id. § 2451a(a).

Plaintiffs ask this court to allow the consumer fraud claim in light of the holding in *Elkins v. Microsoft Corp.*, 174 Vt. 328 (2002). The plaintiff in *Elkins* had sued Microsoft for allegedly overcharging for its pre-installed software on a computer purchased from a manufacturer; the issue was whether the Act covered indirect purchasers or instead required privity of contract. The Supreme Court held that the statute's broad language that "'any consumer,' reinforced by the definition of consumer as 'any person,' who suffers injury may bring an action under the statute against a 'seller, solicitor or other violator'" did not support a privity requirement, and that indirect purchasers could bring claims under the Act. *Id.* at 331 (emphasis in original).

Plaintiffs' argument that "any person" can recover under the Act because there is no privity requirement goes too far. The person still must qualify as a *consumer*: "any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services" 9 V.S.A. § 2451a(a) (emphasis added). In *Elkins*, the plaintiff "indisputably contracted for goods that included the Windows 98 operating system." 174 Vt. at 333. Here, plaintiffs seek recovery under consumer fraud against an attorney, broker, and surveyor to whom they never agreed, even indirectly, to pay consideration for goods or services. Those third-party defendants provided services in relation to a land transaction between third-party defendants Renners and defendants Caponigro and Mador; the plaintiffs were not involved in that transaction and are not "consumers" of those goods or services.

The purpose of the consumer fraud act is to protect citizens from "unfair and deceptive acts in consumer transactions." *Wilder v. Aetna Life & Casualty Insurance Co.*, 140 Vt. 16, 18 (1981) (emphasis added). This case is more akin to *Wilder*, in which the Court failed to find a contractual relationship between buyer and seller and declined to "read into the Act a transaction one step removed." *Id.* at 19 (relationship between plaintiff and defendants' insured is not contractual relationship). While the Act is remedial in nature and should be liberally construed, liberal construction does not allow courts to "stretch the language beyond legislative intent." *Elkins*, 174 Vt. at 331.

Finally, the 1972 survey contract between plaintiffs and Hemond, and alleged inaccuracies of that survey work, do not change this result. The services at issue here were services in connection with a 1988 land transaction between Defendants Renner and Caponigro and Mador, not a transaction with the plaintiffs. What may have been relied upon in connection with the 1988 transaction, the transaction giving rise to this dispute, does not turn it into a transaction between

the plaintiffs and Hemond.

Here, the harm the plaintiffs may have suffered subsequent to the third-party defendants' actions does not turn them into consumers of those goods and services. The Consumer Fraud Act does not provide a remedy to the plaintiffs, who were not even indirect consumers of the goods or services provided by the moving third-party defendants. The third-party plaintiffs were simply strangers to those goods and services, which were provided to and for the use of others.

Accordingly, the consumer fraud claims against third-party defendants Hemond, Pacillio, and Collier are DISMISSED.

Dated at Chelsea, Vermont, this 9 day of August, 2004.



Harold E. Eaton, Jr. Judge

