STATE OF VERMONT

SUPERIOR COURT
Caledonia Unit

CIVIL DIVISION
Docket No. 80-5-20 Cacv

MARK BOWEN, and the MARK S. BOWEN REVOCABLE TRUST,
Plaintiffs,

v.

CATAMOUNT SOLAR, LLC,
Defendant

DECISION
Defendant's Motion to Dismiss

Plaintiffs allege various forms of fraud against the company that installed a solar array on Plaintiffs' property. Plaintiffs also claim that Defendant induced them to enter the agreement thorough fraudulent misrepresentations and nondisclosures constituting violations of Vermont's Consumer Fraud Act, and that they have suffered money damages as a result. Defendant has moved to dismiss Plaintiffs' entire complaint pursuant to the Vermont Rules of Civil Procedure Rule 12(b)(6). Plaintiffs are represented by Attorney David Bond and Defendant is represented by Attorney Jonathan Rose.

For the purposes of this motion, the court assumes all factual allegations pleaded in the complaint are true. *Dernier v. Mortgage Network, Inc.*, 2013 VT 96, ¶ 23, 195 Vt. 113, 121 (2013). The solar array at issue in the Complaint is located on property owned by the Mark S. Bowen Revocable Trust. Mr. Bowen is a resident of Barnet, Vermont and resides on the property owned by the Trust with his life partner Wendy Stein. The property boasts scenic views which contribute to its value. Plaintiffs contracted with Catamount Solar for the installation of the solar array and the project was managed by Catamount sales employee R. P. "Doc" Bagley.

Mr. Bowen first contacted Howie Michaelson of Catamount in 2011 when he began considering installing solar power on the property. Mr. Michaelson worked with Mr. Bowen on the first project proposal that Mr. Bowen sought in 2011, but Mr. Bowen turned down the proposal in hopes that the technology would become less expensive. Mr. Bowen contacted Mr. Michaelson again in late 2012 and again in the fall of 2015 requesting new quotes, and both times he heard back from Mr. Bagley instead of Mr. Michaelson. Mr. Bagley met with Mr. Bowen on the property for the first time on October 29, 2015 to propose the solar project that Plaintiffs eventually accepted. Mr. Bowen received a bid from a competing firm but instead contracted with Catamount.

Plaintiffs do not complain of any issues with the functionality of the solar array that Defendant installed, but instead seek relief for money damages incurred as a result of their reliance on Defendant's allegedly fraudulent conduct affecting their interests. The three counts in Plaintiff's complaint are (I) fraud under the Vermont Consumer Fraud Act, (II) fraudulent

misrepresentation, and (III) fraudulent nondisclosure. The factual allegations in the Complaint are described in more detail below.

Count I relies on Plaintiffs' status as "consumers" and alleges that the conduct described in Counts II and III were unfair or deceptive acts or practices in commerce in violation of the Vermont Consumer Fraud Act. The allegations for Counts II and III are grouped into four misrepresentations and one omission that allegedly induced Plaintiffs to enter the contract. They include Mr. Bagley's statements about (1) the system's generating capacity and economic benefit, (2) the location of the array, (3) the presence of ledge as related to installation location, and (4) Mr. Michaelson's association with Catamount, as well as one nondisclosure: (5) Mr. Bagley's alleged failure to disclose that the telephone pole would have to be relocated.

Analysis

Defendant's motion requests dismissal of all three of the claims in the Complaint. Dismissal of a claim pursuant to Rule 12(b)(6) may occur only when "it is beyond a doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Dernier*, 2013 VT 96, ¶ 23. While the general pleading standard on a motion to dismiss is "exceedingly low," *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576, actions alleging fraud are subject to the heightened pleading requirements of Rule 9(b).

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." V.R.C.P. Rule 9(b). Under Rule 9(b), Plaintiffs must plead the facts and circumstances of each of the elements of fraud with particularity. *Silva v. Stevens*, 156 Vt. 94, 105 (1991). See also, *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014) (explaining that while the second part of Rule 9(b) "permits knowledge to be averred generally, plaintiffs must still plead the events which they claim give rise to an inference of knowledge").

Fraudulent Misrepresentation. The elements that a party must plead in order to bring a claim of common law fraudulent misrepresentation are:

> (1) intentional misrepresentation of a material fact; (2) that was known to be false when made; (3) that was not open to the defrauded party's knowledge; (4) that the defrauded party acts in reliance on that fact; and (5) is thereby harmed.

Estate of Alden v. Dee, 2011 VT 64, ¶ 32, 190 Vt. 401, 415. While fraudulent misrepresentation involves affirmative conduct, fraud can also be established through the concealment of facts when there is a duty to disclose. *Id.*

Fraudulent nondisclosure. Fraudulent nondisclosure (or fraudulent concealment) "involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Silva*, 156 Vt. at 103 (1991).

The Consumer Fraud Act (CFA). The CFA, on the other hand, provides a "broader right than common law fraud" and does not require a showing that the misrepresentation or omission was intentional. *Poulin v. Ford Motor Co.*, 147 Vt. 120, 124, 126 (1986). The CFA prohibits

"unfair or deceptive acts or practices in commerce," 9 V.S.A. § 2453(a), and in order to establish such conduct:

> (1) there must be a representation, practice, or omission likely to mislead the consumer; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be 'material,' that is, likely to affect the consumer's conduct or decision with regard to a product.

Greene v. Stevens Gas Service, 2004 VT 67, ¶ 15, 177 Vt. 90, 97. Along with damages, the statute authorizes attorneys' fees for "any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices." *Rathe Salvage, Inc. v. R. Brown & Sons, Inc.*, 2012 VT 18, ¶ 26, 191 Vt. 284, 297 (2012) (quoting 9 V.S.A. § 2461(b)).

To survive a motion to dismiss on each of the three Counts, Plaintiffs' allegations must allege facts relating to each element of each cause of action.

System Performance: Generation Capacity of the Solar Array

Plaintiffs allege that Mr. Bagley "knowingly misrepresented that the system would generate more electricity than they were currently using and that the contract would be to Plaintiffs' overall economic benefit." Complaint ¶ 38. For clarity, it is important to note that the issue with the system's performance is not one of breach of contractual performance standards. On the contrary, Plaintiffs allege that the solar array Defendant installed is functioning, and further explain in their opposition to Defendant's motion that the system "more or less" delivers the contract's approximate benchmark of 6,400 kWh annually. Opposition at 4. The issue Plaintiffs raise here is that even though the system is operating as promised under the contract, it falls short of Mr. Bagley's representations, prior to signing, of its generation capacity.

Plaintiffs allege that when deciding to enter the contract, they relied on Mr. Bagley's representations that the system would cover their current energy needs as well as the system's own operating costs. Compl. ¶ 14 ("Doc presented his proposal in superficial terms, assuring Mr. Bowen and Ms. Stein that the electricity the system generated would not only exceed their current energy needs but also pay for the system's operating costs"). Plaintiffs also allege that they relied on his assurance that installing the system made economic sense. *Id.* Because the system is not producing enough to meet their energy needs or cover its own operating costs, Plaintiffs claim Mr. Bagley intentionally misrepresented the system's capabilities in order to induce them to agree to an undersized system, knowing that they were only interested in a system that would cover both but also knowing that they could not afford a higher price point. *Id.* ¶ 13 – 15.

One of the elements of fraudulent misrepresentation is that the misrepresentation was known to be false when it was made. The heightened pleading standard for fraud claims in V.R.C.P Rule 9(b) "requires that the facts and circumstances sufficient to satisfy all of the elements of fraud be specifically pled." *Silva*, 156 Vt. at 105. Plaintiffs, however, did not explain in their pleadings how Mr. Bagley could have known that his statement about the system's ability to cover their electricity needs was false when he made it.

In the Complaint, Plaintiffs do not allege to have provided Mr. Bagley with the specifics of their energy consumption at any point, let alone at some point before his statement that the system would exceed their energy needs. If Mr. Bowen did not know what their energy needs were he could not knowingly state that the system's generation capacity would exceed those needs. Plaintiffs have consequently failed to plead circumstances that could support even an inference that Mr. Bagley knew his representation that the system could generate more electricity than they consumed was false. *Winton v. Johnson & Dix Fuel Corp.*, 147 Vt. 236, 246 (1986) ("Absent a showing that a misrepresentation was false when made and known to be false by the defendant, the action for fraud could not lie"). Similarly, Mr. Bagley's assurance that installing the system made economic sense could not have been knowingly false if he did not have the information necessary to determine for a fact whether the system could cover all the electricity needs that Plaintiffs wanted it to cover.

Additionally, the statements at issue were nonactionable opinions rather than representations of facts. As explained by the Restatement (Second) of Torts, statements are not considered factual where the "recipient knows that the maker has no[] information concerning the fact asserted and therefore can only be stating his belief." Restatement (Second) of Torts § 538A (1977), Comment d. The energy usage information Mr. Bagley is not alleged to have was information possessed by Plaintiffs. They would consequently know that his "superficial" assessments of the system's ability to meet their needs and economic benefits were not grounded on enough information to be factual and were instead expressions of his beliefs or opinions.

Opinions cannot generally form the basis of either common-law fraud or CFA claims. *Proctor Tr. Co. v. Upper Valley Press, Inc.*, 137 Vt. 346, 350 (1979) ("Normally, only representations of existing fact are actionable, and mere expressions of opinion cannot be the basis for an action of fraud"); *Bridge v. Corning Life Sciences, Inc.*, 997 F. Supp. 551, 553 (D. Vt. 1998) ("The Vermont Supreme Court has also drawn a distinction between misrepresentations involving opinions and those involving facts, holding that the latter are actionable under the CFA, although the former are not"). There are exceptional circumstances under which opinions can be actionable, such as when a misrepresentation of opinion is part of a "scheme to defraud." *Winey v. William E. Dailey, Inc.*, 161 Vt. 129, 133 (1993). However, Plaintiffs cannot establish a scheme to defraud where all parties were aware of the limited or "superficial" nature of Mr. Bagley's statements and all parties knew what essential information he lacked in order to make a representation of fact. Dismissal is appropriate because there are no circumstances under which Plaintiffs could show that Mr. Bagley's statements about the system's ability to meet their energy needs and its economic benefits were factual or an actionable opinion when Plaintiffs did not allege that he knew how much energy they wanted the system to produce.

Because Plaintiffs do not allege facts in support of the element of knowledge of falsity when the statements were made, and knowledge of falsity is an essential element of a fraud claim, the motion to dismiss is justified as to this issue.

Plaintiffs describe three additional grounds for fraudulent misrepresentation. Compl. ¶ 38 ("Doc further misrepresented that the array would be most optimally sited at the location he

had selected, that this location was free of ledge, and that Mr. Michaelson remained associated with Catamount").

Location of the System

With regard to location, Plaintiffs argue that Mr. Bagley falsely represented that the system would be "most suitably installed at the location he selected." Plaintiffs object to the way the array was sited in a field in view of the front of the house because the "property's primary attraction is the view from the front of the house" and it is now "marred by the presence of the array and utterly spoiled by the industrial-grade power transmission equipment that now hangs across the skyline." *Id.* ¶ 26. They argue that he did not consider the three alternatives they provided which did not interfere with the scenic view, instead stating that the spot he chose was the "best spot." *Id.* ¶¶ 16, 26, 27. Plaintiffs claim to have accepted the site Mr. Bagley selected because of his expertise in the industry even though he did not explain why his choice was the best location. *Id.* 27.

As with Mr. Bagley's statements about system performance, his statement about which location he believed was the best cannot support a fraud claim. A statement that "expresses only (a) the belief of the maker, without certainty, as to the existence of a fact or (b) his judgment as to quality, value, authenticity, or other matters of judgment" is a representation of opinion. Restatement (Second) of Torts § 538A. As Defendant argues, Mr. Bagley's statement meets both of these alternative criteria and is thus a nonactionable opinion. Mr. Bagley made his determination that the location was optimal without visiting the other sites suggested by Plaintiffs, and it was not otherwise alleged to be grounded on factual certainty. The statement was also an opinion because deciding that location would be the "best" meant making a subjective judgment about its quality based on his experience. *Webb v. Leclair*, 2007 VT 65, ¶ 23, 182 Vt. 559, 564 (explaining that representations are "generally not actionable under the Consumer Fraud Act if they are the product of the defendant's professional judgment based upon his legal knowledge and skill") (internal quotation removed). These were not statements of fact based on analysis of measurable circumstances in relation to identified standards.

Mr. Bagley's statements of opinion do not support Plaintiffs' claims of fraud, nor is it clear how selecting a location that Plaintiffs did not prefer could have induced them to enter the contract. This is especially the case where Plaintiffs were concerned about preserving their view and "knew that the array would be visible from their home if it were installed at Doc's location." Compl. ¶ 18.

Plaintiffs have not sufficiently alleged facts supporting important elements of fraudulent misrepresentation: there is insufficient showing of intentional misrepresentation of a material fact known to be false at the time.

Absence of Ledge

Plaintiffs also argue that Mr. Bagley fraudulently misrepresented that the site he selected for the array was free of ledge so that "the array could be mounted on poles stuck into the ground rather than on costly and unsightly cement ballast blocks." *Id.* ¶ 22. The Complaint describes

two different statements that Mr. Bagley made about the ledge at different times, one during their first meeting and one when he returned to the site after Plaintiffs had signed the contract. *Id.* ¶ 22. The claim in Count II that Mr. Bagley falsely represented that the location was "free of ledge," appears to be based on the later statement that he had "found the right spot" after using a tool to test the depth of the soil. Compl. ¶¶ 22, 38. However, Plaintiffs could not have acted in reliance upon the alleged representation that Mr. Bagley had found a spot without a ledge if they signed the contract before he made the representation. *Id.* ¶ 22 ("By then, Plaintiffs had already signed the contract with Catamount"). See *Winey* 161 Vt. at 136 (the CFA "is concerned with the contents of advertisements and offers – that is, elements of contract formation").

Mr. Bagley's first statement about the ledge cannot ground Plaintiffs' claim either. The Complaint alleges that "[d]uring his first visit, [Mr. Bagley] stated that he could probably locate a ledge-free spot where the array could be mounted on poles stuck into the ground, rather than on costly and unsightly cement ballast blocks." *Id.* This statement could not be fairly characterized as a representation that the location is "free of ledge" nor is it a representation of fact because he did not test the soil until later. *Id.* If anything, Mr. Bagley's representation that he could "probably" find a ledge-free spot put Plaintiffs on notice of the possibility that the array would have to be mounted with accommodations for a shallow ledge.

Again, there is not a sufficient showing of intentional misrepresentation of a material fact known to be false at the time. Both of the statements are insufficient to show all of the elements necessary for fraudulent misrepresentation.

Mr. Michaelson's Association with Catamount

Plaintiffs also argue that Mr. Bagley misrepresented Defendant Catamount's relationship with Mr. Michaelson by failing to disclose that Mr. Michaelson was no longer associated with Catamount "as [Mr. Bagley] knew that any such disclosure would put the sale at risk." Compl. ¶ 12. The argument is based on allegations that Mr. Bowen first contacted Mr. Michaelson when he began considering installing solar power on the property in 2011 and learned of Defendant Catamount through Mr. Michaelson after Mr. Michaelson's own company Sun Catcher merged with Catamount. *Id.* ¶¶ 4 – 6. Mr. Bowen respected and was impressed with Mr. Michaelson's knowledge and expertise, and "felt a sense of loyalty to him," such that he was "disappointed that Mr. Michaelson would no longer be involved in the project." Compl. ¶ 11. Plaintiffs claim that while working with Mr. Bagley, Mr. Bowen would "routinely ask how Mr. Michaelson was doing, and to convey his regards" to which Mr. Bagley would respond that Mr. Michaelson "was well and that he would say hello." *Id.* ¶ 12. In this way, Plaintiffs allege Mr. Bagley misled them into thinking that Mr. Michaelson was still associated with Catamoun.

This argument fails to support either fraudulent misrepresentation or a violation of the CFA because the alleged misrepresentation is not material. The Complaint does not allege that Mr. Michaelson was involved at any stage of the proposal, agreement, or installation. Mr. Michaelson's association with Defendant is not material because Plaintiffs knew that he would not be involved with the project and still entered the agreement. Additionally, Plaintiffs do not describe working with Mr. Michaelson at any point after 2011. Starting in "late 2012," each

time Mr. Bowen reached out to Mr. Michaelson to request a new proposal or quote he would receive a response back from Mr. Bagley instead. *Id.* ¶¶ 7 – 10. A misrepresentation related to Mr. Michaelson's association with Defendant could not have reasonably impacted Plaintiffs' decision to enter the agreement as he had no alleged involvement in the agreement. There are no facts showing that Plaintiffs only contracted with Catamount because they believed that Mr. Michaelson was involved with Catamount and that they relied on Mr. Bagley's statements that Mr. Michaelson was associated with Catamount as to that fact.

Telephone Pole

Plaintiffs' claim for fraudulent nondisclosure is based on Mr. Bagley's alleged omissions with regard to the relocation of a telephone pole near the installation site from its former location below the horizon to a new location that interferes with their scenic view. Plaintiffs allege that Mr. Bagley knew about Green Mountain Power's long-standing "inflexible policy" of requiring a utility pole be moved "close enough to the road to be serviced by a truck-mounted cherry-picker" when connecting a new transformer to the grid. *Id.* ¶ 19. They argue that Mr. Bagley did not inform them of this policy and that they would not have agreed to the contract had they known that "they would be required not only to replace the telephone pole but also to move it to a position in the very center of their view." *Id.* According to the Complaint what Mr. Bagley did tell them during their first meeting was that "the old telephone pole might need to be replaced." *Id.*

Their claim fails on this argument as well because Plaintiffs accuse Mr. Bagley of fraudulently omitting more than what they allege he knew regarding the replacement of the utility pole. Alleging knowledge of the policy is not enough to establish knowledge that the pole would be moved to the center of their view. In this way the claim falls below the Rule 9 standard. The allegation that Mr. Bagley knew of Green Mountain Power's long-standing policy at most permits the inference that he knew the pole would be replaced in some location along the road. See *Ranny v. Munro*, 138 Vt. 523, 524 (1980) ("Failure to aver the essential element of knowledge in an action for fraud constitutes a fatal defect in the complaint, and the trial court correctly dismissed the action"). Plaintiffs do not provide any context in either the Complaint or their opposition to Defendant's motion as to how Mr. Bagley would have known it would be moved to the center of their view, or even why the pole ended up being moved to that undesirable location.

Further, any omission related to the likelihood that the pole would be moved would not amount to fraudulent nondisclosure or, in the CFA context, would not be likely to mislead under the circumstances. Mr. Bagley warned Plaintiffs that the pole might need to be replaced. While the statement did not detail the extent of Mr. Bagley's alleged knowledge of Green Mountain Power's policy, it cannot fairly be read as providing a false sense of security that the pole would not be moved or that their view would remain unchanged. On the contrary, warning that the pole might be replaced put Plaintiffs on notice that the solar array might involve changes to the pole. As in *Sugarline Associates v. Alpen Associates*, Mr. Bowen's statement "invited further investigation, at least by implication," into whether a potential replacement of the old pole located just below their line of sight would impact their view. *Sugarline*, 155 Vt. 437, 446-447

(1990) ("the nature of the 'concealment' found by the trial court, far from having led Sugarline 'to forbear a full inquiry,' actually invited further inquiry"). Additionally, the Complaint gives no reason to suspect that Mr. Bowen engaged in the type of conduct that could have made his statement misleading or fraudulent, such as discouraging follow-up questions or further investigation or pressuring Plaintiffs by placing them under some kind of time constraint. See *Id.* (distinguishing *White v. Pepin*, 151 Vt. 413 (1989)).

Summary

As the analysis above shows, none of the five allegations in Counts II and III are supported by sufficient facts to show that each element of either fraudulent misrepresentation or fraudulent nondisclosure are met.

In addition, Plaintiffs have not shown the three necessary elements for a CFA claim and consequently have not sufficiently stated a claim under the regular Rule 12(b)(6) standard without consideration of the heightened pleading requirements of Rule 9(b).[1] The required elements are: (1) there must be a representation, practice, or omission likely to mislead the consumer; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be 'material,' that is, likely to affect the consumer's conduct or decision with regard to a product.

The analysis above shows that the representations relied on were not statements of fact but general opinions not likely to mislead. With respect to all five sets of circumstances, for the reasons previously described, Plaintiffs did not reasonably interpret the statements as what they were: general statements of opinion rather than statements of specific fact. In some cases, they were not material because they were made after the contract was signed (absence of ledge) or not material to the decision to enter the contract (statements concerning Mr. Michaelson).

Order

For the foregoing reasons, the court grants Defendant's motion to dismiss all three counts in the complaint brought by Plaintiffs.

Dated this 8th day of January, 2021.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge

[1] Because the court concludes that the Rule 12(b)(6) standard is not met, it is not necessary to address the legal issue of whether or not the heightened Rule 9(b) standard applies to the CFA.