UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
DEBORAH L. BOARDMAN
UNITED STATES DISTRICT JUDGE

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December 13, 2022

LETTER ORDER

RE: *Ten-X, Inc. v. Pasha Realty Holdings, LLC, et al.*
DLB-21-562

Dear Counsel:

This case arises from the sale of a commercial office building at 5900 Princess Garden Parkway in Lanham, Maryland. In 2017, counterclaimants Dr. Azhar Pasha, Pasha Realty Holdings, LLC ("Pasha Realty"), and Pasha Aviation, LLC ("Pasha Aviation") (collectively, "Pasha") purchased the commercial property from 5900 LLC ("5900"). Pasha resold the property in 2020. Ten-X, Inc. ("Ten-X") marketed the property and hosted the online auction of the property when Pasha purchased it in 2017, and it was also involved in Pasha's efforts to resell the property. Events related to the 2020 resale motivated Ten-X to file suit against Pasha in the United States District Court for the Central District of California. ECF 1. Pasha asserted counterclaims against, among others, 5900 and its members Sanjeev Preet, Raj Dua, and Rama Krishna Grandhi (the "5900 Members") arising out of the 2017 sale, some of which were transferred to this Court. ECF 67 & 88. Pasha's counterclaims pending in this Court are:

Count I	Fraud against 5900 and the 5900 Members;
Count II	Intentional misrepresentation against 5900 and the 5900 Members;
Count III	Negligent misrepresentation against 5900 and the 5900 Members;
Count IV	Breach of contract against 5900;
Count V	Breach of the implied covenant of good faith and fair dealing against 5900;
Count VI	Unfair or deceptive trade practices in violation of the Maryland Consumer Protection Act, Md. Code Ann., Com. Law ("CL") § 13-101, *et seq.* ("MCPA"), against 5900 and the 5900 Members.

ECF 92. Counts IV and V are asserted by Dr. Pasha only. Discovery has closed. 5900 and the 5900 Members move, separately, for summary judgment on the counterclaims. ECF 146 & 147. The motions are fully briefed. ECF 150, 151, 154, & 157. Summary judgment is granted to the 5900 Members on Counts I, II, III, and VI. No claims remain against the 5900 Members. Summary judgment is granted to 5900 on Counts V and VI and the claims asserted by Pasha Aviation. 5900's motion is granted in part and denied in part as to Count IV. The fraud-based claims against 5900 in Counts I, II, and III remain unresolved, and the parties shall submit

additional briefing on those claims, as explained below, by January 6, 2023. A virtual hearing on the outstanding issues is scheduled for January 17.

I. Standard of Review

Summary judgment is appropriate when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). The Court must "view the evidence in the light most favorable to the nonmoving party" and avoid "weigh[ing] the evidence or mak[ing] credibility determinations." *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017) (quoting *Jacobs v. N.C. Admin. Off. of the Courts*, 780 F.3d 562, 568–69 (4th Cir. 2015)) (internal quotation marks omitted). However, the Court also must abide by its "affirmative obligation . . . to prevent factually unsupported claims and defenses from proceeding to trial." *Drewitt v. Pratt*, 999 F.2d 774, 778–79 (4th Cir. 1993) (quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)) (internal quotation marks omitted).

If the moving party demonstrates "an absence of evidence to support the nonmoving party's case," the burden shifts to the nonmoving party to "present specific facts showing that there is a genuine issue for trial." *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 540 (4th Cir. 2015). A factual dispute is genuine only where there is sufficient evidence to permit a reasonable jury to find in the nonmoving party's favor. *Id.*; *see also Perkins v. Int'l Paper Co.*, 936 F.3d 196, 205 (4th Cir. 2019). "To create a genuine issue for trial, 'the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence.'" *Humphreys & Partners Architects*, 790 F.3d at 540 (quoting *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013)). "Instead, the nonmoving party must establish that a material fact is genuinely disputed by, *inter alia*, 'citing to particular parts of the materials of record.'" *United States v. 8.929 Acres of Land in Arlington Cnty.*, 36 F.4th 240, 252 (4th Cir. 2022) (quoting Fed. R. Civ. P. 56(c)(1)(A)).

II. Claims by Pasha Aviation

The counter-defendants request summary judgment on the claims brought by Pasha Aviation because it was "neither a signatory to the November 2017 Contract of Purchase and Sale . . . nor a party to the January 2018 conveyance" and Pasha did not make any allegations about Pasha Aviation's role in the events giving rise to this litigation. ECF 146-2, at 18; ECF 147-1, at 18. Pasha does not respond to these arguments in its oppositions, despite the arguments receiving their own designated section in the counter-defendants' briefs. Nor does Pasha identify any evidence connecting Pasha Aviation to the counterclaims. "A plaintiff who fails to respond to an argument for summary judgment is deemed to have abandoned the claim." *Rodgers v. Eagle All.*, 586 F. Supp. 3d 398, 448 (D. Md. 2022) (citing *Ferdinand-Davenport v. Children's Guild*, 742 F. Supp. 2d 772, 783 (D. Md. 2010)). Such is the case here. The motions for summary judgment are granted as to the counterclaims brought by Pasha Aviation.

III. Counts I, II, and III – Fraud-based Claims

Pasha asserts claims of fraud, intentional misrepresentation, and negligent misrepresentation ("fraud-based claims") against 5900 and the 5900 Members. Under Maryland law, claims for fraud and intentional misrepresentation are indistinguishable. "In Maryland, the terms 'fraud' (otherwise known as 'deceit') and 'intentional misrepresentation' are often used interchangeably, and the elements necessary to establish intentional misrepresentation are identical to those required for fraud." *Simms v. Mut. Benefit Ins. Co.*, 137 F. App'x 594, 600 (4th Cir. 2005) (unpublished) (citing cases). Because the legal claims are indistinguishable, I will analyze Counts I and II and the supporting allegations as a single fraud claim. Count III, negligent misrepresentation, has different elements, but it too requires proof of a false or misleading statement or material omission. *See Martens Chevrolet, Inc. v. Seney*, 439 A.2d 534, 539 (Md. 1982) (identifying the negligent assertion of a false statement among the elements of negligent misrepresentation). Pasha alleges that 5900 and its members made false or misleading statements and omitted material information about the condition of the property, its occupancy, and projected future rent information.

The 5900 Members argue that the fraud-based claims are barred by Maryland's three-year statute of limitations. Md. Code Ann., Cts. & Jud. Proc. § 5-101. To determine when the limitations period began, I must decide when the cause of action accrued. Under Maryland law, "a cause of action does not accrue until all of its elements are present[.]" *Catler v. Arent Fox, LLP*, 71 A.3d 155, 171 (Md. Ct. Spec. App. 2013) (citing *Doe v. Archdiocese of Wash.*, 689 A.2d 634, 638–39 (Md. Ct. Spec. App. 1997)). The accrual date may be delayed by application of the discovery rule, which protects diligent plaintiffs by delaying the start of the limitations period until the date the plaintiff "knew or reasonably should have known of the wrong." *Cain v. Midland Funding, LLC*, 256 A.3d 765, 783 (Md. 2021) (quoting *Poffenberger v. Risser*, 431 A.2d 677, 680 (Md. 1981)). "The relevant inquiry . . . is when a plaintiff knew or reasonably should have known of the operative facts giving rise to the cause of action, not whether a plaintiff had knowledge of the applicable law." *Id.* at 784 (quoting *Crowder v. Master Fin., Inc.*, 933 A.2d 905, 921 (Md. Ct. Spec. App. 2007)), *aff'd in part, rev'd in part on other grounds*, 972 A.2d 864 (Md. 2009)). But "[o]nly under unusual facts . . . may a plaintiff's late discovery of the *identity* of an alleged tortfeasor delay the running of the statute of limitations." *Iglesias v. Pentagon Title & Escrow, LLC*, 51 A.3d 51, 76 (Md. Ct. Spec. App. 2012) (citing *Jacobs v. Flynn*, 749 A.2d 174, 183–88 (Md. Ct. Spec. App. 2000)). Rather, "a cause of action accrues for the purposes of limitations at the time of the injury or, if the injury is unknown to the plaintiff, at such times as the plaintiff discovers that he or she has been injured." *Id.* (citing *Poffenberger*, 431 A.2d at 680).

The parties disagree over when the limitations period for the fraud-based claims began. The 5900 Members contend Pasha knew or reasonably should have known of the alleged false statements about the condition of the property, its occupancy, and projected future rent, at the latest, when it closed on the sale and took title to the property on January 16, 2018. Pasha did not sue the 5900 Members until more than three years later, on February 12 and March 31, 2021. Pasha counters that the discovery rule delayed the start of the limitations period until March 1,

2021, when Pasha first learned through discovery about a series of pre-closing emails from the 5900 Members to each other and to employees of Ten-X and Jones Lang LaSalle ("JLL"), the realtor. The emails concern the size and occupancy rate of the property, the status of certain tenants' leases, an appraisal report, the inclusion of an adjacent parking lot in the sale, and a demand for an addition $300,000 deposit from Pasha in exchange for additional information about the property and full access to it in advance of the closing.

None of these emails delays the start of the limitations period until March 1, 2021. Pasha could have investigated the veracity of the alleged misstatements about the property's condition and occupancy after it bought and obtained title for the property on January 16, 2018. It could have inspected the property, reviewed all existing leases, and communicated with each tenant. Such investigation would have, and evidently did, reveal that certain pre-closing representations were potentially false or misleading. As to the 5900 Members, Pasha knew that 5900, a limited liability company, sold the property, and it could have researched 5900 and identified its members. The fact that Pasha did not learn until much later that Preet, Dua, and Grandhi made specific representations on specific dates is beside the point. Pasha knew or reasonably should have known about the alleged misrepresentations when it acquired the property, even if it did not have access to evidence such as the emails to prove them.

Pasha argues alternatively that its counterclaims against the 5900 Members are not time-barred because its amended pleadings relate back to its initial counterclaims filed on November 13, 2020, within the limitations period, against "Roes" who represented the "agents, managing agents, principals, owners, partners, joint ventures, successors, representatives, servants, employees and/or co-conspirators" of the other counter-defendants, including 5900. ECF 10, ¶ 8. Pasha's amended pleadings substituted the 5900 Members for the Roe defendants. Under Rule 15(c), an amendment to a pleading that "changes the party or the naming of the party against whom a claim is asserted" relates back to the date of the original pleading when three conditions are met:

> (1) the claim asserted in the proposed amendment arises out of the same conduct set forth in the original pleading, and (2) the party to be added (a) received timely notice of the action such that he would not be prejudiced in maintaining a defense on the merits, and (b) knew or should have known that he would have been named as a defendant "but for a mistake concerning the proper party's identity."

Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 371 (4th Cir. 2014) (quoting Fed. R. Civ. P. 15(c)(1)(C)(ii)).

Pasha suggests that the 5900 Members had timely notice of the action and should have known that they were among the intended counter-defendants because the initial counterclaims included counterclaims against 5900, their company, and counterclaims against unnamed Roes as stand-ins for persons affiliated with 5900. Even if sensible, this argument conflicts with the law. "For purposes of Rule 15(c), naming 'John Doe' as a defendant does not constitute a 'mistake.'" *Shakeri v. Prince George's Cnty.*, No. GJH-21-549, 2022 WL 103095, at *4 (D. Md. Jan. 10, 2022) (citing cases). The rationale for this rule is that the substitution of a name for a John Doe defendant

is not the correction of a mistake, but rather the supply of information not previously provided or known. That rationale applies here. Pasha did not mistakenly identify an incorrect 5900 member or an unconnected third party and fix the mistake with the corrected name. He named the Roe defendants as a placeholder for persons whose names he claims he did not know when he filed suit. In such cases, Rule 15(c) does not permit an amended pleading to relate back to the initial one. *See Locklear v. Bergman & Beving AB*, 457 F.3d 363, 366–67 (4th Cir. 2006) (citing "the weight of federal case law holding that the substitution of named parties for 'John Doe' defendants does not constitute a mistake pursuant" to Rule 15(c)).

The 5900 Members are entitled to judgment as a matter of law as to the fraud-based counterclaims because those counterclaims were filed after the expiration of the three-year statute of limitations and, therefore, are time-barred.

Turning to the fraud-based counterclaims against 5900, I will defer ruling until after the parties submit additional briefing on the following issues:

Pasha should:

- Respond to the evidentiary objections raised in 5900's reply brief.
- Elaborate on its response to 5900's "bootstrapping" argument.

5900 should:

- Elaborate on its "bootstrapping" argument, with citation to Maryland law and discussion of analogous cases.
- Elaborate on its argument that Pasha's fraud-based claims are barred because the sale was "as is" and discuss, in greater detail, whether and how *Colony Apartments v. Abacus Project Mgmt., Inc.*, 197 F. App'x 217 (4th Cir. 2006) (unpublished), and the related cases apply to these facts.

Each side's brief is due on January 6, 2023, and each brief may not exceed 10 pages.

IV. Count IV – Breach of Contract

5900 argues Pasha's breach of contract counterclaim fails as a matter of law because the 2017 Purchase and Sale Agreement included a one-year limitations period for certain breach of contract claims, and Pasha filed its counterclaim for breach on November 13, 2020, more than two years year after the January 16, 2018 closing. "As a general rule, statutory limitations periods may be shortened by agreement, so long as the limitations period is not unreasonably short." *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 287 (4th Cir. 2007); *see also Daniels v. NVR, Inc.*, 56 F. Supp. 3d 737, 742 (D. Md. 2014) (noting courts applying Maryland law routinely uphold "contractual limitations periods in the absence of a controlling statute to the contrary or a clear showing of fraud, misrepresentation, or other unconscionable conduct"). 5900 relies on subsection 13(A) of the 2017 Purchase and Sale Agreement, which provides:

> 13(A) Survival of Representations and Warranties. Except as otherwise set forth in this Agreement, (i) all representations and warranties of Seller and Buyer in this Agreement shall continue through and be deemed remade as of Closing and shall survive Closing for a period of one year, and (ii) no claim for breach of any representation or warranty in this Agreement may be made more than one year after Closing.

ECF 146-3, at 302.

The plain language of subsection 13(A) limits its reach to claims "for breach of any representation or warranty in" the agreement. This includes subsections 9 and 10—the Buyer's and Seller's "Representations and Warranties." *Id.* at 300–01. Pasha appears to concede that its breach of contract claim based on breaches of subsection 10(B) (representing that all information regarding the Property "was accurate in all material respects" when it was not accurate) and section 10(D) (representing that all leases were true, correct, and complete, and that no other agreements existed, when in fact the leases were not true, correct, or complete, and there were multiple undisclosed addenda to certain leases) fall within the reach of subsection 13(A) and, therefore, are subject to the one-year limitations period. ECF 150, at 23.

As for the other breach of contract grounds not arising from those subsections of the agreement, Pasha argues they are subject to a three-year statute of limitations period, not the one-year period in subsection 13(A). The other alleged breaches are a refusal to provide "[a]ny and all other instruments reasonably required by Buyer's lender, Closing Agent or otherwise necessary to Close the transactions contemplated by this Agreement" as required by Section 4(A); a failure to "promptly notify Buyer if Seller learns of any material change in any condition of the Property or any event of Circumstance which makes any representation or warranty of Seller under this Agreement untrue or misleading" as required by Section 11(F); and a failure to give written notice to Pasha "[i]f any material portion of the Property is damaged . . ." as required by Section 13(C). ECF 92, ¶¶ 127, 134, 136–38. These alleged contract breaches are not claims "for breach of any representation or warranty in" the agreement and, therefore, are not subject to the one-year limitations period. They were timely filed.

5900's motion for summary judgment on Count IV is granted as to alleged violations of subsection 10 of the agreement and otherwise denied.

V. Count V – Breach of the Implied Covenant of Good Faith and Fair Dealing

Pasha wisely consents to the grant of summary judgment as to Count V, because in Maryland, there is no independent cause of action for breach of the implied covenant of good faith and fair dealing. *Mount Vernon Props., LLC v. Branch Banking & Tr. Co.*, 907 A.2d 373, 381 (Md. Ct. Spec. App. 2006). 5900's motion for summary judgment is granted as to Count V.

VI. Count VI – MCPA

The MCPA prohibits "any unfair, abusive, or deceptive trade practice" in, among other areas, the "sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services[.]" CL § 13-303. The law is to "be construed and applied liberally to promote its purpose." *Id.* § 13-105. "The purpose of the MCPA is to 'set certain minimum standards for the protection of consumers across the state.'" *Wheeling v. Selene Fin. LP*, 250 A.3d 197, 215 (Md. 2021) (quoting CL § 13-102(b)(1)).

Under the MCPA, a "consumer" is an "actual or prospective purchaser, lessee, or recipient of consumer goods, consumer services, consumer realty, or consumer credit." *Id.* at 215–16 (quoting CL § 13-101(c)(1)). "'[C]onsumer realty' is defined as real property that is 'primarily for personal, household, family, or agricultural purposes.'" *Id.* at 215 (quoting CL § 13-101(d)). Thus, persons who "lease[] or own[] real property for personal purposes[] qualify for protection under the MCPA." *Id.* at 216. The phrase "personal, household, family, or agricultural purposes" uses unambiguous language and "should be given [its] plain meaning." *Pasternak & Fidis, P.C. v. Recall Total Info. Mgmt., Inc.*, 95 F. Supp. 3d 886, 909 (D. Md. 2015) (citing *Gomez v. Jackson Hewitt, Inc.*, 16 A.3d 261, 274–75 (Md. Ct. Spec. App. 2011)). Pasha is not a consumer within the meaning of the MCPA because the real property it purchased was not "primarily for personal, household, family, or agricultural purposes." CL 13-101(d). Rather, the property was a multi-million-dollar commercial property featuring "an eight-story retail/office building containing approximately 77,000 leasable square feet[.]" ECF 92, ¶ 14.

Pasha argues it "must be granted protection as a consumer" because of "the egregious and willful nature of the fraud perpetrated by 5900 and its members." ECF 150, at 25. But the nature of the alleged misconduct has no bearing on Pasha's standing under the MCPA. Pasha next points to two other provisions in the MCPA, CL § 13-301(1) and (3), as forms of "unfair or deceptive trade practices" that are not expressly limited to consumer goods, consumer realty, or consumer services. The former covers representations that could deceive or mislead consumers. The latter covers the failure to state a material fact if the failure deceives or tends to deceive. I am not persuaded. Pasha does not explain how either provision extends to representations or material omissions made in connection with a commercial property transaction, and it cites no cases interpreting or applying the law in that context. Indeed, Pasha's interpretation ignores CL § 13-303, which incorporates the definition of "unfair or deceptive trade practices" in CL § 13-301 but prohibits such practices only in certain areas, none of which cover the transaction at issue in this case.

The motions for summary judgment are granted as to Count VI.

VII. Conclusion

Remaining are the fraud-based and breach of contract counterclaims against 5900. The parties shall submit supplemental briefing, not to exceed 10 pages, on the topics identified in this letter by January 6, 2023. Neither party may respond in writing to the other's submission unless

ordered by the Court. A virtual hearing is scheduled for January 17 at 2:00 p.m. Shortly before the hearing, I will provide information about how to access it.

Although informal, this letter is an Order of the Court and will be docketed as such.

Sincerely,

Deborah L. Boardman
United States District Judge