

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

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CLERK OF THE CIRCUIT COURT
MANATEE CO. FLORIDA

MIKE URBANIAK and
SALLY URBANIAK,

Plaintiffs,

v.

CASE NO. 2013 CA 006088

KB HOME FORT MYERS, LLC
KB HOME TAMPA, LLC and
KB HOME ORLANDO, LLC,

Defendant(s).

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court on February 9, 2017 on Defendants' Motion for Summary Judgment, and the Court having considered arguments of counsel for the respective parties and being otherwise duly and sufficiently advised, hereby finds as follows:


- 1) The economic loss rule does not bar any of the tort claims brought by Plaintiffs, given that such tort claims are founded – in part – on duties owed to Plaintiffs by Defendants independent of those arising from the contract entered into between the parties. *See Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985) and *Court Appointed Receiver of Lancer Offshore, Inc. v. Citco Group Ltd.*, 2011 WL 1233106 (S.D. Fla. 2011).
- 2) As to the proposition that the contract limits the relief available to Plaintiffs, the Court rejects same, given Plaintiffs' assertion that Mr. and Mrs. Urbaniak were induced by fraud to enter into said contract. *See Lower Fees, Inc. v. Bankrate, Inc.*, 74 So. 3d 517, 520 (Fla. 4th DCA 2011), *D & M Jupiter, Inc. v. Friedopfer*, 853 So. 2d 485, 489 (Fla. 4th DCA 2003), and *Burton v. Linotype Co.*, 556 So. 2d 1126, 1127-28 (Fla. 3d DCA 1989).

- 3) As to the measure of damages, whether the injury to Plaintiffs' "real property is characterized as temporary or permanent is an issue of fact to be determined by the jury" See *Bisque Associates of Fla., Inc. v. Towers of Quayside No. 2 Condominium Ass'n, Inc.*, 639 So. 2d 997, 999 (Fla. 3d DCA 1994).
- 4) As to Count I, Plaintiffs' cause of action for Rescission, it is undisputed that "a fundamental requirement necessary for rescission of a contract is that the moving party has no adequate remedy at law." See *Collier v. Boney*, 525 So. 2d 971, 972 (Fla. 1st DCA 1988).
- 5) It is likewise clear that a plaintiff in a civil suit is free to assert causes of action in the alternative, even when they are mutually exclusive. See *Mather-Smith v. Fairchild*, 135 So. 2d 233, 234 (Fla. 2d DCA 1961), *Real Estate Value Co., Inc v. Carnival Corp.*, 92 So. 3d 255, 263 n.2 (Fla. 3d DCA 2012), and Fla. R. Civ. P. 1.110(g).
- 6) Because an election between inconsistent remedies need not be made until the conclusion of a trial, there is no impropriety in permitting the rescission count to proceed to verdict along with all of the other remaining counts. See *Wolfe v. Aetna Ins. Co.*, 436 So. 2d 997, 1001 (Fla. 5th DCA 1983).

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is **DENIED**.

DONE AND ORDERED at Bradenton, Manatee County, Florida, on this 13th day of February, 2017.


BRIAN A. ITEN, CIRCUIT COURT JUDGE

Copies furnished via email to:

Michael P. Murphy, Esquire (mmurphy@dglawyers.com)
Paul J. Ullom, Esquire (pullom@carltonfields.com)