IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DAVID J. FOGELSON and CORINNE FOGELSON, husband and wife,

Plaintiffs-Appellees,

v.

Ct. App. No. 35,086

ERIC WALLACE, MARK BOZZONE, WALLEN DEVELOPMENT, INC., DEVELOPMENTS BY WALLEN, LLP,

Defendants-Appellants.

DEFENDANT-APPELLANT MARK BOZZONE'S ANSWER BRIEF ON CROSS-APPEAL

On appeal from the Thirteenth Judicial District Court
The Honorable George P. Eichwald

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STATEMENT OF ABREVIATIONS

Trial transcripts are identified as follows:

April 29, 2014: Tr.I
April 30, 2014: Tr. II
May 1, 2014: Tr.III

Plaintiffs exhibits are identified by Exhibit number.

Eric Wallace's exhibits are identified by name and letter, e.g. "Wallace Exhibit A."

Mark Bozzone's exhibits are also identified by name and letter, e.g. "Bozzone Exhibit A."

I. SUMMARY OF FACTS PERTINENT TO THE CROSS APPEAL

A. Introduction

In their First Amended Complaint Plaintiffs David and Corinne Fogelson, (Plaintiffs) pleaded six claims against Mark Bozzone (Mark): fraud, intentional interference with contract, *prima facie* tort, civil conspiracy conversion, and violation of the Unfair Trade Practices Act, NMSA 1978 § 57-12-1 et. seq. (UPA) [RP 162-174]. On cross-appeal Plaintiffs complain of the district court's dismissal of their conversion and UPA claims.

All of Plaintiffs' claims were based on the same allegations: that because of Mark Bozzone's, Eric Wallace's and Larry Filener's decisions, Wallen Development, Inc. and Developments by Wallen, LLP (hereinafter sometimes jointly "Wallen") breached Plaintiff's Purchase Agreement by failing to complete the house contracted for and convey the real property [RP 162-174]. Plaintiffs identified no source of duty other than the Purchase Agreement [Id.]. Plaintiffs pleaded no negligence claims.

B. The facts pleaded and relied upon in opposing the motion to dismiss did not support Plaintiffs' attempt to bring a UPA claim

Via the Purchase Agreement Wallen sold Plaintiffs a lot with a house on it [Exhibit 24 § 3.1]. Wallen is identified as the general contractor under the Agreement [Exhibit 24, § 3.1]. The Agreement anticipates the use of subcontractors [Exhibit 24 § 11].

Plaintiffs warranted that they were purchasing "the Property" as their "primary residence" [Exhibit 24, Primary Residence Addendum]. Consistent with their contract, in their First Amended Complaint Plaintiffs identified "the Property" at issue by legal description and also specifically defined it as "a lot and new home to be constructed thereon located at 1012 Cristanos Drive, Bernalillo, New Mexico" [RP 162-63, ¶¶ 4, 8].

In Count III, the UPA claim, Plaintiffs alleged that Wallen's obligation, pursuant to their Purchase Agreement, had been to use all of Plaintiffs' monies "to complete the work at the Property" [RP 166, ¶ 28].[1] Plaintiffs also alleged that "Defendants" made misrepresentations to them about the use of their money to pay subcontractors, and violated the UPA by failing to deliver "the Property" as provided for by the contract [RP 6].

The Purchase Agreement establishes that the latter claim—failing to deliver a completed house free of liens—was a contract violation. And that had already been established by Plaintiffs' first suit, in which the district court found it their favor on their claims of breach of contract against Wallen [Exhibit 141].

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[1] Plaintiffs do not address funds that would have been owed to Wallen as the general contractor or that would have represented Wallen's profit on the sale. There was no evidence establishing the amounts or percentage of the total cost of the house that would have been payable to subcontractors.

The Purchase Agreement refutes the former claim because it contains no express promises with respect to the use or retention of any funds other than an Earnest Money deposit and it provides that it "embodies the entire agreement between Purchasers and Seller" [Exhibit 24, §§ 2.0, 7.0].

The Purchase Agreement specifically contemplates that there may be liens placed on the property. It then obligates Wallen to:

> ...remove any and all mechanics and materialmen liens prior to closing, and to remove and hold Purchasers harmless with respect to any and all mechanics and materialmen liens filed after closing, arising out of or alleged to arise out of work performed or materials supplied at the request of Seller, his agents or subcontractors....

Thus, there is no violation of the Agreement from the placement of liens on the property. The failure to remove those liens and hold Plaintiffs harmless with respect to them, however, was a breach of this contract.

The allegation regarding the failure to use Plaintiffs' funds to pay subcontractors appears to have been intended to invoke the UPA, NMSA 1978 § 57-12-2(D)(17), which prohibits misrepresentations made in connection with "failing to deliver the quality or quantity of goods or services contracted for." For this Count, Plaintiffs recited the statutory language but set forth no facts or circumstances different from or in addition to those that they had already alleged in support of their other claims [See RP 162-73]. Plaintiffs did not

plead any UPA violation related to or resulting from "the collection of a debt" [Id.].

Mark moved for dismissal of the UPA claim on August 25, 2013 [RP 424-27].The district court determined that the UPA was inapplicable as a matter of law to real estate transactions and granted the motion on November 19, 2013 [RP 860-62].

C. The facts Plaintiffs established at trial confirmed that Plaintiffs had no UPA claim

Plaintiffs did not allege that, at the time of the sale, any affirmative misrepresentations had been made to them about Wallen's banking or payment practices, nor did they specifically identify any affirmative representations related to their contract's terms that they claimed were false or misleading.

When Plaintiffs and Ms. Montoya signed the Purchase Agreement, Plaintiffs became bound by it. The Purchase Agreement disclaimed any representations not contained within it [Exhibit 24, §§ 2.0, 7.0]. Although Plaintiffs now claim that periodic payments fall within the UPA's reference to misrepresentations made in the course of "collection of a debt," no such violation was pleaded nor did Plaintiffs prove that any representations were made at the time of their payments. And Plaintiffs never asked the district court to find that there had been a violation of the UPA by misstatements

about, or wrongful collection of, a debt [See RP 1086, Plaintiffs Requested Findings 39-41].

Both pretrial and at trial Plaintiffs conceded that Mark had not made any misrepresentations to them and that, in fact, they had had no idea Mark even existed until after Wallen had ceased doing business [Tr.I:56-59, 63-64; RP 598].

In their renewed effort to assert a UPA claim, Plaintiffs appear to be relying on the fact that Mark told Ms. Montoya, in February, 2009, to advise creditors that Wallen was in the middle of renewal with banks to raise additional capital [see RP 1159, finding 74; Tr.III:14-15]. This representation was made long after Plaintiffs signed their Purchase Agreement, and so cannot be said to have been made "in connection with the sale, lease, rental or loan of goods or services" to Plaintiffs, as required by NMSA 57-12-2(D). And even if the timing did not preclude reliance on this statement, there was no evidence that Ms. Montoya conveyed this statement to Plaintiffs or, for that matter to anyone outside of Wallen.[2]

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[2] The un-contradicted evidence was that Wallen was working on a new business plan to present to its banks in order to obtain new lines of credit or renewals of lines of credit [Tr.I:105, 137-39; Tr.II:96; Tr.III:13, 15; Exhibits 63, 69, 72, 93]. Charter Bank had indicated that it would renew if it got the second half of an interest reserve, which Wallen was trying to raise [Tr.I:144; Exhibits 59, 80, 93]. Compass Bank had renewed [Tr.III:13, 15; Exhibit 93].

D. The pleadings and the evidence established the absence of a viable conversion claim

The allegation made in ostensible support of the conversion claim was that all "Defendants," including Wallen, converted Plaintiffs' "monies to their own use...." [RP 166, ¶ 29]. No source of duty to Plaintiffs, aside from the contract itself, was pleaded [RP 162-73].

It was established at trial that Jenice Montoya oversaw Wallen's day-to-day operations [RP 1150, Finding 3]. The district court found that Montoya provided traffic reports, weekly updates, home start reports, production summaries to Mark, Wallace and Filener [RP 1151-52, findings 6, 7, 13, 15]. But Wallen's cash flows were shown in the job reports [RP 1153, finding 20]. The court did **not** find that Mark received job reports [*see* Id.].

There are also no findings that Mark ever received reports that would have disclosed due dates for Plaintiffs' payments, or ever saw any customer's checks or Wallen deposit slips or bank statements. The absence of findings stems from the absence of any evidence that Mark ever saw customer's checks, Wallen deposit slips or bank statements, or any other evidence that could support the notion that Mark's role was such that he would have been receiving or examining these types of documents.

Mr. Filener testified that on February 23, 2009, he was still working to keep the company open [Tr.III:100-01]. Charter Bank appeared to be working with Wallen right up until February 24, 2009 [Tr.II:62-64; Tr.III:14-16, 101-102].

Plaintiffs may be attempting to base a conversion claim on their allegation that Mark knew that funds received by Wallen were deposited in a single operating account, and that all of the funds provided for a specific purpose were not used solely for that purpose. If so, it fails because evidence of Wallen's internal accounting and use of funds it lawfully obtained does not support a conversion claim against Mark, even if he had had knowledge of that usage, because, where funds are lawfully obtained, a conversion claim lies only after demand has been made for return of those funds. *Nosker v. Trinity Land Co.*, 1988-NMCA-035, ¶¶ 14-15, 757 P.2d 803 (concluding that there was no conversion claim where a timely demand was not made because, where a defendant had the right of possession, a conversion claim requires a demand for return of the property and a refusal of that demand).

Montoya's un-contradicted testimony was that use of a single operating account had been the practice under prior ownership, and was common in the industry [Tr.I:104, 184-185]. Whether or not Mark could be charged with knowledge of Wallen's banking practices, there was no evidence that, prior to Wallen's closing, Mark knew that funds delivered to Wallen for a specific purpose were not used for that purpose. On this matter, Plaintiffs confuse knowledge of Wallen's banking practices with knowledge of its payment

practices. But the finding they rely on addresses only knowledge of the banking practice, not the use of designated funds [RP 1154, finding 30].

Plaintiffs focus on Montoya's answer to the imprecise question whether "everybody in the company" knew that Wallen had one operating account. Montoya said: "*As far as I know*. It was like that from the day I started when it was Garry and Larry." [Tr.I:104 (emphasis added)]. This is speculation.

Montoya's only other statement is a non-responsive and somewhat confusing answer to a multi-part question:

> Q: Were, to your knowledge, Eric Wallace, Mark Bozzone, and Larry Filener aware that there was just a general operating account that all monies were put into?
>
> A: Yeah. I think we had a separate account for activities in Las Cruces. We didn't have multiple accounts, but there was generally one operating account.

[Tr.I:121]. This testimony goes only to deposit of funds, not their use.

Montoya's follow-up testimony regarding her February 2009 email exchange with Mark established that she was explaining to him *at that time*, that Wallen did not use earmarked funds for their designated purpose [Tr.I:186-87]. And Mark's testimony was that, before February 2009, he had been unaware that payments intended to be applied to a specific property were not so used [Tr.II:176-177,188; *and see* Bozzone Exhibit G].

Plaintiffs had no evidence that Mark actually knew that Plaintiffs were purchasing a house through periodic cash payments. There was also no

evidence that Mark knew when any payment might have been due and no finding or conclusion of any such knowledge. Because intent is an element of a conversion claim, evidence of knowledge that payments were being made was essential to a claim of misuse of those payments. Without such evidence, no reasonable inference that Mark knew that specific payments on Plaintiffs' contract were not being used solely on that contract, and intended that result, could be drawn.

Most importantly, Plaintiffs failed to show any fact or circumstance that would have imposed on Mark any independent duty to them that could have given rise to a tort claim, such as conversion. There was no evidence that would support any claim that Mark personally received any of Plaintiffs' funds.

At trial and by Order dated May 21, 2014, the district court granted Mark's Rule 1-041(b) motion to dismiss the conversion claims [RP 1050].[3]

E. Additional facts relevant to Plaintiffs' cross appeal include Mark's status as a Wallen agent and lack of involvement with the particulars of their contract

At trial Plaintiffs established Mark's legal status as an agent and de facto officer of Wallen [See RP 1152-534, 1158-59, 1162-63, findings 17, 18, 21, 50, 70, 76, 78, 103, 108; see also RP 1172, conclusion 25, which, albeit

[3] This Order also disposed of the fraud claims. Plaintiffs are not appealing dismissal of their fraud claims.

erroneous in all other respects, correctly concludes that Mark actively participated in Wallen's management]. They thereby established that his duties ran to Wallen and its owners and that Mark, in his role as a "high-level" manager, acted so as to protect and further the interests of his principals [See Mark's Brief-in Chief at 4, 6, 9, 11, 26-33, 37-38 and Reply 6-9; RP 1152, Finding 17]. By establishing Mark's role as a Wallen agent, Plaintiffs effectively established that he personally owed them no duty. [See Brief-in-Chief at 26-33, 37-38 and Reply Brief at 6-9].

Plaintiffs also established that, in entering into their contract, they dealt with a sales representative, Lenore Rees, and Ms. Montoya, and not with Mark [Tr.I:25, 29-30; and see RP 1058, Plaintiffs' proposed finding 2, 1068, Plaintiffs' proposed findings 83, 85; RP 1150, finding 3; 1160, findings 84 and 86].

II. SUMMARY OF ARGUMENT

Through their cross-appeal Plaintiffs continue their effort to shoehorn their breach of contract case into causes of action that simply do not apply. But the fact that they were not able to collect the total amount of their Judgment against Wallen does not transform their circumstances into ones that could give rise to a claim either under the UPA, or for conversion.

Plaintiffs' arguments are fairly obvious attempts to pierce the corporate veil without actually establishing any of the elements required to pierce a corporate veil. *See Scott v. AZL Resources Inc.*, 1988-NMSC-028, ¶¶ 10-12, 753 P.2d 897. As explained in *Scott*, to pierce the corporate veil a plaintiff must establish that:

(1) the corporation was "operated not in a legitimate fashion to serve the valid goals and purposes of that corporation,"

(2) some form of moral culpability or improper purpose was attributable to the shareholders, such as use of the corporation to perpetrate a fraud, and

(3) a reasonable relationship between plaintiff's injury and the morally culpable use of the corporation.

Id.

There was never any attempt to show that Wallen entities were not operated by their owners so as to serve Wallen's goals or purposes, or that they were improperly used in a morally culpable manner. Instead Plaintiffs' complaints are based upon the fact that Mark and Eric Wallace acted to protect Wallen, instead of acting *as if* their duties ran to Plaintiffs. But, as established in Mark's Brief-in-Chief at 26-33, 37-38 and Reply Brief at 6-9, Mark had no duty to Plaintiffs.

The UPA claim failed on many fronts. First, the UPA is inapplicable to transactions involving real property. *McElhannon v. Ford*, 2003-NMCA-091, ¶ 16, 73 P.3d 827. Second, given their admission that Mark had made no representation to either of them, dismissal of the UPA claim as against Mark could have caused no legal injury to Plaintiffs. Third, Plaintiffs failed to prove that any representation was made at or after the sale. And fourth, the damages alleged all resulted from the breach of Plaintiffs' contract, which is generally not actionable under unfair trade practice or deceptive trade practice statutes. Dismissal under Rule 1-012(B)(6) is proper where, as here, the claim asserted is legally deficient. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 257 P.3d 917.

The conversion claim also failed on many fronts. Conversion consists of the unlawful and intentional exercise of dominion and control over property belonging to another in defiance of the owner's rights. *Santillo v. N.M. Dept. of Public Safety*, 2007-NMCA-159, ¶ 30, 173 P.3d 6 (quoting *Nosker v. Trinity Land Co.*, 1988-NMCA-035); *In re Yalkut*, 2008-NMSC-009, ¶ 25, 176 P.3d 1119 (conversion requires intentional wrongdoing); *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 680 N.W.2d 634, 638 (N.D. 2004); (conversion is the "tortious detention or destruction of personal property, or a wrongful exercise of dominion or control over the property inconsistent with or in defiance of the rights of the owner.").

The conversion claim was properly dismissed because it is a tort remedy that requires proof of a duty that arises independently of and is entirely separate from contractual obligations. *Id.*; *Come Big or Stay Home, LLC v. EOG Resources, Inc.*, 816 N.W.2d 80, 88 (N.D. 2012); 18 Am.Jur.2d *Conversion* § 67 (August 2016 Update) (conversion claim lies if plaintiff alleges breach of a duty owed separately from the obligations created by the contract).

No extraneous source of duty was pleaded. No circumstances extraneous to the contract, which could have given rise to a duty running from Mark to Plaintiffs, were proved [see Mark's Brief-in Chief at 21-23, 27-30]. No evidence was adduced that could support a claim that Mark intentionally converted Plaintiffs' funds or any part of them. Instead, Plaintiffs' allegations all fall under the rubric of a contract claim because they are essentially claims that, due to the actions of individuals working on Wallen's behalf, Wallen did not perform its contractual obligations to Plaintiffs when they were due [RP 162-74]. See *Come Big or Stay Home, LLC*, 816 N.W.2d at 84 ("a breach of contract is the nonperformance of a contractual duty when it is due") (quoting *WFND, LLC v. Fargo Marc, LLC*, 730 N.W.2d 841, 848 (N.D. 2007)).

Plaintiffs' contract anticipates the possibility of liens and establishes Wallen's duty to remove those liens. Thus, Wallen's failure to remove those liens is a contract breach, not an independent tort.

Plaintiffs' reliance on facts that preceded their demand for return of their money or completion of their house is misplaced because both a demand and a refusal were required to give rise to a conversion claim. *Nosker v. Trinity Land Co.*, 1988-NMCA-035, ¶¶ 14-15.

The conversion claim, like the UPA claim, also fails because the harm alleged is Plaintiffs' inability to obtain the benefit of their contractual bargain. A buyer's desire to enjoy the benefit of his bargain is not an interest that the tort law traditionally protects. *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 327 (Ill. 1982).

III. POINTS AND AUTHORITIES

A. The UPA requires a false or misleading statement, knowingly made, at the time of the sale, and is not applicable to contracts for the purchase or sale of real property

The UPA is applicable to contracts for provision of goods or services. *See* NMSA 1978 § 57-12-2. The UPA applies where there has been a misrepresentation, knowingly made, in connection with a sale or lease of such goods or services. NMSA 1978 § 57-12-2(D). The "gravamen of a UPA claim is a misleading, false or deceptive statement, knowingly made...." *Guidance*

Endodontics, LLC v. Dentsply Intern., Inc., 749 F.Supp.2d 1235, 1274 (D.N.M. 2010) (quoting *Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112,¶ 17, 965 P.2d 332 (338) (internal quotations omitted); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 811 P.2d 1308 (the UPA requires that a misrepresentation have been knowingly made); *Eckhardt v. Charter Hospital of Albuquerque, Inc.,* 1998-NMCA-017, ¶ 60, 953 P.2d 722 (the UPA "is intended to provide a private remedy for individuals who suffer pecuniary harm for conduct involving either misleading identification of a business or goods, or false or deceptive advertising.") (quoting *Parker v. E.I. DuPont de Nemours & Co.*, 1995-NMCA-086, ¶ 47, 909 P.2d 1.

For a UPA claim a plaintiff must prove that (1) the party charged made a false or misleading representation, (2) knowingly and in conjunction with a sale of goods or services, (3) in the regular course of the defendant's trade or commerce and (4) the statement was of the type that tends to deceive. *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13. The complained-of statements must have been made in connection with a sale, lease rental or loan of good or services to fall within the UPA. *Page & Wirtz Const. Co. v. Solomon*, 1990-NMSC-063, ¶¶ 13, 15, 794 P.2d 349.

A false or misleading statement is an essential element of a UPA claim. *Eckhardt v. Charter Hospital of Albuquerque, Inc.,* 1998-NMCA-017, ¶ 60.

"The subjective belief of the party receiving the information is not sufficient to establish a violation of the Act." *Id.* In the absence of a misleading statement, knowingly made, a failure to deliver services contracted for does not give rise to a UPA claim. *Id.*, at ¶¶ 60-61; *U.S. ex rel. Custom Grading, Inc. v. Great American Ins. Co.*, 952 F.Supp.2d 1259, 1268 (D.N.M. 2013).

To pursue a UPA claim, a plaintiff must allege more than a breach of contract. *Guidance Endodontics, LLC v. Dentsply Intern., Inc.*, 749 F.Supp.2d at 1274-1275; cf. *Coy Chiropractic Health Center, Inc. v. Travelers Cas. and Sur. Co.*, 957 N.E.2d 1174, 1181 (Ill.App. 2011) (to the extent plaintiffs "are simply realleging a breach of contract" it is not actionable under the Consumer Fraud Act); *Martinez v. River Park Place, LLC*, 980 N.E.2d 1207, 1217-1218, (Ill.App.Ct. 2012) (breach of a contract is not a violation absent evidence of a misrepresentation and an intent to breach at the time of sale).

It is settled that, as the district court concluded, the UPA does not apply to real estate or to contracts for the construction of homes to be sold as part of real estate. *McElhannon v. Ford*, 2003-NMCA-091, ¶ 16, (the UPA is not applicable to sales "to the extent goods and services are combined to create a structure that is permanently affixed to realty."); *Elliott Industries Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091, 1119 (10th Cir. 2005) (where payments at issue were connected not to goods or services, but to

realty, the claim did not fall within the ambit of the UPA); *Kysar v. Amoco Production Co.*, 379 F.3d 1150, 1156-57 (10th Cir. 2004) (affirming dismissal of UPA claim where plaintiffs' claims were based on misrepresentations regarding their right of access to a well, citing NMSA 1978 § 57-12-2(D) and *McElhannon*); *In re Arellano*, 384 B.R 586, 592 (Bankr. D. N.M. 2008) (dismissing UPA claim because UPA does not apply to the sale of real estate).

Plaintiffs attempt to distinguish *McElhannon* because their house was not finished. But this conflicts with their contract—which is a Purchase Agreement for real property—and with their articulation of the basis for their damages claim—the loss of a completed house and the land upon which it stood. Their attempted distinction is irreconcilable with their definition and use of the term "Property" throughout their pleadings. And it conflicts with *Kerman v. Swafford*, 1984-NMCA-030, ¶¶ 11-12, 680 P.2d 622, which holds that where the "nature of the property, the manner of its construction and its intended use" show the intention to make permanent additions to land, the fixtures are presumed to be part of the realty (*quoting Patterson v. Chaney*, 1918-NMSC-077, ¶ 6, 173 P. 859).

The exclusion of real property transactions from New Mexico's UPA, and most particularly with respect to houses being built and property being sold by developers like Wallen, makes perfect sense because real estate and

real estate related transactions are already governed by a myriad of state and federal statutes. *See e.g.* the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1701 et. seq. (ILSFDA) (adopted in 1968), the New Mexico Real Estate Disclosure Act, NMSA 1978 § 47-13-1 et. seq. (providing a private remedy), the Uniform Vendor and Purchaser Risk Act, NMSA 1978 § 47-1a-1 et. seq., the Land Subdivision Act, NMSA 1978 § 47-5-1 et. seq. (providing penalties), and the New Mexico Subdivision Act, NMSA 1978 § 47-6-1 et. seq. (providing private remedies).[4] The UPA's limitation to "goods and services" prevents it from creating conflicts between it and these statutes, most particularly ILSFDA.

ILSFDA imposes disclosure requirements on real estate developers. *See* 15 U.S.C.A. §§ 1703(a); *Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201, 1207 (10th Cir. 2015) (Land Sales Act applies to developers who directly or indirectly offer to or sell or lease lots or directly or indirectly advertise the

[4] Additional statutes demonstrating the absence of any need for the UPA to be extended to real property matters and transactions, include the Uniform Owner-Resident Relations Act, NMSA 1978 § 47-8-1 et. seq. (providing private remedies), the Building Unit Ownership Act, NMSA 1978 § 47-7-1 et. seq. (providing joint and several liability for common expenses), the Mobile Home Park Act, NMSA 1978 § 47-10-1 et. seq. (providing civil remedies), the New Mexico Time Share Act, NMSA 1978 § 47-11-1 et. seq. (incorporating securities laws remedies), and the Land Use Easement Act, NMSA 1978 § 47-12-1 et. seq. (providing remedies).

sale or lease of lots, and to parties that represent, or act for or on behalf of, developers). Thus, it regulated Wallen's disclosures.

ILSFDA imposes a duty on developers to return down payments to purchasers under specifically delineated circumstances. See 15 U.S.C.A. § 1703(e). It specifically prohibits unfair and fraudulent practices. 15 U.S.C.A. § 1703(a)(2). And ILSFDA provides private remedies very similar to those available through the UPA. *See* 15 U.S.C.A. § 1709, which permits an action in law or equity, allows for damages and injunctive relief and provides for recovery of, *inter alia*, interest, court costs and "reasonable amounts for attorneys' fees." ILSFDA thereby provides the protection to buyers of lots and to-be-built houses from developers that the UPA provides for transactions in goods and services. Because ILSFDA was already in place when New Mexico adopted its UPA, there was no need for the UPA to include real estate transactions.

In arguing for application of the UPA, Plaintiffs rely on an unreported decision that expressly declines to decide whether an unfinished house could qualify as goods or services, *Mileta v. Jeffryes*, 2009 WL 6763602 (N.M. App. Feb 19, 2009). Because *Mileta* did no more than note that the claim was being made, it provides no support for Plaintiffs' argument. Plaintiffs fail to address *Kerman v. Swafford*, 1984-NMCA-030, ¶¶ 11-12, which establishes that the

materials used and items placed in their house all come within the definition of realty.

Despite NMSA 1978 § 57-12-4, which directs that New Mexico is to look to federal law, Plaintiffs also rely on an Ohio decision that arises out of Ohio's Consumer Sales Practices Act, R.C. Chapter 1345 (OCSPA). Not only does OCSPA differ from New Mexico's UPA in several key respects, it has been held to have incorporated violations of Ohio's Home Solicitation Sales Act as OCSPA prohibited practices. *Keiber v. Spicer Constr. Co.*, 619 N.E.2d 1105, 1107 (Ohio App. 1993). Ohio's statute is a version of the Uniform Consumer Sales Practices Act, not the Uniform UPA. *See generally* Ohio R.C. Chapter 1345. And *Keiber* appears to have been wrongly decided.

In *Keiber*, the court specifically distinguished *Heritage Hills, Ltd. v. Deacon*, 551 N.E.2d 125 (Ohio 1990). It did so because *Deacon's* conclusion that residential lease transactions were excluded from OCSPA was based on inclusion of such transactions in Ohio's Residential Landlord and Tenant Act. 619 N.E.2d at 1107-08. While finding *Deacon* distinguishable, *Keiber* acknowledged the official comments to 7A *Uniform Laws Annotated* 235, Section 2 (1985), to the effect that "[o]n the assumption that land transactions frequently are, and should be, regulated by specialized legislation, they are excluded altogether" from the Uniform Consumer Sales Practices Act. At no

point does the court mention the ILSFDA. Yet the ILSFDA appears to bear the same relation to OCSPA as Ohio's Residential Landlord and Tenant Act bears to OCSPA.

Keiber's reasoning that coverage under the Residential Landlord and Tenant Act appropriately resulted in exclusion of leases from OCSPA, would seem equally applicable to matters covered under ILSFDA, and to require exclusion of developers' lot and to-be-built home sales from OCSPA. But because the federal statute is never mentioned it would appear that ILSFDA was not brought to the attention of the Ohio court.

As *Deacon* demonstrates, each state's UPA or consumer protection statute is but a part of that state's overall statutory scheme, which is, in turn, affected by applicable federal statutes. Where existing statutory landscapes include provisions specifically addressing transactions involving real property, exclusion of those transactions from UPAs or other consumer protection statutes is warranted. *See e.g. State v. First National Bank of Alaska*, 660 P.2d 406, 410, 412 (Alaska 1982) (Alaska Unfair Trade Practices and Consumer Protection Act did not apply to developer who was selling houses to-be-built and lots in flood prone area without disclosing the risks; instead Alaska's

Uniform Land Sales Practices Act applied);[5] New Mexico's statutory landscape, like Alaska's, is such that exclusion from the UPA of real estate transactions, including those involving a developer's failure to complete construction of a residence, makes perfect sense. *Id.*

Although the dismissal order was based upon the non-applicability of the UPA to real estate transactions, dismissal was also warranted because Plaintiffs never established that a misrepresentation was made to them at the time of sale. *Page & Wirtz Const. Co. v. Solomon*, 1990-NMSC-063, ¶ 15. Plaintiffs' complaint about liens does not support a UPA claim because the contract establishes that Plaintiffs were on notice that liens might be placed on the Property and the duty to remove those liens was a duty imposed on Wallen by contract [Exhibit 24, § 3.1].

Plaintiffs' complaint about not receiving a completed house, in the absence of proof of an affirmative misrepresentation made at the time of the sale, does not give rise to a UPA claim. *Id.*; *U.S. ex rel. Custom Grading, Inc. v. Great American Ins. Co.*, 952 F.Supp.2d 1259, 1268-1269 (D.N.M. 2013) (holding that where plaintiffs did not allege a misleading statement, knowingly

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[5] The language used and the specific acts prohibited under Alaska's Unfair Trade Practices and Consumer Protection Act are quite similar to the language used and the specific acts prohibited under New Mexico's UPA. See AS §45.50.471(a) and (b) (as amended in 1974).

made, but only the failure to deliver the services contracted for, they had no UPA claim).

Plaintiffs' argument that their claim was actually for misrepresentation in the "collection of a debt" does violence to both the language and intent of the UPA and is belied by their failure to have included any such claim in their first amended complaint or their proposed findings of fact and conclusions of law [see RP 162-74, 1086 Plaintiffs' proposed UPA findings 39-41]. Plaintiffs cannot change the basis for their UPA claim at this late date. *American Bank of Commerce v. U.S. Fidelity & Guaranty Co.*, 1973-NMSC-078, ¶ 2, 513 P.2d 1260. And even if this claim had been raised below, Mark has been unable to find any case in which this language has been applied outside its obvious intent of application to creditors, finance companies, debt collection agencies and repossession agents, who engage in misrepresenting a debt, the debtor's legal rights, or the status of a debt, in the course of demanding payment. No such circumstances were claimed or established herein.

Finally, in claiming that dismissal of this Count was error, it is Plaintiffs' burden to show that the alleged error caused them harm. *Tevis v. McCrary*, 1965-NMSC-051, ¶ 9. 402 P.2d 150 (duty is on party claiming error to demonstrate prejudice to his rights caused by the alleged error). They make no effort to do so. The facts Plaintiffs established both pretrial and at trial

foreclosed their UPA claim because they established that Mark was not the party they dealt with at the time of sale, had made no representations to them at the time of the sale (or thereafter) and owed them no duty. [See Tr.I:25, 29-30 and see Mark's Brief-in Chief at 4, 6, 9, 11, 26-33, 37-38 and Reply 6-9]. Therefore Plaintiffs' claim of error on the UPA claim fails.

B. As a matter of law, Plaintiffs had no viable conversion claim because the contract was the only source of any duty and they established no facts that would support the claim as against Mark

To have a claim for conversion, it was incumbent upon Plaintiffs to establish that Mark had a duty to them, wholly separate from any duty that might have arisen as a result of their contract with Wallen. *Cottonwood Enterprises v. McAlpin*, 1991-NMSC-044, ¶ 11, 810 P.2d 812 (where the only legal duty arises by contract there is no cause of action in tort); *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 680 N.W.2d at 640-641; *Calcutti v. SBU, Inc.*, 223 F.Supp.2d 517, 521 (S.D.N.Y. 2002) (the independent duty must arise "from circumstances not constituting elements of the contract" and which are "extraneous to it").

Where plaintiffs fail to show a legal duty independent of the contract itself, or that defendants engaged in tortious conduct "separate and apart from [their] failure to fulfill [their] contractual obligations," dismissal of a conversion claim is proper. *D'Ambrosio v. Engel*, 741 N.Y.S.2d 42

(N.Y.App.Div. 2002) (quoting *New York Univ. v. Continental Ins. Co.*, 87 N.Y. 2d 308, 316, 639 N.Y.S.2d 283, 662 N.E.2d 763 (N.Y. 1995)).

Plaintiffs identified no source of any extraneous, independent duty. To the contrary, all of their claims were based upon the Purchase Agreement and the duties owed them as a consequence of that contract [see RP 1083, Plaintiffs' proposed finding 23, setting forth their conversion claims as being based on Mark's having ratified Wallen decisions to delay payments to vendors, to allow Plaintiffs' money to be used for purposes other than payment of subcontractors, and causing Wallen not to finish Plaintiffs' house]. Thus, Plaintiffs' own allegations established that they had no conversion claim. *Calcutti v. SBU, Inc.*, 223 F.Supp.2d at 521, 523 (stating that in the absence of allegations that distinguish a conversion claim from a breach of contract the conversion claim is not cognizable).

Plaintiffs cannot rely on allegations about the failure to use Plaintiffs' payments solely on Plaintiffs' house or to prevent the filing of liens because the basis for any claimed duty to use Plaintiffs' funds only for their house would have to have been either Section 3.1 of the Purchase Agreement or the Purchase Agreement's implied covenant of good faith and fair dealing. *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 53, 68 P.3d 909 ("the implied covenant of good faith and fair dealing depends upon the existence of an

underlying contractual relationship..."). Thus, any duty to sequester Plaintiffs' funds or to use them to pay the subcontractors who worked on or provided materials to Plaintiffs' house, (and to pay Wallen for its work as general contractor), would be a contractual duty, not a duty extraneous to and separate from the contract. As such it could give rise to no claim against Mark. *New York Univ. v. Continental Ins. Co.*, 87 N.Y. 2d at 316.

In their Brief-in-Chief on cross-appeal, Plaintiffs argue as if events that preceded their demand for return of their payments, made in March 2009, were relevant to the claim. They are wrong. Where a defendant comes into possession of personal property lawfully, a conversion claim arises only after demand for return of the property is made and refused. *Nosker v. Trinity Land Co.*, 1988-NMCA-035, ¶¶ 14-15.

Plaintiffs also argue as if there had been evidence that Mark was involved in Wallen's post-closing decisions about allocation of funds. But, as Plaintiffs established in their first lawsuit against Wallen, Wallen's withholding of or failing to return money to Plaintiffs once Wallen knew that it would be unable to complete their house, and failure to remove all liens, was a breach of contract [Exhibit 141; and see Exhibit 24, § 3.1]. Thus, it cannot form the basis for a conversion claim. *D'Ambrosio v. Engel*, 741 N.Y.S.2d at 44 (affirming dismissal of conversion claim while explaining that defendants'

wrongfully directing that plaintiffs' deposit be withheld from plaintiffs constituted a breach of their contractual obligation, rather than a tort).

Even assuming *arguendo* Plaintiffs could have based a conversion claim on Wallen's failure to refund their money after Wallen closed, that claim would not lie as against Mark.

First, the claim depends upon Wallen having refused to refund Plaintiffs' money after a demand was made. *Nosker v. Trinity Land Co.*, 1988-NMCA-035, ¶¶ 14-15. Plaintiffs' only demand was made in March 2009, after Wallen had closed [see Exhibit 105]. Any claim that Mark was responsible for post-closing decisions made after Plaintiffs' demand is irreconcilable with the actual evidence and with Plaintiffs' Answer Brief on Mark's appeal, wherein they acknowledge that decisions made by *Wallace and Filener* were the "major reason" Plaintiffs did not get repaid. Plaintiffs' Ans. Br. 13 (emphasis added).

Second, Plaintiffs have not disputed Mark's position that he received none of their post-closing communications. As the evidence established non-receipt of Plaintiffs' and their counsel's misaddressed emails, there is no basis for any claim (or more accurately, assumption) that Mark knew about Plaintiffs' circumstances or Filener or Wallace's decisions [see Mark's Brief-in-Chief 16, 18-20].

Third, Plaintiffs fail to provide transcript citations to any evidence that could support an assertion that Mark was involved in post-closing decisions and, in fact, that claim was disproved at trial [See Tr.I:42; Tr.II:67-68, 85-86, 99, 101-05; see also Mark's Brief-in-Chief at 16, 18-20]. It was established that, with exceptions limited to properties for which Mooresville took responsibility, Mark's participation in Wallen's had ended by March of 2009. [Id]. Plaintiffs' demand was not made until March 18, 2009 [Exhibit 105]. It was established that the receipt of funds from Wallen's post-closing sale of raw land, which Plaintiffs claim should have been used, at least in part, to complete their house, occurred months later, in May 2009 [Tr.II:67-68, 70].

The undisputed evidence was that Wallace, Filener and Gary Wallen, along with and on the advice of their attorneys, made the decisions respecting the use of these funds. This evidence precludes Plaintiffs' current attempt to argue that *Mark* committed any tort or caused them any harm by means of post-closing decisions. [See Tr.II:85-86, 99, 101-02, 104-05]; *see also Taylor v. McBee*, 1967-NMCA-015, ¶¶ 23-26, 433 P.2d 88 (where defendant came into possession of plaintiff's properties lawfully, he cannot be said to have converted them to his own use absent a demand and an absolute refusal of that demand that amounts to a denial of plaintiffs' rights).

Finally, because the harm alleged is Plaintiffs' inability to obtain the benefit of their contractual bargain, their conversion claim failed. *Redarowicz v. Ohlendorf*, 441 N.E.2d at 327 (tort law does not traditionally protect a buyer's "desire to enjoy the benefit of his bargain"); *17 Vista Fee Assoc. v. Teachers Ins.. and Annuity Ass'n of America*, 693 N.Y.S.2d 554, 559 (N.Y.App.Div. 1999) (noting that party attempting to recover economic loss under contract cannot sue in tort). Therefore, the dismissal of this claim was proper.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth herein, the district court's dismissal of the UPA and conversion claims should be affirmed.

Respectfully submitted.

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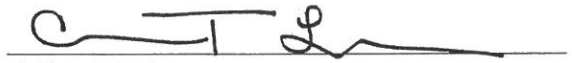

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