IN THE STATE COURT OF FAYETTE COUNTY
STATE OF GEORGIA

GARY PEURIFOY,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	FILE NO. 05SV-575
v.	)	
	)	
WILLIAM GILMER AND	)	
SIMPLY SOUTHERN HOMES, INC.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants Simply Southern Traditional Homes, Inc. ("Simply Southern") improperly named Simply Southern Homes, Inc. and William Gilmer ("Gilmer") (hereinafter collectively "Defendants"), and shows the Court as follows:

SUMMARY AND OVERVIEW

This is a construction defect matter involving a failed septic system and various minor code violations. Plaintiff Gary C. Peurifoy ("Peurifoy") is the original purchaser and former owner of a home located at 120 Pleasant Hill in Fayetteville, Georgia .("Home"or "subject home") The Home was constructed and sold by Simply Southern. Mr. Peurifoy alleges that the septic system in the home failed and brings the within lawsuit seeking damages for the cost of repairing and replacing the septic system. He also seeks damages to remedy minor codes violations, though he no longer owns the home.

Peurifoy brings these claims against Simply Southern and its principal Gilmer under the legal theories of : Count I – Breach of Contract, Count II – Breach of Warranty, Count III –

Fraud, Count IV – Gross Negligence, Count V – Simple Negligence, Count VII- Stubborn Litigiousness and Bad Faith , and Count VIII-Misrepresentation.

Gilmer and Simply Southern deny that the septic system was improperly installed and show this Honorable Court that the septic system at the subject home was installed solely by a subcontractor. That the septic system was permitted by the Fayette County Health Department ("FCHD") which determined the amount of drain line required, the location on the property where the septic system was to be installed, the depth of the drain lines and the suitability of the soil for the septic system. Neither Gilmer, Simply Southern or Simply Southern's subcontractor had any discretion with regard to the septic system and were required to comply with the FCHD's permit. The septic system was installed pursuant to the permit and was inspected and approved by the FCHD.

Peurifoy also claims that Gilmer and Simply Southern buried organic debris on the property. Gilmer and Simply Southern deny this allegation and show that Simply Southern paid to have debris, organic and otherwise, removed from the lot when the Home was being built and deny any knowledge of buried organic debris. The Defendants also show that the lot was partially cleared when Simply Southern purchased it from the developer and had no knowledge if the developer buried any organic debris on the lot.

Finally, Gilmer and Simply Southern deny that there were any undisclosed code violations at the time of sale and show that Peurifoy's claims for such items are barred by the terms of the purchase contract and the warranty. Gilmer and Simply Southern now move for summary judgment dismissing all of Peurifoy's claims.

STATEMENT OF MATERIAL FACTS

A. Construction of the Home

The Home is located at 120 Pleasant Hill in Fayetteville, Fayette County, Georgia.("Home") (Complaint ¶6) Simply Southern acted as the general contractor for the construction of the home. (Gilmer Affidavit ¶2). Simply Southern hired various subcontractors to perform almost all of the construction. (Gilmer Affidavit ¶2)

1) Bury Pits

The Home is located in a subdivision more commonly known as Highgrove. (Gilmer Affidavit ¶3) Simply Southern purchased the lot for the Home from Kingston Hill Development Company, L.L.C. ("Kingston") the developer of the subdivision. (Gilmer Affidavit ¶3) Kingston cleared the part of the subdivision and installed the roads and curbs prior to Simply Southern's purchase of the lot. (Gilmer Affidavit ¶4) When Simply Southern purchased the lot, the first 15-20 feet of the lot along the curb and roadway had already been cleared. (Gilmer Affidavit ¶4) Simply Southern hired subcontractors to clear the remaining areas of the lot in order to build the Home. (Gilmer Affidavit ¶5) Simply Southern also hired subcontractor O.W. Inc. to haul off organic debris. (Gilmer Affidavit ¶5) Simply Southern did not use or allow its subcontractors to use bury pits on the job. (Gilmer Affidavit ¶5) Simply Southern and Gilmer deny that they had any knowledge of any buried debris on the lot and deny that they buried any organic or construction debris on the property. (Gilmer Affidavit ¶5)

2) Septic System

The Home was built with a septic system. (Gilmer Affidavit ¶6) Simply Southern applied for and received a permit to install a 4 bedroom septic system. (Gilmer Affidavit ¶6 and Application for Construction Permit and Site Approval for On-site Sewer Management System

attached as Exhibit "B"[1]). The Fayette County Health Department ("FCHD") permitted the septic system and determined the length of drain line, where on the property the septic system was to be installed, the depth of the drain lines and the suitability of the soil for the septic system. (Gilmer Affidavit ¶6 and Application for Construction Permit and Site Approval for On-site Sewer Management System attached as Exhibit "B"). The permit included a diagram showing the layout for the septic system and noted that the FCHD used test holes to determine the suitability of the soil. (Application for Construction Permit and Site Approval for On-site Sewer Management System attached as Exhibit "B")

In or around January 2000, Simply Southern's subcontractor Fayette Septic & Sewer, Inc. installed the septic system per the specifications set forth in the permit. (Gilmer Affidavit ¶7) Neither Gilmer, Simply Southern or Fayette Septic & Sewer, Inc. had any discretion with regard to the septic system and all were required to comply with the FCHD's permit. (Gilmer Affidavit ¶7)

On or about January 13, 2000, the septic system was inspected and approved by Shelly Ross of the FCHD. (Gilmer Affidavit ¶8 and Inspection Report attached as Exhibit "C") The inspection report indicated that a 4 bedroom system had been installed, provided a diagram showing the layout of the septic system and indicated that the system had been approved. (Inspection Report attached as Exhibit "C") The inspection was performed by Shelly Ross who was an environmental health specialist II with the FCHD. (Inspection Report attached as Exhibit "C")

[1] All Exhibits are attached to the Affidavit of William Gilmer which is being filed contemporaneously with this brief.

B. Contract of Sale

On or about May 16, 2000. Peurifoy entered into a Purchase and Sale Agreement ("Contract") with Simply Southern to purchase the Home. (Gilmer Affidavit ¶9 and Contract attached as Exhibit "A") The sales price was $389,700.00. (Gilmer Affidavit ¶9 and Contract attached as Exhibit "A")

1) Warranty

Per the terms of the Contract, Simply Southern provided a one year warranty. (Gilmer Affidavit ¶10 and Contract attached as Exhibit "A" and Limited Warranty attached as Exhibit "D") Specifically, Special Stipulation 4 of the Contract states "SELLER/BUILDER TO FURNISH TO PURCHASER AT TIME OF CLOSING STANDARD ONE YEAR WARRANTY FOR HOME". (Contract attached as Exhibit "A")

The terms of the warranty were set forth in a standard three (3) page "Limited Warranty" which was provided to Peurifoy along with a copy of the "Homeowner Handbook, 2nd Edition". (Gilmer Affidavit ¶ 10 and Limited Warranty attached as Exhibit "D")The terms of the Limited Warranty required that the "Buyer must provide written notice of such problem to the Seller." (Limited Warranty ¶3) The Limited Warranty was also deemed to be the Exclusive Warranty and Remedy and specifically stated:

> This Limited Warranty is given by the Seller and accepted by the Purchaser in lieu of all other warranties of any kind whatsoever, express or implied, including without limitation, warranties of habitability , merchantability, fitness and workmanship relating to the Property, all of which other warranties are expressly excluded by the Seller. …. this Limited Warranty, is also given by the Seller and accepted by the Buyer in lieu of all other rights and remedies that Buyer has or may have against the Seller relating to the construction on the Property or the condition or circumstances existing on or in the vicinity of the Property, including but not limited to any rights based upon negligent construction, code violations, breach of contract or breach of warranty (other than based upon the terms of the Limited warranty).

As the closing on the home took place on June 22, 2000, the Limited Warranty Expired on June 22, 2001. (Gilmer Affidavit ¶11) Peurifoy did not make any warranty claims, written or otherwise, with regard to the septic system during the one year warranty. (Gilmer Affidavit ¶12) The first time that Peurifoy ever raised an issue with regard to septic problems was not until 2003 or 2004. (Gilmer Affidavit ¶12) More over, the first notice of the alleged code violation were not received by Gilmer until May 4, 2006. (Gilmer Affidavit ¶13 and Exhibit "E")

2) Home Inspection and "as is' Clause

The Contract gave Peurifoy the right to have the home inspected prior to closing and to demand repairs. (Contract ¶ 8.) Section 8 A was initialed by Peurifoy and was entitled "Property Sold With Right to Request Repairs". Pursuant to the terms of paragraph 8A:

> Buyer (Peurifoy) shall have the right to request that Seller repair defects in the Property by providing Seller within the 10 days from the Binding Agreement Date with a copy of inspection report(s) and a written amendment to this agreement setting forth the defects in the report which Buyer request be repaired and/or replaced.

The right to request repairs further provided "if Buyer does not timely present the written amendment in inspection report, Buyer shall be deemed to have accepted "as is" in accordance with Paragraph B below."

Paragraph B entitled "Property Sold 'as is'" states that

> All parties agree that the Property is being sold "as is," with all faults including lead based paint and lead based paint hazards. The Seller shall have no obligation to make repairs to the property (except as may be required to comply with the termite letter paragraph or as otherwise required herein).

Peurifoy never presented a written amendment requesting repairs and the home was sold "as is." (Gilmer Affidavit ¶14)

3) Entire Agreement Clause and Disclosures

Paragraph 9A of the Contract is entitled "Binding Effect, Entire Agreement, Modification, Assignment:" and states:

> This Agreement shall be for the benefit of, and binding upon, the parties hereto, … This Agreement constitutes the sole and entire agreement between the parties hereto and no modification or assignment of this Agreement shall be binding unless signed by the parties to this Agreement. No representation, promise or inducement not included in this Agreement shall be binding upon any party hereto." (Contract ¶9 A)

In addition, the Contract also incorporated the "Seller's Property Disclosure Statement" ("Disclosure") as Exhibit "A". (Gilmer Affidavit ¶15 and Seller's Property Disclosure Statement attached as Exhibit "E") The disclosure was signed by Gary Peurifoy under paragraph 14, which stated:

> 14. RECEIPT AND ACKNOWLEDGMENT OF BUYER:
> I acknowledge receipt of this Seller's New Construction Property Disclosure Statement. I understand that except as stated herein in the New Construction Purchase and Sale Agreement with Seller, the Property is being sold without warranties or guarantees of any kind by Seller or any Broker. No representations concerning the condition of the Property are being relied upon by me except as disclosed herein or stated in the New Construction Purchase and Sale Agreement.

The only specific disclosures involving the septic system were contained in section "5. PLUMBING RELATED ITEMS", subsection (c) states that there is a septic tank while subsection (d) states that Simply Southern Homes and Gilmer were not aware of any past or present leaks, backups or other similar problems related to the plumbing, water and/or sewage-related items on the property after their completion.

C. Peurifoy's Evidence

Peurifoy now seeks damages for the cost to repair and replace the septic system. (Complaint) Peurifoy has not presented any expert evidence that the septic system was not properly installed. In response to Interrogator 21 requesting the identity of any expert witness-

Plaintiff responded "Objection: the Plaintiff is not required to disclose experts at this time but will do so in a timely fashion prior to trial". (See Exhibit G which is a true and accurate copy of Defendant's First Interrogatories and Request for Production of Documents and Exhibit H which is a true and accurate copy of Plaintiff's Responses to Defendant's First Interrogatories.) To date Peurifoy has not disclosed any expert witness with regard to the septic claims.

Peurifoy has no specific evidence to support the allegation that Gilmer or Simply Southern buried debris or had knowledge of buried debris on the property. In response to Defendant's Second Interrogatories and Request for Production of Documents numbers 4-6, which sought the factual basis for Peurifoy's contention that Gilmer and Simply Southern had any knowledge of the alleged bury pit, Peurifoy responded "Plaintiff pleads the doctrine of res ipsa loquitur" (See Exhibit "I" which is a true and accurate copy of Defendant's Second Interrogatories and Request for Production of Documents and Exhibit "J" which is a true and accurate copy of Plaintiff's Responses to Defendant's Second Interrogatories.

Finally, it is significant to note that Peurifoy no longer owns the home and sold it in June for $465,000. (See Interrogatory Answer Number 23 in Exhibit H which is a true and accurate copy of Plaintiff's Responses to Defendant's First Interrogatories.)

LEGAL ARGUMENT AND CITATION OF AUTHORITIES

A . Standard Of Review

"To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." O.C.G.A. § 9-11-56(c). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient

to create a jury issue on at least one essential element of plaintiff's case . . . . A defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. O.C.G.A. § 9-11-56 (e)." Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991)

Applying the aforementioned standard required to prevail on a motion for summary judgment, Defendants Gilmer and Simply Southern respectfully submit that there are no genuine issues as to any material fact and they are therefore entitled to judgment as a matter of law.

B. Peurifoy Has Presented No Competent Expert Evidence That The Septic System Was Improperly Installed And This Claim Fails As a Matter of Law

Peurifoy seeks damages for the costs he incurred in replacing the septic system. In order to recover these damages under a theory of negligence, breach of contract or breach of implied warranty, Peurifoy must present evidence that the septic system was not properly installed.

The standard of proof on the contract claim for breach of the express duty to build the house in a fit and workmanlike manner is essentially the same as for proof of negligence. Hudgins v. Bacon, 171 Ga. App. 856, 861 (1984) The law imposes upon building contractors and others performing skilled services the obligation to exercise a reasonable degree of care, skill, and ability, which is generally taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by others of the same profession. Howell v. Ayers, 129 Ga. App. 899, 900 (1973)

In an action against a builder, "[i]t is essential to present competent evidence as to the acceptability of specific professional conduct." Hudgins v. Bacon, 171 Ga. App. 856, 860 (Ga. Ct. App. 1984) In Bilt Rite v. Gardner, 221 Ga. App. 817 (1996) the court held that expert testimony is required to establish the standard of care applicable to a builder and explained:

> In an action against a builder, it is essential to present competent evidence as to the acceptability of specific professional conduct (citation omitted), because our law requires building contractors to exercise that degree of care and skill ordinarily employed by other contractors under similar conditions and like circumstances; the standard of care must generally be established through expert testimony
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> Id. at 817-818.

Thus, in the matter at hand, Peurifoy must present expert evidence to establish the standard of care and skill that was required to install the septic system. Peurifoy must also present expert evidence that the septic system was not installed pursuant to that applicable standard of care. Peurifoy has not identified any such experts and therefore can not meet his burden of proof. Moreover, the evidence in the record establishes that the septic system was properly installed, as it was inspected and approved by an independent third party, the Fayette County Health Department. In light of the forgoing, Gilmer and Simply Southern are entitled to judgment as a matter of law dismissing all claims regarding the septic system.

C. Peurifoy's Tort Claims Are Barred By The Statute of Limitations

Peurifoy seeks damages under the tort theories of fraud (Count II), gross negligence (Count IV), simple negligence (Count V) and misrepresentation (Count VIII). These claims fail as they were raised after the expiration of the four year statute of limitations. O.C.G.A. §9-3-30 requires that all claims "for trespass upon or damage to realty shall be brought within four years after the right of action accrues." It is well settled that the starting date for damage to realty

claims is the date of substantial completion. Mitchell v. Contractors Specialty Supply, Inc., 247 Ga. at 628, 629 (2001). See also, Mercer University v. Nat. Gypsum Co., 258 Ga. 365, 366 (1988); Hall vs. Harris, 239 Ga. App. 112, 118 (1999). However, when a contractor owns the property at the time of substantial completion, the statute of limitations does not begin to run until the property actually is sold. See Colormatch Exteriors, Inc. v. Hickey, 275 Ga. 249, 252 (2002)

As the closing for the subject home took place on June 20, 2000, Peurifoy had until June 20, 2004 to raise his tort claims. Peurifoy did not file suit until August 9, 2005, more than a year after the statute of limitations expired. Accordingly, Peurifoy's tort claims fail as a matter of law.

Peurifoy can not rely upon the discovery rule to toll the statute of limitations, as Georgia law recognizes that "(n)either the discovery rule nor the continuing tort theory is applicable to actions involving only damage to real property." Mitchell v. Contractors Specialty Supply, Inc., 247 Ga. App. 628, 629 (2001). Nor can Peurifoy argue that the statute of limitations was tolled by any alleged fraud. In order to toll the statute of limitation, Peurifoy must prove that: (1) the Defendant(s) committed actual fraud involving moral turpitude, (2) the fraud concealed the cause of action from him, and (3) that he exercised reasonable diligence to discover his cause of action despite his failure to do so within the applicable statute of limitation. Wilson v. Phillips 230 Ga.App. 290 (1998) *citing* Jim Walter Corp. v. Ward, 245 Ga. 355, 357 (1980). The concealment of a cause of action must be by positive affirmative act, not by mere silence. Comerford v. Hurley, 154 Ga.App. 387, 388 (1980). To constitute concealment of a cause of action so as to prevent the running of limitations, some trick or artifice must be employed to prevent inquiry or elude investigation, or to mislead and hinder the party who has the cause of

action from obtaining information, and the acts relied on must be of an affirmative character and fraudulent. Clinton v. State Farm Mut. Auto. Ins. Co., 110 Ga.App. 417, 422 (1964). *See* Moore v. Meeks, 225 Ga.App. 287, 288 (1997).

When the alleged fraud is raised by a purchaser of defective realty, the buyer must prove that the seller's concealment of the defect was an act of fraud and deceit and must present evidence that the seller was aware of the problems and did not disclose them. Wilson v. Phillips, 230 Ga.App. 290, 291 (1998) Therefore for Peurifoy to toll the statute of limitation based upon a claim of fraud he would have to present evidence that Gilmer or Simply Southern knew that the septic system would fail and that there was organic debris buried on the property. Peurifoy has failed to present any evidence that there was any defect with the septic system let alone one of which the Defendants had actual knowledge. Furthermore, the record shows that there was no defect nor reason for the Defendants to suspect a defect with the septic system since it had been inspected and approved by the FCHD.

Similarly, Peurifoy has not presented any evidence that Gilmer or Simply Southern had actual knowledge of the alleged buried organic debris. In his discovery responses Peurifoy admits this fact by relying on the doctrine of res ipsa loquitur with regard to this issue. Moreover, Gilmer and Simply Southern specifically deny any knowledge and show that they paid to have all the organic debris removed from the property when the home was being constructed.

D. **Peurifoy's Fraud and Misrepresentation Claims Fail On Their Merits**

Under Georgia law to prove a fraud claim the plaintiff must prove: (1) a false representations made by defendant; (2) that defendant knew representations were false; (3) intention by defendant to induce Plaintiff to act or refrain from acting in reliance on

representations; (4) justifiable reliance by the party on representations; and (5) damage to the Plaintiff. Lester v. Bird, 200 Ga. App. 335, 338, 408 S.E.2d 147 (1991).

Georgia also recognizes the doctrine of passive concealment in the sale of realty and the elements are similar to fraud. In order prove a claim of passive concealment against the seller of defective realty, "the buyer must prove that the vendor's concealment of the defect was an act of fraud and deceit, including evidence that the defect could [not] have been discovered by the buyer by the exercise of due diligence ... [and that the] seller was ... aware of the problems and did not disclose them ...' [Cit.]" U-Haul Co. of Western Georgia v. Dillard Paper Co., 169 Ga.App. 280, 282,(1983)

Peurifoy's claims for fraud and passive concealment fail as there were no representations, let alone false representation by the Defendants. Furthermore, the undisputed record shows that the Defendants had no actual knowledge, nor any reason to believe, that there was any defect with the septic system or that there was any buried debris on the property.

1. Peurifoy could not rely upon any representation outside of the contract

Gilmer and Simply Southern specifically deny making any false or fraudulent statements to Peurifoy. However, since the Contract contained an entire agreement clause, Peurifoy could not legally rely upon any verbal statements and could only rely upon the representations in the contract to support a fraud claims.

Paragraph 9A of the Contract entitled "Binding Effect, Entire Agreement, Modification, Assignment:" states:

> This Agreement shall be for the benefit of, and binding upon, the parties hereto, … This Agreement constitutes the sole and entire agreement between the parties hereto and no modification or assignment of this Agreement shall be binding unless signed by the parties to this Agreement. No representation, promise or inducement not included in this Agreement shall be binding upon any party hereto."

In addition, the Contract also incorporated the "Seller's Property Disclosure Statement" ("Disclosure") as Exhibit "A". The disclosure was signed by Gary Peurifoy under paragraph 14, which stated:

> 14. RECEIPT AND ACKNOWLEDGMENT OF BUYER:
> I acknowledge receipt of this Seller's New Construction Property Disclosure Statement. I understand that except as stated herein in the New Construction Purchase and Sale Agreement with Seller, the Property is being sold without warranties or guarantees of any kind by Seller or any Broker. No representations concerning the condition of the Property are being relied upon by me except as disclosed herein or stated in the New Construction Purchase and Sale Agreement.

Thus, pursuant to the specific terms of the contract, Peurifoy acknowledged and agreed that there were no representation with regard to the property outside of the contract. Such agreements are valid and binding under Georgia law. It is well recognized that:

> when a home buyer elects to affirm a purchase agreement which contains a merger or entire agreement clause, he or she is precluded from recovering from the seller's alleged fraudulent inducement based upon misrepresentations made outside the contract. The entire agreement clause 'operates as a disclaimer, establishing that the written agreement completely and comprehensively represents all of the parties' agreement (citations omitted) The purchaser, is barred from claiming that he or she relied an alleged misrepresentation not contained in the agreement.
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> Herman Homes v. Smith, 249 Ga. App. 131, 132 – 133 (2001).

In this matter, Peurifoy has foregone a claim for rescission since he sold the home prior to filing suit. Thus, as Peurifoy has elected to affirm the contract and prosecute a claim for fraud he is precluded from relying on any representations outside of the specific terms of the contact.

There were no fraudulent representations in the contract. The Purchase and Sale Agreement consisted of Purchase and Sale Agreement and Exhibit "A" the Seller's Property Disclosure Statement and Exhibit "B" Association/Assessment Fee. There were no representations general or otherwise with regard to the quality of the property except as set forth

in the Seller's Disclosure Statement which was contained as Exhibit "A". Under section 5, entitled "Plumbing Related Items", subsection (c) simply stated that there was a septic tank and subsection (d) stated that Simply Southern and Gilmer were not aware of any past or present leaks, backups or other similar problems related to the plumbing, water and/or sewage-related items on the property after their completion. Peurifoy has failed to present any evidence that either of these representation are false. More importantly Peurifoy has failed to identify any specific contract provision which he claims is false.

2. Peurifoy failed to plead fraud with particularity

Peurifoy failed to plead fraud with the particularity required to satisfy the strict pleading requirements of O.C.G.A. § 9-11-9(b)which requires that "[i]n all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity." Allegations of fraud should at least designate the occasions on which affirmative misrepresentations were made, by whom and in what way they were acted upon." Hayes v. Hallmark Apt., Inc., 232 Ga. 307, 207 S.E.2d 197 (1974). General allegations of fraud do not meet this requirement. Cook v. Cook, 225 Ga. 779, 171 S.E.2d 568 (1969).

Peurifoy alleges that "Defendants specifically represented that the house was suitably constructed to handle and process the sanitary sewer needs of the home even though Defendants knew these representations to be false." (Complaint ¶42) Peurifoy also appears to allege that Defendants failed to disclose the existence of a bury pit and knowingly installed the septic system in unsuitable soil. (Complaint ¶ 44) These allegations, which are specifically denied, are not sufficient to support a fraud claim since these representation were not contained in any of the Contract documents. As such, Peurifoy's Complaint fails to set forth any false representations and must be dismissed as it does not meet the strict requirements of O.C.G.A. §9-11-9(b).

3. Fraud can not be predicated on the future performance of the septic system

Even assuming Peurifoy properly pled a claim for fraud, in order to prove his claim, he must first prove that a false representation was made by Defendants. It is well settled under Georgia law that statements of opinion, speculation, conjecture, or hope cannot serve as the basis for an action for fraud. "A false representation made by a defendant, to be actionable, must relate to an existing fact or a past event." Fuller v. Perry, 223 Ga. App. 129, 132, 476 S.E.2d 793 (1996). The court in Fuller held that "fraud cannot consist of mere broken promises, unfilled predictions, or erroneous conjecture as to future events," and that "representations concerning expectations and hopes are not actionable." Id. See also U-Haul Co. of Western Georgia v. Dillard Paper Co., 169 Ga.App. 280 (1983) (Broker's statements to purchaser that building was of "excellent construction and had been well maintained," that it was "one of the best warehouse buildings in the City of Atlanta," and that the building was sound were expressions of opinion and could not constitute basis for a claim of fraud against broker.)

Peurifoy's allegation that "Defendants specifically represented that the house was suitably constructed to handle and process the sanitary sewer needs of the home even though Defendants knew these representations to be false." (Complaint ¶42) falls within the category of a statement of opinion of future performance and is not sufficient to support a fraud claim.

4. There is no evidence that Gilmer or Simply Southern had any knowledge of the alleged defect with the septic system or the bury pit

Not only has Peurifoy failed to establish that Gilmer and Simply Southern made any representations which ultimately turned out to be incorrect, but he has not presented any evidence that Gilmer or Simply Southern had actual knowledge of the any alleged defects. In a fraudulent concealment action the allegedly defrauded party must prove that the alleged defrauder had *actual*, not merely constructive, knowledge of the fact concealed. Lively v.

Garnick, 160 Ga.App. 591, 593 (1981) Fraud, unlike negligence, breach of warranty or breach of contract, is premised upon the "actual moral guilt" of the defrauding party. Dundee Land Co. v. Simmons, 204 Ga. 248, 249 (1949). "Mere concealment of [a material fact], unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of the falsehood constitutes an essential element." Lively at 593

In Lively, the plaintiffs brought suit against the builder of their home and sought damages for various alleged construction defects. Plaintiffs brought claims under a theory of fraud and argued that since the defendant had built the home and it later developed defects the jury could infer that the builder had notice of the same. This argument was rejected by the Court of Appeals which held:

> …to hold that evidence merely that a builder constructed a house which subsequently develops defects presents a jury question as to his "moral guilt" for fraud without some evidence that he had actual knowledge of the defect at the time of sale would mean that the legal theories of res ipsa loquitur or strict liability are applicable to a suit for the tort of fraud and deceit. In our opinion a builder may negligently construct a house or be in breach of his contract or of warranty and yet be free of the moral guilt of fraud. Accordingly we hold that it is not a "reasonable or logical" inference from the mere fact that a builder-seller has constructed a house subsequently discovered to be "defective" that he *knowingly concealed* those defects and thereby deceived and defrauded the purchaser.
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> Id. at 594

The same holds true in this matter and the fraud and misrepresentation claims must be dismissed as Peurifoy has presented no evidence that Gilmer or Simply Southern had knowledge of any defects with the septic system or that there was debris buried on the lot.

Peurifoy, admits that he does not have any evidence that Simply Southern or Gilmer were aware of the buried debris since he relies solely on the doctrine of res ipsa loquitur, which the court in Lively held is not sufficient to support a claim for fraud. Furthermore, the evidence shows that the Defendants paid to have debris removed from the property during clearing and

deny using bury pits. As such there is nothing in the record to support such a claim other than mere speculation.

With regard to the septic system, it is important to begin with the fact that there is no evidence that the septic system was not properly installed or was otherwise defective at the time the home was sold. Therefore there is no basis to even suggest that Gilmer or Simply Southern could have had notice of a defect. Moreover, the record is undisputed that the septic system was installed solely by Simply Southern's subcontractor and was inspected and approved by the Fayette County Health Department. As such the record shows not only that there was no defect with the installation of the septic system but also that there was no reason to even suspect that there was a potential for future problems.

E. Peurifoy's Breach of Express Warranty Claim Fails As There Was No Written Demand For Repairs During the Warranty Term

Special Stipulation 4 of the Contract states "SELLER/BUILDER TO FURNISH TO PURCHASER AT TIME OF CLOSING STANDARD ONE YEAR WARRANTY FOR HOME". The home was sold with a one year warranty. explicit terms of the warranty required that Rainwater make all warranty claims in writing. Specifically it required that in the event of a claim for a workmanship or system defect, the homeowner "must first write a letter to your Builder listing the specific warranty Defect(s) and the date the Defect(s) occurred. (See Section III of The Home Buyer's Warranty Booklet attached as Exhibit "C") "Your Builder should then perform or pay for (at their option) these warranty repairs if a Defect occurs." Id.

Georgia law is clear, that when a warrantee brings a breach of express warranty claim, the terms of the written warranty control. Culberson v. Mercedes-Benz USA, LLC., 274 Ga. App. 89, 91 (2005) This means that where the terms of a warranty require notice, the notice must be given as prescribed. Dryvit Sys. v. Stein, 256 Ga. App. 327, 329 (2002) (Defendant

granted summary judgment on express warranty claim due to plaintiff's failure to provided timely written notice as required by terms of warranty.)

Simply Southern sold the Home with a one year warranty. By the terms of warranty Peurifoy was required to provide Simply Southern with written notice of any warranty claims. The sale of the home was closed on June 20, 2000, and the warranty therefore expired on June 22, 2001. As Peurifoy failed did not make any warranty claims, written or otherwise, for the septic system or the alleged code violations before June 22, 2001 the breach of express warranty claim fails as a matter of law.

F. Peurifoy's Claims Are Barred As The Warranty Was the Exclusive Remedy

The Limited Warranty was also deemed to be the Exclusive Warranty and Remedy and specifically stated:

> This Limited warranty is given by the Seller and accepted by the Purchaser in liue of all other warranties of any kind whatsoever, express or implied, including wiothout limitation, warranties of habitability , merchantability, fitness and workmanship relating to the Property, all of which other warranties are expressly excluded by the Seller. …. this Limited Warranty, is also given by the Seller and accpeted by the Buyer in lieu of all other rights and remedies that Buyer has or may have against the Seller relating to the construction on the Property or the condition or circumstances existing on or in the vicinity of the Property, including but not limited to any rights based upon negligent construction, code violations, breach of contract or breach of warranty (other than based upon the terms of the Limited warranty).

Peurifoy failed to bring a claim within the one year time frame provided by the limited warranty. Accordingly, since Peurifoy had contractually agreed that the warranty was the sole and exclusive remedy for the claims in the within matter, and he failed to bring them within the time prescribed by the terms of the warranty, the claims are now barred.

G. Peurifoy's Claims Are Barred As He Purchased the Home "As Is"

The Contract also gave Peurifoy the right to have the home inspected prior to closing and to demand repairs. (Contract ¶ 8.) Section 8 A was initialed by Peurifoy and was entitled "Property Sold With Right to Request Repairs". Pursuant to the terms of paragraph 8A:

> Buyer (Peurifoy) shall have the right to request that Seller repair defects in the Property by providing Seller within the 10 days from the Binding Agreement Date with a copy of inspection report(s) and a written amendment to this agreement setting forth the defects in the report which Buyer request be repaired and/or replaced.

The right to request repairs further provided "if Buyer does not timely present the written amendment in inspection report, Buyer shall be deemed to have accepted "as is" in accordance with Paragraph B below."

Paragraph B is entitled "Property Sold 'as is'". It states that

> All parties agree that the Property is being sold "as is," with all faults including lead based paint and lead based paint hazards. The Seller shall have no obligation to make repairs to the property (except as may be required to comply with the termite letter paragraph or as otherwise required herein).

Peurifoy never presented a written amendment requesting repairs and the home was sold "as is." As such, Peurifoy accepted the property with all faults and agreed that the Defendants did not have any obligation to make repairs. Therefore the within claims are barred.

H. <u>There is No Bad Faith to Support an Award of Attorneys Fees</u>

Peurifoy has no basis to recover attorney's fees or expenses of litigation in this matter. Pursuant to O.C.G.A § 13-6-11, to recover attorney's fees or expenses, Plaintiff must show that Defendants acted in "bad faith, . . . have been stubbornly litigious or have caused [Plaintiff] unnecessary trouble and expense." The "bad faith" contemplated by the statute concerns the transaction giving rise to the lawsuit. <u>Allen v. Brackett</u>, 165 Ga. App. 415 (1983); <u>Clark v. Aechenbacher</u>, 143 Ga. App. 282 (1977).

Plaintiff cannot meet his burden by showing that Defendants resisted the claims. <u>Beacon Ind. Inc. v. Vanderbunt Concrete Ltd.</u>, 172 Ga. App. 573 (1984); <u>Gordon v. Ogden</u>, 154 Ga. App. 641 (1980); <u>Milam v. Attaway</u>, 195 Ga. App. 496 (1990). The bad faith must arise out of

the transaction for which the claim arose rather than the defense of that claim. Wheat Enterprises v. Redi-Floors, 231 Ga. App. 853 (1998); Aliner & Marine Corp. v. Prance, 159 Ga. App. 456 (1981). If there is a bona fide controversy then there can be no claim for stubborn litigiousness as a matter of law. Trust Company Bank v. Henderson, 185 Ga. App. 367 (1987).

The facts of this matter clearly show that there was no bad faith on behalf of Gilmer or Simply Southern in the underlying transaction with is the construction and sale of the home. There is no evidence that Gilmer or Simply Southern breach any duty of care to Peurifoy let alone acted in bad faith. The records shows that the septic system was properly installed and that the Defendants did not bury any debris, organic or otherwise on the property.

Furthermore, the alleged code violations can not be deemed bad faith since they were visible upon inspection, as demonstrated by the alleged nature of the defects, i.e. improperly spaced guardrail pickets, and by the fact that Peurifoy's current inspector was able to discover them upon inspection. Peurifoy had the right under the contract to have this inspection performed before closing on the home and demanding repairs prior to closing but waived that right and purchased the home as is. Peurifoy can not wait almost six years and raise these issues after he has sold the home, and claim bad faith, especially since he did not raise them prior to the lawsuit.

Finally as set forth above, Gilmer and Simply Southern have meritorious defenses to the claims in this lawsuit and at a minimum a bona fide controversy exists to preclude a claim for attorney's fees.

I. Peurifoy's claim for Punitive Damages Fails As a Matter of Law

It is well established under Georgia law that an award for punitive damages may only be made in cases "in which it is proven *by clear and convincing evidence* that the defendant's action showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.2 [emphasis provided]. The expression "conscious indifference to consequences" relates to an intentional disregard of the rights of another and knowingly or willfully disregarding such rights. Associated Health Systems, Inc. v. Jones, 185 Ga. App. 798, 802 (1988).

Georgia law also requires that something more than the mere commission of a tort to support the imposition of punitive damages. Troutman v. B.C. B. Co., 209 Ga. App. 166, 168 (1993). In fact, "mere negligence, although gross, will not alone authorize the recovery of

punitive damages." Currie v. Haynie, 183 Ga. App. 506 (1987); Alliance Transport v. Mayer, 165 Ga. App. 344, 345 (1983); Mills v. Mangum, 107 Ga. App. 614, 617 (1963).

Further when a plaintiff does not prevail on his underlying tort claim, his claim for punitive damages must fail. Burns v. Dees, 252 Ga. App. 598 (2001); Viau v. Fred Dane, Inc., 203 Ga. App. 801, (1992).

In the matter at hand there is no evidence, let alone clear and convincing evidence, of willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. Accordingly there is no evidence to support an award of punitive damages, and Gilmer and Simply Southern are entitled to summary judgment dismissing the claims for punitive damages.

CONCLUSION

In light of the foregoing, Defendants William Gilmer and Simply Southern Traditional Homes, Inc. respectfully submit that there are no issues of material fact and that they be granted summary judgment dismissing all of Plaintiff's claims.

Respectfully submitted this10th day of May, 2006.

Respectfully, submitted,

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IN THE STATE COURT OF FAYETTE COUNTY
STATE OF GEORGIA

GARY PEURIFOY,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	FILE NO. 05SV-575
v.	)	
	)	
WILLIAM GILMER AND	)	
SIMPLY SOUTHERN HOMES, INC.,	)	
	)	
Defendants.	)	
	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing **DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** upon all counsel of record by hand delivering a copy of same to:

John W. Mrosek, Esq.
P.O. Box 1168
Fayetteville, GA 30214-7336

This 10th day of May, 2006.

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