IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DEVELOPERS DIVERSIFIED REALTY CORPORATION	)	**CASE NO. CV 09 710372**
	)	
	)	**JUDGE JOHN P. O'DONNELL**
Plaintiff,	)	
	)	
vs.	)	
	)	
COVENTRY REAL ESTATE FUND II, L.L.C., *et al.*	)	
	)	**JOURNAL ENTRY**
Defendants.	)	

John P. O'Donnell, J.:

The plaintiff filed this lawsuit on November 18, 2009, and has now filed a motion for summary judgment. The motion is fully briefed and this entry follows.

THE COMPLAINT

Plaintiff Developers Diversified Realty Corporation and defendant Service Holdings, LLC, are parties to a management and leasing agreement dated September 21, 2006. Defendant Coventry Real Estate Fund II, L.L.C., is a managing member of Service Holdings.

The properties that the plaintiff manages under its agreement with Service Holdings were acquired under a co-investment agreement among DDR, Coventry Real Estate Fund II, L.L.C., and Coventry Fund II Parallel Fund, L.L.C. These properties include the other nine defendants. The co-investment agreement called for an 80% contribution of equity by Coventry Real Estate Fund II and 20% by DDR. Each property acquired under the co-investment agreement became an asset of a separate limited liability company whose members included DDR and Coventry Real Estate Fund II. The plaintiff describes these limited liability companies in its complaint as "Property Owning LLCs." Coventry Real Estate Fund II is the managing member of each

Property Owning LLC, but each limited liability company has a separate management agreement with DDR. The separate management agreements are in essentially the same form as DDR's management and leasing agreement with Service Holdings. In particular, each management agreement has the same provisions relating to termination. Each contract allows for termination either "without cause" or "for cause."

If a management agreement is terminated without cause, DDR has certain rights. First, DDR is entitled to a termination fee equal to three months of management fees. Second, DDR can invoke a buy/sell provision that allows it to name a price at which Coventry Real Estate Fund II can either buy DDR's interest in the particular property or sell its own interest to DDR. Third, DDR may elect to have Coventry Real Estate Fund II pay it the current value of any carried interest distributions that DDR would have received if all of the properties had been sold at fair market value as of the termination date.

In the event of a "for cause" termination, DDR is entitled to all carried interest distributions earned but not distributed on the date of the termination and Coventry Real Estate Fund II must purchase DDR's interest in each Property Owning LLC for 95% of its fair market value as of termination.

An object of both of these termination provisions is to ensure that DDR will not have to continue as a co-investor in any property where it has been terminated as property manager, with or without cause.

On November 5, 2009, Coventry Real Estate Fund II sent the plaintiff a notice of termination of management and leasing agreement of Service Holdings LLC. By that correspondence, Coventry notified DDR that it "hereby terminates the services of DDR as property manager with regard to the Service Merchandise properties and all other properties for

which DDR serves as property manager, effective December 5, 2009." The termination was described as "for cause" based upon DDR's willful misconduct and fraud "as set forth in the accompanying complaint, which was filed on November 4, 2009, in the Supreme Court of the State of New York."

By its complaint here, DDR seeks a declaratory judgment that the purported "for cause" terminations are not valid.

THE MANAGEMENT AND LEASING AGREEMENT

The Management and Leasing Agreement is attached as Exhibit 1 to the complaint. The provisions pertinent to this case include the following:

> **MANAGEMENT AND LEASING AGREEMENT**
>
> THIS MANAGEMENT AND LEASING AGREEMENT . . ., made and entered into as of the 21st day of September, 2006, by and between SERVICE HOLDINGS LLC, . . . and DEVELOPERS DIVERSIFIED REALTY CORPORATION, . . .
>
> W I T N E S S E T H :
>
> WHEREAS, Owner is the indirect owner or lessor of the real properties described and depicted on Exhibit A attached hereto . . .
>
> WHEREAS, Property Manager is experienced in the management of income properties similar to the Properties; and
>
> WHEREAS, Owner wishes to engage Property Manager, exclusively, as the manager and leasing agent of the Properties . . .
>
> NOW, THEREFORE, . . ., the parties hereto agree as follows:
>
> ARTICLE ONE
> Engagement of Property Manager
>
> 1.1 Engagement. Owner hereby engages and authorizes Property Manager to take the sole, entire and exclusive charge of the management and leasing of the Properties, . . . Property Manager agrees to render capable and competent services and to exercise due care in accordance with standard practices

acceptable and common in the industry. This Agreement initially covers those Properties identified on Exhibit A hereto. . .

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ARTICLE TWO
Duties of Property Manager

Subject to. . .and in accordance with the Operating Budget. . .Property Manager shall have the sole and exclusive authority to take such actions, and perform such duties, as Property Manager deems necessary and desirable for the care, protection, operation, maintenance, repair, replacement, and leasing of the Properties. . .

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2.2 Preparation of Annual Budget. . . .Property Manager shall prepare and deliver to Owner a proposed operating budget for each Property. . .Owner and Property Manager shall jointly adjust, modify or amend the proposed operating budget. . .

***

ARTICLE FOUR
Term, Default and Termination

4.1 Term. . . . This Agreement shall not be cancelled, except as provided in this Article Four or by written agreement signed by Property Manager and Owner.

4.2 Termination of Property Manager without Cause. Owner may terminate this Agreement at any time without cause upon at least ninety (90) days' prior written notice to Property Manager, provided that . . . Owner pays to Property Manager no later than five (5) business days after the date of such termination, the Termination Fee. As used herein, the "Termination Fee" shall mean an amount equal to the monthly Management Fee (as defined in Section 5.1(a)) multiplied by three (3). . .

***

4.4 Termination for Cause.

(a) Subject to clause (f) of this Section 4.4 below, Owner may terminate this Agreement upon at least thirty (30) days' prior written notice to Property Manager for "cause" as defined in Section 4.4(b) below or in the event that a Property Manager Event of Default (as hereinafter defined) shall have occurred and shall be continuing at the time of the giving of such termination notice provided, in either event, that all other Property Management Agreements

(as defined in the Co-Investment Agreement) are concurrently terminated and the members of the Advisory Committee shall have unanimously approved such termination. . .

(b) "Cause" shall be defined as follows: (i) willful misconduct or fraud herewith by a senior vice-president of DDR or any other individual ranked above any senior vice-president of DDR (any such individual, a "DDR Executive Officer"; and any such default under this clause (i) being referred to as "Property Manager Fraud Event") or (ii) a final determination by a court of competent jurisdiction that a DDR Executive Officer has committed gross negligence in connection with the performance of the Property Manager's duties hereunder.

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(f) In the event (i) Owner terminates this Agreement by reason of the occurrence of a Property Manager Fraud Event and (ii) Property Manager disagrees that such Property Manager Fraud Event has occurred, Property Manager may elect, at its option, by written notice to Owner no later than thirty (30) days after the date of termination, to resolve such disagreement by expedited arbitration . . . If Property Manager does not elect to submit such disagreement to arbitration in accordance with the foregoing, Property Manager shall retain all rights and remedies available to it at law or in equity to claim such termination was inappropriate.

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7.9 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio. . .

***

7.11 Entire Agreement. This Agreement constitutes and expresses the entire agreement of the parties hereto and no agreements, warranties, representations or covenants not herein expressed shall be binding upon the parties.

***

7.15 Consent to Jurisdiction. All of the parties hereto (a) submit to personal jurisdiction in the State of Ohio, the courts thereof . . . for the enforcement of this Agreement, . . .

THE EVIDENCE

Coventry claims DDR committed fraud or willful misconduct in four ways: 1) entering into a contract with Oxford Building Services that increased property management costs by 3%; 2) misrepresenting to Coventry that DDR was covering the cost of the contract with Oxford; 3) badly managing the properties intentionally so that Fund II would never succeed; and 4) slowly bleeding Coventry to death.

Peter Henkel is the president and chief executive officer of Service Holdings, LLC. He testified in a deposition that his understanding of the "for cause" termination provision in the contract is that it requires a showing that "senior vice president or above at DDR willingly abrogated their responsibilities" under the management and leasing agreement. He believes that Scott Wolstein and Dan Hurwitz – both of whom rank as senior vice presidents or above in DDR's management – committed fraud. He expanded during his testimony as follows:

> . . . I did not participate in any meetings or conversation or discussions directly where anybody talked about committing fraud or willful misconduct against Coventry. And so I'm basing my conclusions on an extensive working relationship with not only the company, but the senior management team. And really, in my view, the facts speak for themselves, which is that all you have to do is look at the performance of the properties we acquired in Fund II relative to the success and in stark contrast to the success we had in Fund I and have to conclude that this was a plan that was carried out under the direction of the senior management team of DDR. In my opinion, it can't have happened any other way.
>
> ***
>
> I don't think that any decision of any consequence is made at DDR, I know that no decision of any consequence at DDR is made without the direction of then Scott Wolstein, now Dan Hurwitz. I've participated in innumerable meetings with DDR management teams, from board meetings to investment committee meetings to property level reviews, and I've seen up close and very personally the way the company operates. And there is no doubt in my mind, as I said, that any decision of any consequence or significance is made only by Scott Wolstein and/or Dan Hurwitz. So it is my strong belief that the only way that a decision to commit fraud or willful misconduct as it relates to Coventry Fund II could have been made by anyone other than those two.[1]

[1] Henkel depo., p. 30-31, 33.

The defendants have also produced the affidavit of Loren F. Henry, the vice president of Coventry Real Estate Fund II, L.L.C.'s investment manager. That affidavit outlines the details of DDR's allegedly fraudulent conduct.

First, Henry complains that DDR retained Oxford Building Services to assist in managing the properties. Oxford's responsibilities include soliciting and contracting with various service vendors and sub-contractors needed to maintain the properties. These are functions that Coventry considers to be covered under DDR's responsibility pursuant to the contract. Therefore, by retaining Oxford – a fact that DDR kept from Coventry – Henry says the cost to Coventry of management at each property was raised by 3% of total maintenance expenses. Not only that, but Henry contends that 75% of Oxford's fees were returned as "kickbacks" to DDR. Second, Henry asserts that DDR has defrauded Coventry and the properties' tenants by overcharging for its self-insurance and by intentionally under-leasing the properties. As Henry's affidavit notes:

> I have always suspected DDR deliberately failed on the leasing because Dan Hurwitz wanted to make sure the Coventry platform failed. The way to make sure that happened was to slowly bleed us to death. Dan Hurwitz and Scott Wolstein allowed every project to exceed the cost budget to made [sic] sure our cost basis was as high as possible. They deliberately short changed [sic] the leasing in order to never allow the assets to reach stabilization. The combination of high costs and low [net operating income] crushed our ability to sell any of the assets and thereby allowed their ill-gotten fee stream to continue.[2]

LAW AND ANALYSIS

Before addressing the merits of the summary judgment motion, the current circumstances of the parties' relationship – DDR is still working under the management agreement – require a consideration of whether the complaint presents a justiciable issue for the court to decide.

[2] Henry affidavit, ¶23.

The complaint seeks a declaratory judgment. Section 2721.03 of the Ohio Revised Code allows a party to a contract to have determined in a declaratory judgment action any question of validity arising under the contract, and §2721.04 provides that the action may be filed "before or after there has been a breach of the contract." Despite that, a declaratory judgment action can be maintained only where a real, justiciable controversy exists between adverse parties.[3] The Supreme Court of Ohio, quoting the United States Supreme Court, has said:

> In order to grant declaratory relief, the court must be convinced of the existence of a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[4]

There is a real controversy here: the defendant claims the plaintiff's senior management has engaged in willful misconduct or fraud, thereby triggering a "for cause" termination of the contract, and the plaintiff denies that claim. The only reason the plaintiff is still acting as the property manager, which creates the appearance that there is no controversy, is that the *status quo* was preserved by this court's agreed preliminary injunction. By stipulation, the parties have agreed to maintain the *status quo* only until a trial on the merits, after which the injunction expires. So the controversy still exists and the facts present a justiciable dispute, and the court must decide the merits of the motion for summary judgment.

The relief DDR wants is a declaratory judgment that the "defendants' purported termination 'for cause' is invalid and that DDR has the right to continue to serve as property manager."[5] The plaintiff is entitled to that declaration on a motion for summary judgment only if all of the evidence, construed most strongly in Coventry's favor, shows that there is no genuine

[3] *Huron Cty. Bd. of Commrs. v. Saunders*, 2002-Ohio-3974, 149 Ohio App.3d 67, ¶21.
[4] *Thomas v. Cleveland*, 140 Ohio App.3d 136, 142.
[5] Complaint, p. 25.

issue of material fact about whether DDR's senior management committed willful misconduct or fraud.

Before examining the record for evidence of "willful misconduct" or "fraud," the meaning of these terms must be established. DDR asserts that the parties intended to use the legal meaning of these terms and Coventry agrees.[6] Proof of fraud, therefore, requires evidence of: a representation about, or failure to disclose, a material fact by DDR; that was made falsely with the intention of misleading Coventry into relying on it; actual reliance by Coventry; and damages.[7] To prove "willful misconduct" it is necessary to show an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing some wrongful acts with knowledge or appreciation of the likelihood of resulting injury.[8] But in proving fraud or willful misconduct, proof of a breach of contract will not suffice because it is not a tort to breach a contract, no matter how willful or malicious the breach.[9]

Coventry believes that the evidence of fraud and willful misconduct sufficient to defeat DDR's motion for summary judgment can be found in DDR's contractual arrangement with Oxford Building Services. Coventry argues:

> DDR's relationship with Oxford Business Services and its scheme to recover kickbacks for services that it pawned off upon a third party without the Coventry defendants' knowledge or approval is more than sufficient to create a genuine issue of fact for trial. One need only read the confidentiality provision in the Oxford agreement to realize that secrecy was paramount. (Oxford Business Services agreement at paragraph 8.) It is difficult to imagine a more comprehensive provision that clearly demonstrates that DDR did not want

[6] Motion for summary judgment, p. 5, and Coventry's counsel's stipulation at the May 5, 2011, oral hearing.
[7] See, *e.g.*, *Williams v. Clarke*, 2010-Ohio-3318, Cuyahoga County App. No. 93973, ¶11.
[8] *Brenner v. Cuyahoga Cty. Dept. of Children & Family Svcs.*, 2009-Ohio-1523, Cuyahoga County App. No. 91712, ¶24.
[9] *Lightbody v. Rust*, 2003-Ohio-3937, Cuyahoga County App. No. 80927, ¶29.

> Coventry to have any knowledge whatsoever about its agreement with Oxford, lest it discover its true purpose.[10]

This argument relies on the following conduct by DDR as evidence of fraud and willful misconduct: 1) concealing the contract with Oxford Building Services from Coventry; and 2) undertaking a "scheme to recover kickbacks."

As to the first, preventing Coventry from knowing of the contract with Oxford is not even a breach of contract, much less willful misconduct or fraud. The management agreement, at Section 2.8, allows DDR to enter into contracts for services DDR deems desirable, subject only to "the operating budget" and to DDR respecting "its fiduciary duty to owner." But the agreement does not require that all contracts be disclosed.

As for a "scheme to recover kickbacks," the evidence of DDR's contract with Oxford is that Oxford provides "facility maintenance services that optimize the facility maintenance process for companies with multi-unit facility management needs through the use of software, vendor management tools, statistical modeling and analysis, paperless invoicing and a transaction/call center."[11] In plain terms, Oxford finds, hires and pays the outside contractors needed to maintain the properties. Oxford is compensated through a 3% surcharge on every vendor contract. Based on a proposed budget outlined in a June 24, 2010 e-mail by Aileen Smith of DDR and attached as Exhibit 19 to Coventry's brief in opposition to the motion for summary judgment, the amount Oxford would receive based on a property management budget of $85,580,945 is $2,567,428. From that amount, Oxford keeps a fixed fee of $647,500 for technology and management costs.[12] Of the remaining $1,919,928, "kickbacks" – or rebates, as

[10] Brief in opposition, p. 15.
[11] Defendants' Exhibit 30 to their brief in opposition, the Oxford/DDR contract, p. 1.
[12] Apparently owed under a licensing agreement to Control Building Services, Inc. Control seems to be a company operated and owned by the same principals as Oxford.

DDR calls them – in the amount of $1,439,946, representing 75% of the 3% vendor surcharge after the fixed technology cost is deducted, are paid by Oxford to DDR.

Henry refers to the payments back to DDR as "ill-gotten billings" that DDR is "stealing from Coventry and its tenants."[13]

DDR counters that "any complaint about the propriety of DDR's engagement of Oxford pertains to rights and obligations in the Management and Leasing agreements" – in particular, section 2.8 of the management agreement that requires DDR to "respect its fiduciary duty" to Coventry when executing contracts – so that any wrongdoing by DDR is at most a breach of contract but cannot be fraud.[14] As legal support for that proposition DDR cites *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App. 3d 137.

In *Textron*, the plaintiff leased computer equipment to Nationwide. The lease prohibited alterations to the computer without the lessor's consent. Nationwide upgraded the computer without Textron's consent or knowledge. Textron eventually sued, claiming breach of contract and fraud. The fraud claim was based, among other things, on Nationwide's failure to disclose

[13] Henry affidavit, ¶18 and 19. Henry's conclusion that the Oxford contract amounts to theft from Coventry is based on his inference that there is no value at all to Oxford's services. Because this is an inference that can be proved with reference to specific evidence – namely, historical budgets and expenses incurred – the court declines to accept it, standing alone, as a reasonable inference sufficient to create a genuine issue of material fact. There is no record evidence to support an inference that DDR's contract with Oxford amounts to stealing from Coventry. First, DDR has entered into the contract with Oxford for all of its properties, not just those that are co-owned with Coventry. That fact does not allow a reasonable inference that the Oxford vendor management program amounts to stealing from the property owner since it would never be reasonable to infer that DDR would steal from itself on properties it owns. Second, there is no evidence that Coventry did not approve budgets for 2008 and 2009, the first two years of the Oxford program. Since the disputed 3% surcharge was ultimately included in those budgets, Coventry's approval suggests either that even with the 3% surcharge the budgets were reasonable and acceptable to Coventry, or that the program achieved the cost savings it was designed for. Finally, Coventry has produced no evidence that the 3% charge actually increased its property management expense by that amount or that it didn't generate value to the properties that was worth the expense. Indeed, the stated goals of the Oxford program are "to recognize the value of the critical mass and purchasing power" of DDR's portfolio to allow "cost savings" – *i.e.*, to get better deals from contractors – and to "enable our property managers to spend more of their valuable time" servicing tenants. (See defendants' Exhibit 9 to brief in opp., 01/14/2008 e-mail from DDR's John Kokinchak.) As to overcharging tenants, that would not be fraud vis-à-vis Coventry.

[14] Plaintiff's reply brief in support of motion for summary judgment, p. 7. As if in concurrence, at page 15 of its brief in opposition Coventry describes DDR's contract with Oxford as a "clear breach of its fiduciary duty."

the unauthorized upgrade. In deciding as a matter of law that Textron could not recover on a fraud claim the court explained:

> Nationwide's failure to obtain Textron's consent to the 4128 upgrade, as fraudulent conduct, cannot be separated from the conduct as breach of the master lease. In Ohio, a breach of contract does not create a tort claim. *Wolfe v. Continental Cas. Co.* (C.A.6, 1981), 647 F.2d 705, 710. Generally, "the existence of a contract action * * * excludes the opportunity to present the same case as a tort claim." *Id.* A tort claim based upon the same actions as those upon which a claim of contract breach is based will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed. *Battista v. Lebanon Trotting Assn.* (C.A.6, 1976), 538 F.2d 111, 117.
>
> Nationwide's duty to obtain consent for the 4128 upgrade was purely contractual. The additional allegation of an *intentional* failure to obtain Textron's consent to the upgrade by claiming concealment does not change the contractual nature of Textron's claim. See, *e.g., id.* The motive of a breaching party is irrelevant to a contract action. *Wolfe*, 647 F.2d at 710. In claiming fraud, Textron has essentially put Nationwide's motives in failing to obtain consent to the 4128 upgrade at issue. To hold Nationwide liable for fraud based upon actions constituting a breach of contract would be to "abandon the venerable rule that the motive of a breaching party to a contract is irrelevant to the merit of the promisee's claim, and would allow parties to convert contract actions into actions in tort by attacking the motive of the breaching party * * *." *Battista*, 538 F.2d at 118.[15]

Just as Nationwide owed Textron a contractual duty not to alter the leased equipment so that Nationwide's making, and concealing, alterations could only be a breach of contract but not fraud, DDR owed Coventry a contractual duty to enter into contracts consistent with its contractual fiduciary duty to Coventry and a violation of that duty is only a breach of contract, not an intentional tort.

The fraud claim here is worth comparing to the claims in another case involving DDR, *Best Buy Stores, LP v. Developers Diversified Realty*, No. 05-2310 (DSD/JJG), 2007 WL 4191717, (D. Minn., Nov. 21, 2007). In that case, Best Buy had leases with 16 different landlord defendants. Best Buy did not have a contractual relationship with DDR, but DDR was named as a defendant because it owned or controlled the landlord-defendant limited liability companies

[15] *Textron, supra*, at 151.

and managed the properties. The leases all required Best Buy to pay additional rent to cover common area maintenance charges and insurance. Best Buy's fraud claims alleged that DDR and the landlords knowingly submitted false billing statements that misrepresented that they had procured insurance and incurred certain expenses. Or, to use Henry's terms, Best Buy claimed that DDR stole its money.

The court denied DDR's motion to dismiss the fraud claim because it existed independently given that there was no contractual relationship between DDR and Best Buy. However, the court, citing to *Textron*, granted the motion to dismiss of an Ohio landlord-defendant, DDR MDT Great Northern, LLC. The court concluded that the plaintiff did not allege breach of a duty that existed apart from the contract. Additionally, the damages for the breach of contract and the claimed fraud – overpayment of insurance costs – were identical, so Best Buy also failed to allege damages attributable only to the fraud.

Like Best Buy, which didn't allege the breach of a duty that arose outside of the contract, Coventry has not produced evidence of misconduct that, if true, would support a breach of duty other than that owed by DDR pursuant to contract. As a matter of law, then, and despite how underhanded Coventry claims DDR was, the available evidence on DDR's contract with Oxford Building Services cannot support a claim for fraud or willful misconduct as those terms are used in the contract. The same reasoning applies to Henry's allegations about: "similar scheme(s)" with CentiMark Roofing and Bass Fire Monitoring;[16] overcharging for insurance;[17] and failure to execute leases at the properties.[18]

Of course, Coventry might understandably ask whether anything DDR does could ever support a claim of fraud or willful misconduct since their relationship is entirely contractual.

[16] Henry affidavit, ¶18.
[17] *Id*., ¶19.
[18] *Id*., ¶22.

The answer is yes, but only if it involved fraud in the formation of the contract. A plaintiff can maintain a tort claim for fraud in the inducement because that theory raises a separate and independent legal duty that is considered outside of the contract.[19] Fraud by DDR to induce Coventry to enter into a contractual relationship would occur, by definition, before the contract and implicate a duty apart from contract. Similarly, promissory fraud is making a promise with no present intention of performing it.[20] And Coventry does assert claims of this sort, but without any evidentiary support.

For example, as noted in the excerpt of his testimony cited above, Henkel looks at the success of the first Coventry venture compared to the poor performance of the current venture and can only "conclude that this was a plan that was carried out under the direction of the senior management team of DDR." But there is no evidence to support that conclusion sufficient to create a genuine issue of material fact about whether DDR committed fraud or willful misconduct. So too with Henry's claim that it was always DDR's intention to "slowly bleed us to death." He admits that it is only his suspicion that DDR "wanted to make sure the Coventry platform failed," and cites as evidence for that suspicion only conduct that, at worst, constitutes a breach of contract but does not rise to the level of fraud in the inducement or promissory fraud.

Finally, Coventry relies on a February 12, 2009, e-mail from DDR's director of funds management Will Boukalik as evidence of fraud. In that e-mail, Boukalik replies "yes" to an earlier e-mail from Loren Henry asking for an assurance that the cost of the Oxford program "is borne solely by DDR." While this is the kind of representation that, if false, could support a claim outside the contract for promissory fraud, the available evidence, even construed most strongly in favor of Coventry, is insufficient to prevent summary judgment. As discussed in

[19] *King v. The Hertz Corp.*, 1:09 CV 2674, 2011 Westlaw 1297266, (N.D. Ohio 2011), at 3.
[20] *Deitrick v. American Mtge. Solutions, Inc.*, 2007-Ohio-839, 10th Dist. App. No. 05AP-154, ¶16.

footnote 13 above, there is no evidence that the Oxford contract resulted in an overcharge to Coventry equal to 3% of the budget; it is just as possible that the program saved more than 3% by driving down the costs associated with bidding maintenance projects and by decreasing vendor charges through more competitive bidding. Not only that, but there is no evidence that Coventry relied at all on Boukalik's representation, much less relied to its detriment. Henry's affidavit is clear that he has not approved a budget since Boukalik's e-mail.

CONCLUSION

There is insufficient evidence of record in this case to create a genuine issue of material fact about whether Coventry had cause, as defined in the contract, to terminate DDR as property manager. Therefore, the plaintiff's motion for summary judgment is granted and the court finds, as a matter of law and fact, that Coventry did not have the contractual right to terminate DDR for cause effective December 5, 2009. Having found that there is no evidence of willful misconduct or fraud by a senior vice-president, or any other person ranked above any senior vice-president, of DDR, the court, pursuant to O.R.C. 2721.03, declares that Coventry's November 5, 2009, for cause termination is invalid.

IT IS SO ORDERED:

_____ Date: _____
JUDGE JOHN P. O'DONNELL

SERVICE

A copy of this journal entry was sent by regular U.S. mail, this _____ day of July, 2011, to the following:

Robert S. Walker, Esq.
rswalker@jonesday.com
Attorney for Plaintiff

Stephen M. Bales, Esq.
sbales@zieglermetzger.com
Attorney for Defendants

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JUDGE JOHN P. O'DONNELL