In the United States Court of Federal Claims

No. 09-63 C
(Filed November 9, 2010)

UNPUBLISHED

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U.S. HOME CORPORATION,	*	
BEECHWOOD AT EDISON, LLC,	*	
BEECHWOOD SHOPPING	*	
CENTER, LLC,	*	Contracts; Implied-in-Fact
	*	Contract Claim; Alleged
Plaintiffs,	*	Warranty of the Environmental
	*	Condition of Property Sold by
v.	*	the United States.
	*	
THE UNITED STATES,	*	
	*	
Defendant.	*	
* * * * * * * * * * * * * * * * * *	*	

Lee Henig-Elona, West Orange, NJ, for plaintiffs.

Kenneth D. Woodrow, United States Department of Justice, with whom were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Alan J. Lo Re*, Assistant Director, Washington, DC, for defendant.

OPINION

Bush, *Judge*.

This suit concerns hazardous waste contamination of land sold by the United States to plaintiffs. In an earlier opinion, the court dismissed Counts II and III of the complaint for lack of subject matter jurisdiction. *U.S. Home Corp. v. United States*, 92 Fed. Cl. 401, 412 (2010) (*U.S. Home*). Nonetheless, plaintiffs' claims related to an alleged breach of deed covenants and an alleged breach of an implied-

in-fact contract, which together comprise Count I of the complaint, survived defendant's jurisdictional challenge. *Id.* at 408, 411-12.

Now before the court is defendant's motion for partial summary judgment which seeks dismissal of a portion of Count I of the complaint. Defendant's motion argues that plaintiffs' claim for breach of an implied-in-fact contract regarding the environmental condition of the property sold by the United States fails as a matter of law. Oral argument was neither requested by the parties nor deemed necessary by the court. For the reasons set forth below, defendant's partial summary judgment motion, brought pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC), is granted.

BACKGROUND FACTS[1]

Plaintiffs U.S. Home Corporation, Beechwood at Edison, LLC and Beechwood Shopping Center, LLC (collectively, the Developers) are the current owners of approximately 29 acres of real estate (the Property), which was at one time part of the former Raritan Arsenal, a 3200-acre United States Army facility in New Jersey.[2] Def.'s Facts ¶ 1. The United States General Services Administration (GSA) sold one of the two constituent parcels of the Property, approximately 23 acres (the 1989 Parcel), to TWC Realty Company (TWC) at a public auction in 1989. *Id.* ¶ 2. TWC then sold the 1989 Parcel to Beechwood at Edison, LLC in

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[1]/ Plaintiffs' proposed findings of uncontroverted fact (Pls.' Facts) were not set forth in plaintiffs' response to defendant's proposed findings of fact, but are found in forty paragraphs of an affidavit filed by plaintiffs on December 14, 2009, allegations that in turn reference exhibits attached to that affidavit. *See* Pls.' Resp. to Def.'s Facts at 5. Plaintiffs' proposed findings do not appear to fully conform to RCFC 56(c)(3)(D), which requires such proposed findings to be "contained" in a party's response to the summary judgment movant's proposed findings of uncontroverted fact. Defendant, despite the indirect presentation of plaintiffs' proposed findings of uncontroverted fact, was on notice of plaintiffs' proposed findings. *See* Def.'s Mot. at 7, 9-10 (citing to plaintiffs' affidavit or affidavit exhibits); Def.'s Reply at 5 (citing to plaintiffs' affidavit exhibits), Pls.' Opp. at 1 (stating that the affidavit was "incorporated" into plaintiffs' response to defendant's proposed findings of uncontroverted fact). The parties' proposed findings of fact appear to be undisputed.

[2]/ Although Beechwood at Edison, LLC is no longer an owner of the Property, having conveyed the two parcels making up the Property to U.S. Home Corporation and Beechwood Shopping Center, LLC, Beechwood Shopping Center, LLC is an affiliate of Beechwood at Edison, LLC. Compl. ¶ 2.

2002. *Id.* ¶ 3. GSA sold the second constituent parcel of the Property, approximately 5 acres (the 2003 Parcel), to Beechwood at Edison, LLC in 2003. *Id.* ¶ 4. Beechwood at Edison, LLC consolidated and subdivided the Property, conveying part to U.S. Home Corporation in 2005 and 2008, and part to Beechwood Shopping Center, LLC at a later date. *Id.* ¶ 5. Both residential and commercial development of the Property have commenced. *Id.* ¶ 10.

As the Raritan Arsenal began to phase out its military functions, an evaluation in the early 1960s discovered contamination of some of the land at the Arsenal, but this contamination was not thought to be present on the land eventually acquired by plaintiffs. Pls.' Facts ¶¶ 4-5. Concerns about the Arsenal's land contamination issues apparently arose from time to time in the late 1970s and throughout the 1980s. *See id.* ¶¶ 6-15. Both before and after TWC's purchase of the 1989 Parcel, the government represented that no contamination of that parcel was known to the government. *See id.* Ex. 13.

Some efforts to remove buried ordnance from current or former Arsenal land occurred before and during 1991. Pls.' Facts Exs. 16-17. Studies in the early 1990s also noted hazardous waste contamination at the Arsenal. *Id.* Exs. 19-20. A General Accounting Office (GAO, now Government Accountability Office) report published in 1992 described the government's plans for removing ordnance and cleaning up hazardous waste at the former Arsenal. *Id.* Ex. 21. In the mid-1990s, a study issued by the United States Army Corps of Engineers (Corps) discussed potential clean-up activities at the former Arsenal. *Id.* Ex. 24.

Correspondence in 1996 between TWC's engineering firm and the Corps discussed the government's plans to investigate possible contamination of the Property. Pls.' Facts Exs. 25-26. The New Jersey Department of Environmental Protection (NJDEP) was involved in the former Arsenal clean-up plans in 1997. *Id.* Ex. 28. As GSA prepared to sell the 5.44-acre parcel to the Developers in 2001, the Corps prepared a Hazardous Substance Activity Certification regarding this parcel of the Property. *Id.* Exs. 29-30. The certification stated that there was "no evidence to indicate that hazardous substance activity took place on the [5.44-acre parcel] during or prior to federal ownership." *Id.* Ex. 31. The 2003 deed conveying the parcel to the Developers contained covenants regarding the environmental condition of the 2003 Parcel and the government's clean-up responsibilities, as required by the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (2006). Pls.' Facts Ex. 32.

Two 2004 letters from the Corps assured the Developers that the Property was not known to have had a history of hazardous substance activity, and that the risk of buried ordnance was low. Pls.' Facts Exs. 33-34. Nonetheless, the Property had some hazardous substance contamination that required remediation. *Id.* Ex. 35. In 2008, two of the plaintiffs in this suit, U.S. Home Corporation and Beechwood at Edison, LLC, filed a complaint against the United States in the United States District Court for the District of New Jersey. *U.S. Home Corp. v. United States*, No. 2:08-cv-04144-WJM-MF (D.N.J. filed Aug. 15, 2008). In particular, the plaintiffs relied on CERCLA § 107(a)(2)-(3), 42 U.S.C. § 9607(a)(2)-(3), to seek reimbursement from the United States for the monies they had expended to respond to the contamination of the Property. The plaintiffs, relying on CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), also sought a declaratory judgment as to the liability of the United States for past and future response costs incurred by the owners of the Property. That suit settled and was dismissed on July 20, 2010. A portion of that suit was earlier dismissed without prejudice and was re-filed as a complaint in this court on February 3, 2009. *U.S. Home*, 92 Fed. Cl. at 404-05.

DISCUSSION

I. Standard of Review for a Motion for Summary Judgment

"[S]ummary judgment is a salutary method of disposition designed to secure the just, speedy and inexpensive determination of every action." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (internal quotations and citations omitted). The moving party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." RCFC 56(c)(1). A genuine issue of material fact is one that could change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A summary judgment "motion may, and should, be granted so long as whatever is before the . . . court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (quoting former version of Fed. R. Civ. P. 56(c)). However, the non-moving party has the burden of producing sufficient evidence so that a reasonable finder of fact could rule in its favor. *Anderson*, 477 U.S. at 256-57. Such evidence need not be admissible at trial; nevertheless, mere denials, conclusory statements or evidence that is merely colorable or not significantly probative is not sufficient to preclude summary judgment. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 249-50; *see also Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984) (noting that a party's bare assertion that a fact is in dispute is not sufficient to create a genuine issue of material fact). "The party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant." *Barmag*, 731 F.2d at 836. Any evidence presented by the non-movant is to be believed and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

II. Elements of an Implied-in-Fact Contract

A. Generally

The elements of proof required to establish the existence of an implied-in-fact contract have been described by the United States Court of Appeals for the Federal Circuit:

> Plaintiff has the burden to prove the existence of an implied-in-fact contract. *Pac. Gas & Elec. v. United States*, 3 Cl. Ct. 329, 339 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984) (table). An implied-in-fact contract with the government requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) "actual authority" on the part of the government's representative to bind the government in contract. *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). Thus, the requirements for

> an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. An implied-in-fact contract is one founded upon a meeting of minds and "is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Balt. & Ohio R.R. v. United States*, 261 U.S. 592, 597, 58 Ct. Cl. 709, 43 S. Ct. 425, 67 L. Ed. 816 (1923).

Hanlin v. United States, 316 F.3d 1325, 1328 (Fed. Cir. 2003). The existence of an express contract governing the same subject matter, however, will negate the existence of an implied-in-fact contract: "[i]t is well settled that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract. *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (*en banc*) (citing *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990)). A court need not inquire into all of the elements necessary for the formation of an implied-in-fact contract if an express contract governs the subject matter of the alleged implied-in-fact contract. *See, e.g., Bank of Guam v. United States*, 578 F.3d 1318, 1329 (Fed. Cir. 2009) (upholding the dismissal of an implied-in-fact contract claim because an express contract governed the same subject matter, and citing cases reaching a similar result).

B. Implied Warranty

"'[T]o recover for a breach of warranty, a plaintiff must allege and prove (1) that a valid warranty existed, (2) the warranty was breached, and (3) plaintiff's damages were caused by the breach.'" *Agredano v. United States*, 595 F.3d 1278, 1280-81 (Fed. Cir. 2010) (quoting *Hercules Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994)). As regards the first prong of this analysis, a valid implied warranty requires a meeting of the minds that can be inferred from the parties' conduct. *Id.* at 1281 (citations omitted). Precedent indicates that implied warranties have only been found "where 'the circumstances strongly supported a factual inference that a warranty was implied.'" *Id.* (quoting *Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 715 (Fed. Cir. 1988)). Express disclaimers of warranty indicate that a party did not intend to offer an implied warranty of the item sold. *See id.* ("[E]xpress disclaimers [the government] made at the auction . . . show that [the government] did not intend to make any warranty with regard to the [auction item].

. . . The meeting of the minds required to form an implied-in-fact warranty therefore could not have occurred.").

III. Plaintiffs' Claim for Breach of an Implied-in-Fact Contract Regarding the Environmental Condition of the Property

Plaintiffs' implied-in-fact contract claim has evolved over the course of this litigation. The court reproduces here the relevant paragraphs from Count I of the complaint:

> Defendant's representations, assurances and covenants with regard to its investigation and remediation of the Arsenal, including GSA's letters directly to Beechwood and its predecessor, were false. . . . [Plaintiffs] reasonably relied on the government's numerous and express promises, to their detriment.

Compl. ¶¶ 92-93. Nowhere in the complaint does the term "implied-in-fact contract" appear.[3]

In resisting defendant's motion to dismiss, plaintiffs first introduced the notion that the government had entered into and breached an implied-in-fact contract with plaintiffs. *See* Pls.' Opp. to Dismissal at 19-22. Defendant did not challenge this court's jurisdiction over plaintiffs' implied-in-fact contract claim. The court ruled that plaintiffs had made a non-frivolous allegation of the formation of an implied-in-fact contract between the Developers and the United States. *U.S. Home*, 92 Fed. Cl. at 411.

The nature of plaintiffs' implied-in-fact contract claim, indecipherable in the complaint, may be discerned from plaintiffs' brief opposing defendant's motion for summary judgment. Plaintiffs refer to the government's multiple promises to the

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[3]/ It is possible that plaintiffs had in mind the tort of misrepresentation when crafting their complaint. This type of tort claim, when brought against the United States as a seller of real estate, is not within this court's jurisdiction. *See, e.g.*, *Reforestacion de Sarapiqui v. United States*, 26 Cl. Ct. 177, 190-92 (1992) (dismissing for lack of jurisdiction an implied-in-fact contract claim based on a real estate sale by the United States, because the claim was, in essence, a tort claim for misrepresentation).

Developers (and others) regarding the environmental condition of the Property and the government's remediation plans, as these promises are expressed in a variety of documents. *See* Pls.' Opp. at 3-4, 7-8, 11-13, 15. Plaintiffs argue that these numerous promises resulted in an implied-in-fact contract with two key terms: "the Plaintiffs' Property was clean, and . . . the entire former Arsenal, including Plaintiffs' Property, would be remediated." *Id.* at 4 (emphasis in original). The court will refer to the first of these "contract terms" as an implied-in-fact warranty of the environmental condition of the Property, and the second as a duty of the United States to remediate any hazardous waste contamination of the Property. Plaintiffs allege that the United States has breached its implied-in-fact contract with the Developers. *Id.* at 1.

IV. Analysis

Plaintiffs' implied-in-fact contract claim suffers from several handicaps. First, plaintiffs ask the court to extract from several decades of government activity at the former Arsenal a factual inference that a meeting of minds occurred between the Developers and the United States as to the environmental condition of the Property. There is no one defining moment in plaintiffs' version of events that could be seen as permitting this meeting of the minds. Instead, plaintiffs cite diverse documents which, over the course of many years, allegedly represent "numerous promises" that in some fashion coalesced and produced two key contractual terms binding the government. When did the "unambiguous offer and acceptance," *Hanlin*, 316 F.3d at 1328, occur? Plaintiffs have not answered this question.

Second, plaintiffs' implied-in-fact contract claim glosses over the fact that the meeting of the minds that supposedly occurred took place over the course of two different real estate transfers, one in 1989 and the other in 2003, and included a diverse cast of characters. There were, for example, two different buyers of the parcels which make up the Property, TWC and Beechwood at Edison, LLC; a regulator of environmental hazards, the NJDEP; and at least three different federal entities, the Corps, GSA and GAO, all involved in the "numerous promises" referenced by plaintiffs. Was this one meeting of the minds, or several? Who participated in these meetings of the mind, and how? Is the federal government able to express its "intent" to contract, *Hanlin*, 316 F.3d at 1328, through so many agencies, over a period of so many years? These questions, too, remain unanswered.

Third, plaintiffs vaguely identify the consideration paid the government for the implied contract regarding the environmental condition of the Property. The consideration mentioned in plaintiffs' opposition brief appears to be the argument of counsel and is unsupported by any specific factual allegations. The more obvious form of consideration paid by plaintiffs (or their predecessor) in these circumstances is the purchase price of the parcels which make up the Property. Unfortunately for plaintiffs' implied contract theory, the two purchases of government property are not contemporaneous with most of the "numerous promises" cited by plaintiffs. An implied-in-fact contract requires consideration, *Hanlin*, 316 F.3d at 1328; for plaintiffs' claim to survive defendant's summary judgment challenge, the Developers must allege sufficient facts establishing consideration.

Fourth, the express contracts between the United States and plaintiffs (or their predecessor in interest), to a large extent address the same subject matter as the alleged implied-in-fact contract. In the 2003 deed, contract terms regarding the environmental condition of the 2003 Parcel are explicitly addressed. The 1989 deed contains an explicit disclaimer of any covenants regarding the 1989 Parcel. An implied-in-fact warranty cannot have been offered by the United States if an express contract disclaims such warranties, *Agredano*, 595 F.3d at 1281, and an implied-in-fact contract cannot have been formed where an express contract governs the same subject matter, *Bank of Guam*, 578 F.3d at 1329.

The court will address these topics below, as well as an additional argument raised by plaintiffs. The analysis is somewhat complicated by the forty-year chronology referenced by plaintiffs, the existence of two separate real estate transfers of distinct parcels which together make up the Property, and two related but perhaps distinguishable implied-in-fact contract terms identified by plaintiffs: an implied-in-fact warranty of the environmental condition of the Property; and, the duty of the United States to remediate any hazardous waste contamination of the Property. Despite these surface complexities, it is clear that no implied-in-fact contract can be inferred from the undisputed facts before the court.

A. Representations Made Before the 1989 Purchase by TWC

Although plaintiffs reference several government documents dating from the 1960s, 1970s and 1980s as background documents for their claims, plaintiffs do

not allege that these documents contain representations or promises made to TWC. There is one 1989 GSA affidavit referenced by plaintiffs, however, which allegedly contains a promise made to TWC about the 1989 Parcel:

> [N]o hazardous substances have been manufactured or stored on [the 1989 Parcel]. This portion of the former Arsenal was used as open space (golf course); storage and general supply warehousing. We have no record of any hazardous material being buried on [the 1989 Parcel]."

Pls.' Facts Ex. 13. Although the document itself is not before the court, the affidavit, as described in plaintiffs' Exhibit 13, was apparently submitted in compliance with New Jersey's Environmental Cleanup Responsibility Act (ECRA), N.J. Stat. Ann. § 13:1K-6 *et seq.* (now known as the Industrial Site Recovery Act). This GSA affidavit cannot be construed as evidence of a warranty of the environmental condition of the 1989 Parcel or of a promised remediation of hazardous contamination of the 1989 Parcel.

The representations in GSA's ECRA affidavit may have permitted TWC to seek relief under ECRA, relief which defendant states is available under N.J. Stat. Ann. § 13:1K-13. Def.'s Reply at 4. GSA's statements do not, however, permit an inference that the United States, for consideration paid by TWC at the public auction, gave TWC a warranty of the environmental condition of the 1989 Parcel or a promise that the United States would remediate hazardous contamination of the 1989 Parcel. Neither GSA's ECRA affidavit, nor other conduct by the United States before the 1989 sale to TWC, gives rise to an inference of mutual intent to contract, an unambiguous offer and acceptance, or, ultimately, of an implied-in-fact contract between the United States and TWC. *Hanlin*, 316 F.3d at 1328. Plaintiffs have not mustered a scintilla of evidence of a "tacit understanding" between GSA and TWC in this regard. *Hanlin*, 316 F.3d at 1328 (citation omitted). The evidence presented by plaintiffs simply does not permit a justifiable inference that the United States entered into a implied contract with TWC.

Even if there had been some evidence of promissory conduct of the United States regarding the environmental condition of the 1989 Parcel before the 1989 sale, the deed between the United States and TWC expressly disclaims any covenants express or implied. Pls.' Facts Ex. 14. Because the deed, an express

contract, contains an express disclaimer of "any covenants whatsoever," *id.*, there can be no factual inference as to an implied-in-fact contract regarding the environmental condition of the 1989 Parcel binding the United States. *Agredano*, 595 F.3d at 1281. TWC never had an implied-in-fact contract with the United States as to the environmental condition of the 1989 Parcel, and plaintiffs succeed to no such interest.

B. Representations Regarding the 1989 Parcel Made After 1989

Once TWC, plaintiffs' predecessor in interest, purchased the 1989 Parcel, various federal entities represented that there was no known contamination of the 1989 Parcel, and that the United States was committed to the remediation of hazardous waste contamination of former Arsenal properties. These statements cannot form the basis for an implied-in-fact contract, however, because neither the factual allegations in the complaint nor plaintiffs' proposed findings of fact make any reference to consideration paid to the United States in support of a contract regarding the environmental condition of the property. The only mention of consideration that plaintiffs might have offered in exchange for a warranty of the environmental condition of the 1989 Parcel or a pledge to remediate hazardous waste contamination of the 1989 Parcel is found in plaintiffs' opposition brief. Therein, plaintiffs suggest that the Developers offered the United States "complete cooperation," "access," "patience," "continued cooperation," and "restraint," and "refrained from commencing litigation." Pls.' Opp. at 3-4.

"Attorney argument asserting a genuine issue of material fact is insufficient to oppose successfully a motion for summary judgment." *Delmarva Power & Light Co. v. United States*, 79 Fed. Cl. 205, 217 (2007) (citing *Barmag*, 731 F.2d at 836), *aff'd*, 542 F.3d 889 (Fed. Cir. 2008). Here, there is no evidence before the court which shows consideration flowing to the United States in support of an implied-in-fact contract regarding the environmental condition of the 1989 Parcel. Consideration is a necessary element to establish an implied-in-fact contract with the United States. *Hanlin*, 316 F.3d at 1328. Lacking consideration, all of the post-sale representations by the United States regarding the 1989 Parcel cannot support the formation of an implied-in-fact contract between plaintiffs and the United States. Plaintiffs' reliance on post-1989 representations by the United

States is misplaced, and their implied-in-fact contract claim, as to the 1989 Parcel, fails as a matter of law.[4]

C. Representations Made Before the 2003 Purchase by Beechwood at Edison, LLC

Before 2003, defendant United States made numerous statements regarding the former Arsenal properties in general, and the 2003 Parcel in particular. For more general statements, plaintiffs rely, for example, on a 1992 GAO report and a 1995 study by the Corps. Pls.' Facts Exs. 21, 24. For more particular representations, plaintiffs rely on the Hazardous Substance Activity Certification provided by the Corps and GSA as part of the sale documents for the 2003 Parcel. *Id.* Exs. 29-31. The court has examined these statements by the federal government and agrees with defendant that plaintiffs have failed to present any evidence of a meeting of the minds as to an implied warranty of the environmental condition of the 2003 Parcel or an implied duty of the United States to remediate the 2003 Parcel.[5]

The only meeting of the minds in this regard was reduced to writing. The record before the court shows that the government's warranty of the environmental condition of the 2003 Parcel and its commitment to remediate any hazardous waste contamination of the 2003 Parcel were set forth in the 2003 deed, an express contract between the United States and one of the plaintiffs in this suit. The CERCLA covenants in the 2003 deed address both the environmental condition of the property and the specific promises of the United States as to its responsibilities for the remediation of hazardous waste contamination of the 2003 Parcel. Pls.' Facts Ex. 32. The deed expressly disclaims any other warranty: "The Grantee, in accepting this Deed, acknowledges that the Grantor has made no representation or

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[4]/ Even if evidence of consideration had been proffered by plaintiffs, the court finds nothing in the conduct of the parties regarding the 1989 Parcel to indicate a meeting of the minds giving rise to an implied-in-fact contract of the type alleged by plaintiffs.

[5]/ The court need not address the questions of authority and/or ratification raised by the parties. Even if the government's representatives referenced by plaintiffs had authority to bind the government, their conduct and the conduct of the government in general does not indicate that the United States entered into an implied-in-fact contract with plaintiffs.

warranty concerning the condition or state of repair of the Property that has not been fully set forth in this Deed." *Id.*

Because the 2003 deed disclaims any warranties other than those contained therein, no implied-in-fact warranty concerning the 2003 Parcel could have been offered by the United States to plaintiffs. *Agredano*, 595 F.3d at 1281. Similarly, because the 2003 deed, an express contract, sets forth the government's promises regarding the remediation of hazardous waste contamination of the 2003 Parcel, no implied-in-fact contract regarding remediation of the 2003 Parcel can be found in other conduct of the parties. *See, e.g.*, *Bank of Guam*, 578 F.3d at 1329 ("Accordingly, because we have determined that the [plaintiff] has an express contract with the United States dealing with the pertinent subject matter, we affirm the dismissal of its implied-in-fact contract claims."). Neither of the implied-in-fact contract terms alleged by plaintiffs are supported by the undisputed facts before this court.

D. Representations Made After the 2003 Purchase by Beechwood at Edison, LLC

In 2004, the Corps wrote two letters to Beechwood at Edison, LLC discounting the likelihood that the 2003 Parcel would be affected by either buried ordnance or hazardous waste contamination. Pls.' Facts Exs. 33-34. These statements could not give rise to an implied-in-fact contract, inasmuch as they were made after plaintiffs purchased the 2003 Parcel. As stated *supra*, plaintiffs have failed to show that any consideration was paid to the government for promises contained in the two letters written in March and April of 2004. Furthermore, the terms of the 2003 deed, an express contract, govern any warranties of the environmental condition of the 2003 Parcel and any remediation duties of the United States for that parcel, as stated *supra*. For all of these reasons, no implied-in-fact contract regarding the 2003 Parcel arose after the 2003 purchase by Beechwood at Edison, LLC.

E. Plaintiffs' Third Party Beneficiary Argument

Plaintiffs advance a curious argument in their opposition brief. The Developers suggest that they are "third party beneficiaries to the government's promises to the NJDEP and to Congress." Pls.' Opp. at 12. This argument fails

because plaintiffs have presented no factual evidence in support of this theory.[6] No express contract with NJDEP or Congress has been alleged by plaintiffs. If, perhaps, implied-in-fact contracts with these entities are being argued here, none of the elements of these implied-in-fact contracts have been alleged by plaintiffs. In the absence of factual allegations supporting contracts between the United States and either NJDEP or Congress, plaintiffs have no contracts to benefit from as third parties. Plaintiffs' third party beneficiary argument has no factual foundation, and is insufficient to carry plaintiffs' burden on summary judgment. *See Barmag*, 731 F.2d at 836 (stating that "[m]ere denials or conclusory statements are insufficient" to oppose a motion for summary judgment).

CONCLUSION

There is no genuine issue of material fact and defendant is entitled to judgment as a matter of law on its motion for partial summary judgment. Plaintiffs' implied-in-fact contract claim must be dismissed. The parties are urged to settle the breach of deed covenants portion of Count I of the complaint, the sole remaining claim in this suit.

Accordingly, it is hereby **ORDERED** that

(1) Defendant's Motion for Partial Summary Judgment upon Count One of Plaintiffs' Complaint, filed June 24, 2010, is **GRANTED**;

(2) The Clerk's office is directed to **DISMISS** plaintiffs' implied-in-fact contract claim, a portion of Count I of the amended complaint filed October 26, 2009, with prejudice; and

(3) On or before **January 14, 2011**, the parties shall **FILE** a **Joint Status Report** proposing a schedule for further proceedings in the subject matter and stating the extent to which the parties have determined whether the remaining claim before the court may be settled.

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[6]/ The court need not address whether the United States and Congress could, indeed, enter into a contract such as the one posited by plaintiffs.

/s/Lynn J. Bush
LYNN J. BUSH
Judge