IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JENNIFER A. FARRELL,	:	
	:	
Plaintiff	:	
	:	
vs.	:	**No. 12-2002**
	:	
RYAN CONFER and	:	
WILLIAM J. GUSHUE, JR., TRADING	:	
AS U.S. LIBERTY HOME INSPECTIONS	:	
	:	
Defendants	:	

John F. Hacker, Esquire	Counsel for Plaintiff
Thomas Geroulo, Esquire	Counsel for Defendant Gushue, Jr.
Michael J. Garfield	Counsel for Defendant Confer

MEMORANDUM OPINION

Matika, J. – December , 2013

Before the Court is a preliminary objection filed by Defendant, William J. Gushue, Jr., trading as U.S. Liberty Home Inspections, (hereinafter "Gushue"), in response to Plaintiff's complaint in a breach of contract action. For the reasons that follow, Gushue's preliminary objection is **DENIED.**

I. FACTUAL and PROCEDURAL BACKGROUND

The relevant facts in this matter, as it relates to the preliminary objection before the Court, are as follows: On October 3, 2011, Plaintiff and Defendant Confer entered into a

written agreement, (hereinafter "Agreement of Sale"), for the sale of real estate whereby Defendant Confer would convey fee simple title, by special warranty deed, to Plaintiff for the property located at 33 Catawaba Place, Penn Forest Township, Carbon County Pennsylvania, (hereinafter "Property"). Situated on the Property is a single family dwelling that is serviced by an on lot sanitary sewer system.

In the Agreement of Sale, more specifically section twelve, Plaintiff had the right to obtain a pre-settlement inspection of the Property and sanitary sewer system. Plaintiff, in choosing to exercise this right contacted Gushue to perform an inspection of the Property. On October 22, 2011, Gushue performed the home inspection and issued a written assessment of the inspection to Plaintiff. In the assessment, Gushue noted that he did not observe any leaks in the roof and commented that the roof was in "good shape, one cracked shingle."

Additionally, on this same day, Plaintiff and Gushue orally agreed to a pre-settlement inspection of the sanitary sewer system with a report being furnished to Plaintiff a day later. Gushue noted in the report that the sanitary sewer system was satisfactory. Plaintiff, relying upon these inspections purchased the Property on November 30, 2011.

Thereafter, certain events occurred relating to the roof and sewer system that has lead Plaintiff to allege that both

inspections performed by Gushue were improper. On December 1, 2011, Plaintiff flushed the toilet located in the basement of the Property with said toilet overflowing onto the floor. Nearly two months later Plaintiff observed a puddle of water on the floor of the spare bedroom with water dripping from recessed lighting fixtures in the ceiling of the spare bedroom.[1] On or around April 25, 2012, Plaintiff states she started to smell sewage in the basement of the Property and detected that the floors in the basement, along with the stairway leading to the basement, were wet. Plaintiff opined that such smell originated from the backyard of the Property.

Consequently, Plaintiff hired additional services to inspect the sewer system and roof, to which it was reported that the sewage system had failed for a period of time prior to, and parts of the roof over the spare bedroom had been leaking for an extended time prior to the settlement date.

As a result of such discovery, Plaintiff instituted this instant action.[2] In her complaint, Plaintiff asserts two counts against Gushue: a negligence claim and a breach of contract action. In her breach of contract claim, Plaintiff alleges that

[1] Plaintiff avers that she did not move into the Property until the last week of February, 2012, and did not wash any clothes in the clothes washer until mid-March.

[2] Although this opinion will only reference the counts asserted against Gushue, Plaintiff did bring forth five separate counts against Defendant Confer.

Gushue, who held himself out as a qualified home inspector, breached his contractual obligation under the written home inspection agreement and the sewage system inspection agreement by not performing either inspection with the degree of care that a reasonably prudent inspector would exercise.[3] Plaintiff goes on to aver that but not for Gushue's breach Plaintiff would have terminated the Agreement of Sale for the Property prior to the settlement date, or in the alternative negotiated a lower purchase price for the Property. Consequently, Plaintiff seeks monetary damages for the cost of repairing and replacing the sanitary sewer system and the floors in the Property that were damaged as a result of the backed up sanitary sewerage system, as well as leaks in the roof. Further, Plaintiff requests additional out-of-pocket expenses incurred as a result of the alleged faulty sanitary sewer system and roof leaks.

Defendant, in response to the complaint, filed certain preliminary objections to the two counts asserted against him. The first preliminary objection, raised in defense to Plaintiff's negligence claim, argues that such claim is barred by the Gist of the Action Doctrine.[4] Gushue's second preliminary

[3] Plaintiff also claims Gushue agreed that both inspection reports would be performed according to the American Society Home Inspectors standards, and such obligation was breached by Gushue's failure to detect defects in the roof and sewage system.

[4] Plaintiff, in response to the preliminary objections filed by Gushue withdrew her negligence cause of action. Accordingly, the Court entered an

objection asserts that Plaintiff has a full, complete, and non-statutory remedy at law as it relates to both the home pre-inspection contract and the sanitary sewerage contract. More specifically Gushue contends that Plaintiff's damages on both contracts are limited to the contract price of each respectively. Gushue's basis for such argument is founded in the limitation of damages clause located in the home inspection contract.[5]

In reply to the home inspection contract, Plaintiff claims that such clause, the limitation of damages clause, was never part of the bargained-for exchange between the parties, and was made part of the contract after the parties entered into the agreement and completed performances. Alternatively, Plaintiff raises the affirmative defense of unconscionability in asking the Court to strike such provision.

The Court held an evidentiary hearing to determine the formation of the home inspection contract, and in particular whether Plaintiff voluntarily agreed to the limitation of damages clause. After said hearing, the Court is now ready to address the preliminary objection.

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order dismissing said count with prejudice.

[5] The Court, as it relates to the sanitary sewage system inspection contract, denied Gushue's preliminary objection since such contract was an oral contract and no limitation of damage clause was ever discussed or agreed to for the sewer system inspection.

II. DISCUSSION

An express contract is formed when the terms of an agreement are declared by the parties either verbally or in writing. *Crawford's Auto Center, Inc. v. Commonwealth, Pennsylvania State Police*, 655 A.2d 1064, 1066 (Pa. Cmwlth. Ct. 1995)(citing RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981). A contract is enforceable when the parties reach a mutual agreement, exchange consideration, and have set forth the terms of their bargain with sufficient clarity. *Biddle v. Johnsonbaugh*, 664 A.2d 159, 163 (Pa. Super. Ct. 1995). Consideration is defined as the "inducement to a contract . . . . Some right, interest, profit or benefit accruing to one party, or some forbearance, determent, loss, or responsibility, given, suffered, or undertaken by the other." BLACK'S LAW DICTIONARY 277-78 (5th ed. 1979), *see also*, RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). An agreement is sufficiently definite if the parties intended to contract with each other and if a reasonably certain basis exists upon which a court could grant an appropriate remedy. *Geisinger Clinic v. Di Cuccio*, 606 A.2d 509, 512 (Pa. Super. Ct. 1992). The essential terms to a contract include an offer, acceptance, consideration, and mutual agreement. *See*, *Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa. Super. Ct. 1995). Specifically, time or manner of performance, and price or consideration are essential terms of an alleged bargain, and

must be supplied with sufficient definiteness for a contract to be enforceable. *Lackner v. Glosser*, 892 A.2d 21, 31 (Pa. Super. Ct. 2006)(citing *Lombardo v. Gasparini Excavating Co.*, 123 A.2d 663, 666 (Pa. 1954)).

The Court first notes that as the trier of fact, it is vested with the responsibility of evaluating the credibility of each witness. *See*, *Commonwealth v. Whack*, 393 A.2d 417, 419 (Pa. 1978). Accordingly, at the hearing, the Court found Plaintiff's recollection as to the formation of the home inspection contract to be accurate as oppose to Gushue's recollection. Such is not based upon the Court believing Gushue was intentionally dishonest about the creation of the contract, but rather based upon Gushue's own admission that he does not remember all the details of the events in question; in addition, Gushue's testimony seemed to be more of a general description of how his services are normally contracted for and not necessarily how the contract in question was formed. Consequently, the Court is left to give more credence to Plaintiff's recollection of how she entered into the home inspection contract with Gushue.[6]

Plaintiff testified that she came into contact with Gushue

[6] The Court also observes that this contract formation question is presented in the form of a preliminary objection. Accordingly, the Court must treat all well-pleaded facts as true. *Turner v. Medical Center, Beaver, PA, Inc.*, 686 A.2d 830 (Pa. Super. Ct. 1996).

based upon a brochure her realtor provided her. In the brochure Gushue listed his fee for a home pre-inspection; thus the Court finds such "discussion" to be a preliminary negotiation between the parties.[7]

Thereafter, Plaintiff had the realtor contact Gushue about performing a home pre-inspection. Although the details of such are not clear, the Court presumes Gushue and Plaintiff, through the realtor, entered into a bilateral agreement whereby Gushue would perform a home pre-inspection for cash consideration.[8] The Court reaches such conclusion based upon Plaintiff's five hundred dollar ($500.00) down payment and an initial date of appointment reached between the two parties. Moreover, the Court notes that Plaintiff's down payment of five hundred dollars equates to partial performance with such completion of

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[7] Preliminary negotiation is defined as "[a] manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981); *see also*, RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981) cmt. b. ("Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell. The same is true of catalogues, price lists and circulars, even though the terms of suggested bargains may be stated in some detail.")

[8] A bilateral contract involves two promises and is created when one party promises to do or forbear from doing something in exchange for a promise from the other party to do or forbear from doing something else. *Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1194 (Pa. Super. Ct. 1987). A unilateral contract, in contrast, involves only one promise and is formed when one party makes a promise in exchange for the other party's act or performance. *Darlington v. General Electric*, 504 A.2d 306, 316 (Pa. Super. Ct. 1986). Additionally, "[i]n case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses." RESTATEMENT (SECOND) OF CONTRACTS § 32 (1981).

her performance, that being tendering full payment, conditioned upon Gushue's completion of his promise, the home inspection and assessment. The Court, however, is unaware of the other terms of such agreement as neither party could accurately recollect the precise discussion that they had.

Subsequently, Gushue arrived at the Property to perform his home pre-inspection.[9] As was Gushue's standard practice, he arrived at the Property before Plaintiff and started the inspection. Plaintiff testified that it was raining the day of the inspection, and thus she waited in her car until Gushue finished his inspection. Once Gushue completed the home inspection, Plaintiff met him at the tailgate of his truck, and at which time Plaintiff tendered the remaining monies owed for the home inspection as Gushue presented Plaintiff with a book that contained the written assessment and a written agreement to be signed by the parties. Plaintiff handed Gushue the check and then signed the written contract.

Conversely, Gushue's recollection of such events differs, but as stated previously the Court finds Plaintiff to be more credible as it relates to the events that transpired the day of the inspection. Specifically, Plaintiff was steadfast that she

[9] It is noted that Gushue cancelled the original appointment dated and contacted Plaintiff to reschedule the home inspection. Such is evidence of an agreement reached between the two parties despite any formal written document reflecting such.

was not handed the book that contained the contract until after the home inspection was completed and payment of such was tendered. Gushue, on the contrary, described the events that day in general terms in believing he handed the book to Plaintiff before the completion of the inspection and assessment.

Based upon such testimony, the Court finds an agreement was orally entered into by the parties as evidence by Plaintiff's partial performance and the parties agreeing to a specific date for the home inspection. Additionally, the Court concludes that the signed written agreement symbolizes an attempt on behalf of the parties to reduce their oral agreement into writing as it relates to the home pre-inspection. It is in this written document where the limitation of damages clause appears. However, and notwithstanding the fact it is unclear at this time the exact terms of the home pre-inspection contract, both Plaintiff and Gushue were clear that the limitation of damages clause was never orally discussed between the parties, bt yet appears in the written contract. Whether such term was part of the bargained-for exchange that occurred between the parties and thus a clause of the home pre-inspection contract, or whether such term was added to the written contract after performance of the contract was completed and thus not part of the contract is a question better asked of a jury or the Court, however not in

the form of a preliminary objection. *Gonzalez v. United States Steel Corp.* 398 A.2d 1378, 1385 (Pa. 1979)(A contractual term becomes a jury question if it is ambiguous and its resolution depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.)[10]

The Court is conscious of the fact that there may be an argument that the formal written contract was a modification of the oral agreement. An agreement may be modified with the assent of both contracting parties if the modification is supported by consideration. *Stoner v. Sley System Garages*, 46 A.2d 172, 173 (Pa. 1946); *Corson v. Corson's, Inc.*, 434 A.2d

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[10] As the Pennsylvania Supreme Court has noted, the allocation of functions between judge and jury does not necessarily involve a "fact-law" distinction:

> It has long been accepted in contract law that an ambiguous written instrument presents a question of fact for resolution by the finder-of-fact, whereas the meaning of an unambiguous written instrument presents a "question of law" for resolution by the court. As the authorities in the field of contracts make clear, however, the latter exercise is also in actuality a factual, not a legal, decision. For a variety of reasons the common law has long thought it best to leave to the court rather than to the jury the essentially factual question of what the contracting parties intended. This fact-finding function exercised by the court is denominated a "question of law," therefore, not because analytically it is a question of law but rather to indicate that it is the trial judge, not the jury, to whom the law assigns the responsibility for deciding the matter. All questions of interpretation of written instruments and agreements, in other words, are questions of fact, some in ordinary civil litigation resolved by the jury (ambiguous writings) and others resolved by the trial judge (unambiguous writings).

Community College of Beaver County v. Community, Society of Faculty (PSEA/NEA), 375 A.2d 1267 (Pa. 1977).

1269, 1271 (Pa. Super. Ct. 1981)("It is fundamental that a contract be modified only by the assent of both parties, and only if the modification is founded upon valid consideration.")

Assuming *arguendo* the Court would accept the argument that Plaintiff assented to the limitation of damages clause, and thus provided additional consideration necessary for modification, Gushue has failed to contract for something he was not already obligated to do. The written agreement provides no additional consideration on the part of Gushue as he was already obligated to perform a home inspection and written assessment. Thus, such argument that the written agreement was a modification of the oral contract would be meritless.

Lastly, Plaintiff raised the affirmative defense of unconscionability as an alternative theory in requesting the Court to strike the limitation of damages clause. Although the Court recognizes that the question of unconscionability is a question only for the Court to answer based upon its equity powers, *see*, *Metalized Ceramics for Electronics, Inc. v. National Ammonia Co.*, 663 A.2d 762, 765 (Pa. Super. Ct. 1995), the Court feels such question is more appropriately raised at a later point in this matter, especially in light of its holding above. Therefore, the Court declines to address Plaintiff's

affirmative defense of unconscionability,[11] and enters the following order:

[11] Plaintiff also argued that such clause should be stricken based upon public policy. For the same reason the Court declined to address the defense of unconscionability, the Court will likewise do the same for this affirmative defense.

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Michael J. Garfield	Counsel for Defendant Confer

ORDER OF COURT

AND NOW, this _____ day of December, 2013, upon consideration of the PRELIMINARY OBJECTION filed by Defendant, William J. Gushue, Jr., trading as U.S. Liberty Home Inspections, the brief in support thereof, Plaintiff's response thereto, and following oral argument and an evidentiary hearing held thereon pursuant to PA.R.C.P. 1028(c)(2), it is hereby

ORDERED and DECREED that Defendant's Preliminary Objection to Plaintiff's Complaint, as it relates to the home pre-inspection contract is **DENIED** and **DISMISSED.**

It is further **ORDERED and DECREED** that the Defendant Gushue shall file an Answer to the Plaintiff's Complaint within twenty (20) days from the date hereof.

BY THE COURT:

_____
Joseph J. Matika, J.