

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

|                           |   |             |
|---------------------------|---|-------------|
| LAWRENCE M. McCULLION and | : |             |
| PAMELA J. McCULLION, H/W  | : |             |
|                           | : |             |
| Plaintiffs                | : |             |
|                           | : |             |
| Vs.                       | : | No. 09-0670 |
|                           | : | No. 09-0819 |
| CAROLINE L. SMITH,        | : |             |
| HOWARD R. SMITH, II and   | : |             |
| LESLIE R. SMITH, H/W,     | : |             |
|                           | : |             |
| Defendants                | : |             |

|                                    |                        |
|------------------------------------|------------------------|
| Gerald F. Strubinger, Jr., Esquire | Counsel for Plaintiffs |
| Anthony Roberti, Esquire           | Counsel for Defendants |

**DECISION AND VERDICT**

Serfass, J. - March, 2012

Plaintiffs Lawrence M. McCullion and Pamela J. McCullion seek specific performance of an agreement of sale concerning the real property situated at 387 East White Bear Drive, Summit Hill, Pennsylvania, which agreement was allegedly breached by Defendant Caroline L. Smith (hereinafter "Caroline"). In addition to claims for breach of contract and specific performance, Plaintiffs set forth claims of unjust enrichment, fraud, constructive trust and equitable conversion against Caroline. Plaintiffs also set forth claims of specific performance, tortious interference with a contract, fraud and equitable conversion against Defendants Howard R. Smith, II

(hereinafter "Howard") and Leslie R. Smith (hereinafter "Leslie").

Defendants Howard and Leslie also filed a Counterclaim against Plaintiffs, seeking monetary reimbursement in the amount of seventy-five thousand, seven hundred fourteen dollars and sixty-six cents (\$75,714.66) for work performed on the subject property; or, in the alternative, the sum of seventy-five thousand dollars (\$75,000), representing the increase in value resulting from Howard and Leslie's investment in the subject property; and punitive damages in the amount of seventy-five thousand dollars (\$75,000).

After a non-jury trial held on August 10, 2011, and upon consideration of the proposed findings of fact, conclusions of law and legal memoranda lodged by the Plaintiffs and Defendants on October 14, 2011 and October 18, 2011, respectively, we make the following:

#### **FINDINGS OF FACT**

1. The property at issue is situated at 387 East White Bear Drive, Summit Hill, Pennsylvania, 18250 (hereinafter "Property").

2. The Property is a working farm and consists of approximately 3.195 acres, upon which a home and various outbuildings are situated.

3. Caroline, along with her late husband, acquired the Property from her father-in-law's estate via deed dated November 3, 1980 which is recorded in Carbon County deed book volume 417 at page 175. (Plaintiff's Exhibit 1).

4. Pursuant to that certain deed dated March 12, 2009 and recorded in Carbon County deed book volume 1751 at page 327, the Property was transferred from Caroline to Howard. (Plaintiff's Exhibit 7).

5. The mortgage encumbering the Property is solely in Caroline's name. (Plaintiff's Exhibit 2).

6. Howard and Leslie moved into the Property on or about June 6, 2005, and continue to reside therein with Caroline.

7. On May 22, 2007, Caroline executed a handwritten agreement with Howard and Leslie, in which she agreed to sell them the Property for the sum of forty-six thousand dollars (\$46,000). (Plaintiff's Exhibit 5).

8. On March 21, 2008, Caroline entered into a written "Agreement to Sell Real Estate" with Howard, in which she agreed to sell him the Property for the sum of one hundred six thousand dollars (\$106,000). (Plaintiff's Exhibit 6).

9. The March 21, 2008 "Agreement to Sell Real Estate" contained a "time is of the essence" clause and did not specify a closing date.

10. Howard was unable to tender the purchase price pursuant to either agreement with Caroline because he could not obtain a mortgage loan for the Property.

11. Between October and November 2007, Caroline, Howard, and Leslie met with Lawrence M. McCullion (hereinafter "Lawrence") and Pamela J. McCullion (hereinafter "Pamela") at the McCullions' residence situated at 672 West White Bear Drive, Summit Hill, Pennsylvania, to discuss the possibility of the McCullions purchasing the Property.

12. Howard contacted Lawrence to arrange the 2007 meeting at Caroline's request.

13. Caroline wanted to sell the Property because she could no longer afford to pay the bills associated with the Property.

14. At the 2007 meeting with the McCullions, the Defendants asked Larry and Pamela if they would be willing to rent the Property to Caroline, Howard and Leslie.

15. At the 2007 meeting with the McCullions, there was no discussion of any prior or current agreement of sale for the Property between Caroline and Howard.

16. At the 2007 meeting with the McCullions, no agreement was reached between Caroline and the Plaintiffs.

17. Sometime after March 21, 2008, Caroline became upset with Howard because he was not paying rent to live in the Property.

18. Caroline then contacted Lawrence to discuss his purchase of the Property following March 21, 2008, and contacted him several times thereafter to further discuss such purchase.

19. Caroline subsequently decided to sell the Property to the Plaintiffs because she felt Howard could not afford to purchase the Property, since he was not able to obtain a mortgage loan, and because she wanted to pay off her mounting debt.

20. Caroline then made arrangements with Lawrence to meet at Tommy's Restaurant in Coaldale, Pennsylvania, and agreed to sell the Property to the McCullions.

21. At the meeting in Coaldale, no prior or current agreements of sale with Howard for the Property were discussed.

22. After the aforementioned meeting, Lawrence made arrangements to have an agreement of sale prepared, which agreement was then executed by Pamela.

23. On or about January 5, 2009, Caroline had a meeting with Lawrence, at which her two daughters, Nettie Smith and Anna Smith Trotter, Steven Trotter and Nellie's boyfriend Ted were present.

24. The aforementioned meeting was held at the home of Nettie Smith, which is situated at 118 East Ruddle Street, Coaldale, Pennsylvania.

25. At this meeting, Caroline executed an agreement of sale, pursuant to which the Property was to be conveyed to the Plaintiffs. (Plaintiff's Exhibit 3). No agreements of sale with Howard regarding the Property were discussed.

26. Caroline executed the aforementioned agreement of sale voluntarily and of her own free will, and under no duress nor the influence of alcohol or drugs which would affect her ability to understand her actions.

27. The agreement of sale with the Plaintiffs set the purchase price at eighty thousand dollars (\$80,000), with a two thousand dollar (\$2,000) down payment due upon execution of the agreement, and a closing date of April 1, 2009.

28. Lawrence tendered the down payment by check payable to Caroline on January 5, 2009. (Plaintiff's Exhibit 4).

29. Caroline subsequently cashed the check and used the funds to pay bills.

30. At Caroline's request, Attorney Joseph J. Velitsky sent Howard a letter dated January 6, 2009 informing him that Caroline was selling the Property and that he had to vacate said Property on or before March 1, 2009. (Plaintiff's Exhibit 8).

31. Following receipt of Attorney Velitsky's January 6, 2009 letter, Howard contacted Lawrence to discuss renting the Property after the McCullions purchased it. Howard did not

mention the existence of any prior or current agreement of sale for the Property between himself and Caroline.

32. On March 4, 2009, Howard filed a Complaint against Caroline in a civil action, docketed to Carbon County Case No. 09-0526, seeking specific performance of his agreements of sale with Caroline, and setting forth claims for repairs made to the Property and quantum meruit. (Plaintiff's Exhibit 10).

33. Caroline subsequently transferred the Property to Howard by deed dated March 12, 2009, and the civil action was discontinued. (See Plaintiff's Exhibit 7).

34. Caroline did not notify the Plaintiffs that she transferred the Property to Howard on March 12, 2009.

35. Closing with the McCullions did not occur on April 1, 2009 because of the transfer of the Property to Howard.

36. The two thousand dollar (\$2,000) down payment was returned to the Plaintiffs by check dated April 1, 2009. (Defendant's Exhibit 1).

37. Caroline did not believe that the prior agreements of sale with Howard were in effect when she executed the agreement of sale with Plaintiffs, because Howard never tendered the purchase price in satisfaction of those agreements.

38. Neither Caroline, Howard nor Leslie informed the Plaintiffs of the prior agreements of sale with Howard and/or Leslie prior to January 5, 2009.

39. Neither Lawrence nor Pamela was aware of any written agreements of sale between Howard and/or Leslie and Caroline prior to executing their agreement of sale with Caroline on January 5, 2009.

40. At the time he executed the agreement of sale with Caroline, Lawrence was only aware of Howard's purported verbal intent to purchase the Property.

#### **CONCLUSIONS OF LAW**

1. The essential terms to be contained in a real estate contract are the names of the parties, a description of the property, and the consideration or purchase price. GMH Associates v. Prudential Realty Group, 752 A.2d 889 (Pa. Super. 2000).

2. "[E]ven though the time fixed in an agreement for settlement is stated to be of the essence of the agreement, it may be extended by oral agreement or be waived by the conduct of the parties, and where the parties treat the agreement as in force after the expiration of the time specified for settlement it becomes indefinite as to time and neither can terminate it without reasonable notice to the other." Davis v. Northridge Development Associates, 622 A.2d 381, 385 (Pa. Super. 1993).

3. "[I]t is well settled that even where time is not of the essence, the time for completion is not unlimited and must be reasonable under the circumstances." Id.



4. Where no time is fixed for settlement, it is presumed that a reasonable time was intended. Id. "Reasonableness is a question for the fact-finder and is determined by consideration of all existing circumstances." Id.

5. Since neither the 2007 nor 2008 agreements of sale between Howard, Leslie and Caroline contained a settlement date, Howard and Leslie were required to perform within a reasonable time.

6. Since Howard and Leslie never tendered the purchase price in accordance with the 2007 or 2008 agreement of sale, they did not perform within a reasonable time and have thereby forfeited their rights under the aforementioned agreements.

7. As Howard and Leslie have abandoned the aforementioned agreements with Caroline due to failure of consideration, Caroline effectuated a proper rescission of said agreements by conveying the Property to the Plaintiffs. See Marlin v. Willink, 1821 WL 1885 (Pa. 1821); Di Pompeo v. Preston, 123 A.2d 671 (Pa. 1956); Davis v. Laurenzi, 397 A.2d 1 (Pa. Super. 1978); New-Com Corp. v. Estate of Gaffney, 72 B.R. 90, 93-94 (Bankr. W.D. Pa. 1987).

#### **A. Count I: Breach of Contract**

1. A contract is created when there is mutual assent to the terms of a contract by the parties with the capacity to

consent. Shovel Transfer and Storage, Inc. v. Pa. Liquor Control Bd., 739 A.2d 133, 136 (Pa. 1999).

2. For a contract to be formed, there must be an offer, an acceptance, and an exchange of consideration. Jenkins v. County of Schuylkill, 658 A.2d 380 (Pa. Super. 1995).

3. "A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999).

4. "In a breach of contract action, damages are awarded to compensate the injured party for loss suffered due to the breach." Empire Properties, Inc. v. Equireal, Inc., 674 A.2d 297, 304 (Pa. Super. 1996). "The purpose of damages is to put the plaintiff in the position he or she would have been in but for the breach." Id.

5. A seller of real estate may not rescind an agreement of sale if he or she has conveyed the land to a third person, thereby rendering them unable to perform in accordance with the agreement. Brodhead v. Reinbold, 50 A. 229, 231 (Pa. 1901).

6. The January 5, 2009 agreement of sale between Caroline and the Plaintiffs constitutes an enforceable contract.

7. Caroline breached said agreement of sale with the Plaintiffs by conveying the Property to Howard.

8. "It has been well settled that in a vendee's action against his vendor for breach of a written contract to convey land, the vendee's right of recovery, if the vendor acted in good faith, is limited to the down money, and such other reasonable expenditures that the vendee has incurred in reliance upon the contract. Id.

9. The Plaintiffs are entitled to a return of the money paid toward the purchase of the home since Caroline has breached the agreement of sale. Howard v. Stillwagon, 81 A. 807 (Pa. 1911); Gangwer v. Fry, 1851 WL 5900, 17 Pa. 491 (Pa. 1851). This entitlement has been satisfied by the return of the two thousand dollars (\$2,000) in down money to the Plaintiffs. (See Defendant's Exhibit 1).

10. The Plaintiffs are entitled to damages in the amount of two thousand, nine hundred sixty-six dollars and forty-seven cents (\$2,966.47), representing the costs of litigation incurred as a result of Caroline's breach of the Agreement of Sale, excluding attorney's fees. (See Plaintiff's Exhibit 12).

#### **B. Count II: Specific Performance**

1. "A court may order specific performance of a contract to sell land when the agreement is complete and certain, where no adequate remedy at law exists and the vendor violates the terms of the sales agreement." Messina v. Silberstein, 528 A.2d 959, 960 (Pa. Super. 1987).

2. "[S]pecific performance is a proper remedy when the subject matter of an agreement is an asset that is unique or one such that its equivalent cannot be purchased on the open market." Beckman v. Vassall-Dillworth Lincoln-Mercury, Inc., 468 A.2d 784, 790 (Pa. Super. 1983).

3. "Specific performance in the conveyance of real property is not a matter of right but of grace and will not be granted unless the party seeking the relief is clearly entitled to it." Delaware River Preservation Co. v. Miskin, 923 A.2d 1177, 1182 (Pa. Super. 2007).

4. "A party who purchases real estate with notice that his grantor has a prior obligation to convey to another is subject to an action for specific performance by a prior purchaser." Chorba v. Davlisa Enterprises, Inc., 450 A.2d 36, 39 (Pa. Super. 1982).

5. "[A] purchaser with notice of a prior equity in the same property must not only release legal title but must also account for rents and profits." Frankel v. Northeast Land Co., 570 A.2d 1065, 1069 (Pa. Super. 1990).

6. The Plaintiffs are entitled to specific performance of the January 5, 2009 agreement of sale with Caroline.

7. Howard must transfer the Property to Caroline in order to effectuate compliance with the January 5, 2009 agreement of sale.

### **C. Count III: Unjust Enrichment**

1. A claim for unjust enrichment arises from a quasi-contract. "A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another." Stoeckinger v. Presidential Financial Corp. of Delaware Valley, 948 A.2d 828, 833 (Pa. Super. 2008).

2. "The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." Id.

3. "Whether the doctrine applies depends on the unique factual circumstances of each case." Id. "In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched." Id.

4. "Moreover, the most significant element of the doctrine is whether the enrichment of the defendant is *unjust*." Id. "The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff." Id.

5. Caroline has been unjustly enriched by retaining the down money provided by the Plaintiffs, after breaching the agreement of sale, and using said funds to pay bills. However, the Plaintiffs are not entitled to damages because the two thousand dollars (\$2,000) in down money has been returned to them. (See Defendant's Exhibit 1).

**D. Counts IV & VII: Constructive Trust &  
Equitable Conversion**

1. Under the doctrine of equitable conversion, a contract for the sale of real estate transfers equitable title to the vendee, who bears the risk of any harm to the property, other than that caused by the vendor, which occurs between the execution of the contract and final settlement. Partrick & Wilkins Co. v. Reliance Ins. Co., 456 A.2d 1348, 1351 (Pa. 1983).

2. "[A] constructive trust is not a trust in the ordinary sense of the term but simply an equitable remedy designed to prevent unjust enrichment." Id. "Unlike the duties of a traditional fiduciary, the sole responsibility of a constructive trustee is to surrender the property to the one on whose behalf the constructive trust is raised." Id.

3. Caroline acted contrary to her duty as a constructive trustee, as well as the Plaintiff's equitable ownership of the

Property, by failing to transfer the Property to the Plaintiffs in accordance with the January 5, 2009 agreement of sale.

**E. Count V: Tortious Interference with a Contract**

1. "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." Restatement 2d of Torts, § 766, quoted in Frankel v. Northeast Land Co., 570 A.2d 1065, 1069 (Pa. Super. 1990).

2. The elements of a claim for tortuous interference are: (1) the existence of a contractual relationship between the plaintiff and a third party; (2) purposeful action on the part of the defendant intended to harm the relationship; (3) the absence of privilege or justification on the part of the defendant; and (4) actual damages resulting from the defendant's conduct. Stoeckinger, 948 A.2d at 834.

3. "In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct

interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties." Restatement 2d of Torts, § 767.

4. However, "[o]ne who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction." Restatement 2d of Torts, § 773.

5. "[A] defendant is not liable when it interferes with another's contract by threatening in good faith to institute litigation designed to protect what it believes in good faith to be a legally protected interest...." Peoples Mortgage Co. v. Fed. Nat'l Mortgage Ass'n, 856 F.Supp. 910, 942 (E.D. Pa. 1994). "[T]he 'good faith belief' must be a reasonable one under the circumstances." Id.

6. Howard and Leslie held a good faith belief that their agreements of sale with Caroline were valid, and that his



interest in the Property would be impaired or destroyed by the performance of the January 5, 2009 agreement of sale with the McCullions.

7. Accordingly, Howard and Leslie's conduct in instituting litigation to enforce their agreements of sale with Caroline does not constitute tortious interference with the Plaintiffs' January 5, 2009 agreement of sale.

#### **F. Count VI: Fraud**

1. "Fraud consists of "anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture." Moser v. DeSetta, 589 A.2d 679, 682 (Pa. 1991).

2. "To demonstrate fraud, the plaintiff must establish the following elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Martin v. Hale Products, Inc., 699 A.2d 1283, 1288 (Pa. Super. 1997).

3. "The essence of fraud is a misrepresentation fraudulently uttered with the intent to induce the action undertaken in reliance upon it, to the damage of its victim." Id.

4. Since Caroline held a good faith belief that the prior agreements of sale with Howard and Leslie expired prior to January 5, 2009, the Plaintiffs have not established that Caroline falsely represented that she could transfer the Property free of any encumbrances or prior agreements with any knowledge or recklessness as to whether any such representation was true or false.

5. The Plaintiffs have not established that Howard or Leslie made any false or material misrepresentations to the Plaintiffs that they relied upon to their detriment.

#### **G. Defendants' Counterclaim**

1. Although Howard and Leslie's Counterclaim does not specifically set forth the basis therefore, the averments generally set forth claims for unjust enrichment and tortuous interference with a contract.

2. The evidence and testimony of record in this matter do not establish by a preponderance of the evidence that the Plaintiffs engaged in a purposeful action intended to harm the any contractual relationship between the Defendants.

3. The evidence and testimony of record in this matter do not establish by a preponderance of the evidence that the Plaintiffs have been unjustly enriched at the expense of the Defendants.

4. Punitive damages cannot be awarded for breach of contract because they are inconsistent with traditional contract theory. DiGregorio v. Keystone Health Plan E., 840 A.2d 361, 370 (Pa. Super. 2003).

5. "As a corollary of this principle, punitive damages cannot be awarded for promissory estoppel, which creates an implied contract...or unjust enrichment that sounds in quasi-contract...." Danlin Mgmt. Group, Inc. v. Sch. Dist. of Philadelphia, 2005 WL 2140314 (C.P. Philadelphia 2005).

6. "[A] contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly." Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 663 A.2d 275, 756 (Pa. Super. 1995).

7. Accordingly, Howard and Leslie are not entitled to an award of punitive damages.

#### **VERDICT**

**AND NOW**, to wit, this \_\_\_<sup>th</sup> day of March, 2012, this matter having come before the Court for a non-jury trial, the Court finds **IN FAVOR** of the Plaintiffs, Lawrence M. McCullion and Pamela J. McCullion, and **AGAINST** the Defendant, Caroline L. Smith, as to

Counts I, II, III, IV and VII of the Complaint, **IN FAVOR** of the Plaintiffs and **AGAINST** the Defendants, Howard R. Smith, II and Leslie R. Smith, as to Count II of the Complaint, **IN FAVOR** of the Defendants Howard R. Smith, II and Leslie R. Smith, and **AGAINST** the Plaintiffs as to Counts V, VI and VII of the Complaint, **IN FAVOR** of the Defendant, Caroline L. Smith, and **AGAINST** the Plaintiffs as to Count VI of the Complaint, and **IN FAVOR** of the Plaintiffs and **AGAINST** the Defendants on the Defendants' Counterclaim.

The Court hereby awards damages in the amount of two thousand, nine hundred sixty-six dollars and forty-seven cents (\$2,966.47) in favor of the Plaintiffs and against the Defendant, Caroline L. Smith, representing the costs of litigation incurred as a result of said Defendant's breach of the January 5, 2009 agreement of sale, excluding attorney's fees.

It is **FURTHER ORDERED AND DECREED** that the Defendants, Howard R. Smith, II and Leslie R. Smith, shall transfer the Property to the Defendant, Caroline L. Smith, within fourteen (14) days of the date of entry of this Decision and Verdict on the docket. The Defendant, Caroline L. Smith, shall then transfer the Property to the Plaintiffs for the purchase price of eighty thousand dollars (\$80,000.00), within thirty (30) days thereafter, in accordance with the terms and conditions of the

January 5, 2009 agreement of sale between said Defendant and the Plaintiffs.

Pursuant to Pa. R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment on the Decision and Verdict if no motion for post trial relief has been filed under Pa. R.C.P. No. 227.1 within ten (10) days after notice of the filing of this Decision and Verdict.

**BY THE COURT:**

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**Steven R. Serfass, J.**