

**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 16, 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. 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 and Leslie R. Smith.

In answering the Plaintiffs' complaint, Defendants Howard R. Smith, II and Leslie R. Smith also filed a counterclaim against said 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 Defendants Howard and Leslie Smith'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. Plaintiffs Lawrence M. McCullion and Pamela J. McCullion are husband and wife.

2. Plaintiffs currently reside at 672 West White Bear Drive, Summit Hill, Pennsylvania.

3. Defendants Howard R. Smith, II and Leslie R. Smith are husband and wife.

4. Defendants Howard R. Smith, II and Leslie R. Smith currently reside at 387 East White Bear Drive, Summit Hill, Pennsylvania.

5. Defendant Caroline L. Smith currently resides at 387 East White Bear Drive, Summit Hill, Pennsylvania.

6. Defendant Howard R. Smith, II is the son of Defendant Caroline L. Smith.

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

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

9. Defendant Caroline L. Smith, along with her late husband, Howard R. Smith, 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).

10. 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 Defendant Caroline L. Smith to Defendant Howard R. Smith, II. (Plaintiff's Exhibit 7).

11. The mortgage encumbering the Property is solely in Defendant Caroline L. Smith's name. (Plaintiff's Exhibit 2).

12. Defendants Howard R. Smith, II and Leslie R. Smith moved into the Property on or about June 6, 2005, and continue to reside therein with Defendant Caroline L. Smith.

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

14. Between October and November 2007, Defendants Caroline Smith, Howard R. Smith, II, and Leslie R. Smith met with the Plaintiffs at the Plaintiffs' residence situated at 672 West White Bear Drive, Summit Hill, Pennsylvania, to discuss the possibility of the Plaintiffs purchasing the Property.

15. Defendant Caroline L. Smith wanted to sell the Property because she could no longer afford to pay the bills associated with the Property.

16. At Defendant Caroline L. Smith's request, Defendant Howard R. Smith, II contacted Plaintiff Lawrence M. McCullion to arrange the 2007 meeting at the McCullion residence.

17. At the 2007 meeting with the McCullions, the Defendants asked the McCullions if they would be willing to rent the Property to the Defendants in the event that the McCullions purchased said Property.

18. At the 2007 meeting with the McCullions, there was no discussion of any prior or current agreement of sale for the Property between Defendants Caroline L. Smith and Howard R. Smith, II.

19. At the 2007 meeting with the McCullions, no agreement was reached between Defendant Caroline L. Smith and the Plaintiffs.

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

21. Pursuant to the March 21, 2008 "Agreement to Sell Real Estate," the purchase price of one hundred six thousand dollars (\$106,000) consisted of a "gift of equity" in the amount of thirty one thousand eight hundred dollars (\$31,800), a "seller's assist" in the amount of six thousand dollars (\$6,000) and cash, certified or local cashier's check in the amount of seventy four thousand two hundred dollars (\$74,200). (Plaintiff's Exhibit 6).

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

23. Defendant Howard R. Smith, II was unable to tender the purchase price pursuant to either agreement with Defendant

Caroline L. Smith because he could not obtain a mortgage loan for the Property.

24. Sometime after executing the March 21, 2008 "Agreement to Sell Real Estate," Defendant Caroline L. Smith became upset with Defendant Howard R. Smith, II because he was not paying rent to live in the Property, nor was he paying the property taxes or garbage bills.

25. Defendant Caroline L. Smith then contacted Plaintiff Lawrence M. McCullion to discuss his purchase of the Property, and continued to contact him several times thereafter to further discuss such purchase.

26. Defendant Caroline L. Smith subsequently decided to sell the Property to the Plaintiffs because she felt that Defendant Howard R. Smith, II 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.

27. Defendant Caroline L. Smith then made arrangements with Plaintiff Lawrence M. McCullion to meet at Tommy's Restaurant in Coaldale, Pennsylvania, and, during that meeting, agreed to sell the Property to the McCullions.

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

29. After the meeting in Coaldale, Plaintiff Lawrence M. McCullion made arrangements to have an agreement of sale prepared, which agreement was then executed by Plaintiff Pamela J. McCullion.

30. On or about January 5, 2009, Defendant Caroline L. Smith had a meeting with Plaintiff Lawrence M. McCullion, at which her two daughters, Nettie Smith and Anna Smith Trotter, Steven Trotter and Nettie's boyfriend Ted were present.

31. The January 5, 2009 meeting was held at the residence of Nettie Smith, which is situated at 118 East Ruddle Street, Coaldale, Pennsylvania.

32. At this meeting, Defendant Caroline L. Smith 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 Defendant Howard R. Smith, II regarding the Property were discussed.

33. Defendant Caroline L. Smith executed the aforementioned agreement of sale voluntarily and of her own free will, and she was under neither duress nor the influence of alcohol or prescription medication which would affect her ability to understand her actions.

34. 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.

35. Plaintiff Lawrence M. McCullion tendered the down payment by check payable to Defendant Caroline L. Smith on January 5, 2009. (Plaintiff's Exhibit 4).

36. Defendant Caroline L. Smith subsequently cashed the check and used the funds to pay bills.

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

38. Following receipt of Attorney Velitsky's January 6, 2009 letter, Defendant Howard R. Smith, II contacted Plaintiff Lawrence M. McCullion to discuss the possibility of renting the Property after the McCullions purchased it. Defendant Howard R. Smith, II did not mention the existence of any prior or current agreements of sale regarding the Property between himself and Defendant Caroline L. Smith.

39. On March 4, 2009, Defendant Howard R. Smith, II filed a complaint against Defendant Caroline L. Smith in a civil action, docketed to Carbon County Case No. 09-0526, seeking specific performance of his agreements of sale with Defendant



Caroline L. Smith, and setting forth claims for repairs made to the Property and quantum meruit. (Plaintiff's Exhibit 10).

40. Defendant Caroline L. Smith subsequently transferred the Property to Defendant Howard R. Smith, II by deed dated March 12, 2009, and the civil action docketed to Carbon County Case No. 09-0526 was discontinued. (See Plaintiff's Exhibit 7).

41. Defendant Caroline L. Smith did not notify the Plaintiffs that she had transferred the Property to Defendant Howard R. Smith, II on March 12, 2009.

42. Closing with the McCullions did not occur on April 1, 2009 because of the prior transfer of the Property to Defendant Howard R. Smith, II.

43. A check in the amount of two thousand dollars (\$2,000), made payable to the order of the Plaintiffs and drawn on the account of Roberti & Roberti, LLC, was sent to the Plaintiffs on or about April 1, 2009. (Defendant's Exhibit 1).

44. Defendant Caroline L. Smith admitted that the two thousand dollar (\$2,000) check that was sent to the Plaintiffs was not her money, because she did not have anything to give back to said Plaintiffs.

45. Defendant Howard R. Smith, II testified that he provided the sum of two thousand dollars (\$2,000), which was sent to the Plaintiffs on behalf of Defendant Caroline L. Smith.

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

47. Neither Defendants Caroline L. Smith, Howard R. Smith, II nor Leslie R. Smith informed the Plaintiffs of the prior agreements of sale with Defendants Howard R. Smith, II and/or Leslie R. Smith at any time before said Plaintiffs executed their agreement of sale with Defendant Caroline L. Smith on January 5, 2009.

48. Neither of the Plaintiffs was aware of any written agreements of sale between Defendants Howard R. Smith, II and/or Leslie R. Smith and Defendant Caroline L. Smith at the time they executed their agreement of sale with Defendant Caroline L. Smith on January 5, 2009.

49. At the time he executed the agreement of sale with Defendant Caroline L. Smith on January 5, 2009, Plaintiff Lawrence M. McCullion was only aware of Defendant Howard R. Smith, II's purported verbal intent to purchase the Property.

50. Plaintiff Lawrence M. McCullion was not aware that an agreement of sale existed between Defendants Howard R. Smith, II and Caroline L. Smith until he received a copy of the complaint

which had been filed on March 4, 2009 by Defendant Howard R. Smith, II against Defendant Caroline L. Smith.

### **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 Defendants Howard R. Smith, II, Leslie R. Smith and Caroline L. Smith contained a settlement date, Defendants Howard R. Smith, II and Leslie R. Smith were required to perform within a reasonable time.

6. Since Defendants Howard R. Smith, II and Leslie R. Smith 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 Defendants Howard R. Smith, II and Leslie R. Smith have abandoned the aforementioned agreements with Defendant Caroline L. Smith due to failure of consideration, Defendant Caroline L. Smith effectuated a proper rescission of said agreements by executing the January 5, 2009 agreement of sale with 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 Defendant Caroline L. Smith and the Plaintiffs constitutes an enforceable contract.

7. Defendant Caroline L. Smith breached said agreement of sale with the Plaintiffs by conveying the Property to Defendant Howard R. Smith, II.

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. Empire Properties, at 674 A.2d at 304-05.

9. The Plaintiffs are entitled to a return of the money paid toward the purchase of the home since Defendant Caroline L. Smith 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 two thousand dollar (\$2,000) check, drawn on the account of Roberti & Roberti, LLC, which was sent to the Plaintiffs on or about April 1, 2009. (See Defendant's Exhibit 1).

10. Pennsylvania adheres to the "American Rule," which states that litigants cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear contractual or other agreement of the parties, or some other established exception. In re Farnese, 17 A.3d 357, 370 (Pa. 2011); Mosaica Academy Charter School v. Commonwealth Dept. of Education, 813 A.2d 813, 822 (Pa. 2002).

11. The January 5, 2009 agreement of sale does not provide an entitlement to attorney's fees as a remedy for its breach.

12. There is no applicable statutory or other established exception that would entitle the Plaintiffs to an award of counsel fees in this matter.

13. Therefore, the Plaintiffs are not entitled to recover attorney's fees as damages in this matter.

14. "It is a general rule in our judicial system, stemming from the Statute of Gloucester, 6 Edw. 1, c. 1 (1275), that costs inherent in a law suit are awarded to and should be recoverable by the prevailing party." De Fulvio v. Horst, 362 A.2d 1098, 1099 (Pa. Super. 1976).

15. Absent specific statutory authority otherwise, only the record costs of proceeding in court (such as filing fees) are recoverable, and not the actual costs of preparation, consultation, or fees generally (such as transcript costs and witness fees). Zelenak v. Mikula, 911 A.2d 542, 544-45 (Pa. Super. 2006).

16. "At law, the general rule is that costs follow as a matter of course, and the court has no discretion to award or deny them." Gold & Co., Inc. v. Northeast Theater Corp., 421 A.2d 1151, 1154 (Pa. Super. 1980).

17. Therefore, the Plaintiffs are entitled to record costs in the amount of four hundred sixty-nine dollars (\$469.00), representing the total disbursements made to the Prothonotary and Sheriff of Carbon County.

## **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 Defendant Caroline L. Smith.

7. Defendant Howard R. Smith, II must transfer the Property to Defendant Caroline L. Smith 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. Defendant Caroline L. Smith 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 refunded to them via check drawn on the account of Roberti & Roberti, LLC. (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. Defendant Caroline L. Smith acted contrary to her duty as a constructive trustee, as well as the Plaintiffs' 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  
Contractual Relationship**

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 tortious 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. Defendants Howard R. Smith, II and Leslie R. Smith held a good faith belief that their agreements of sale with Defendant Caroline L. Smith were valid, and that this 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, Defendant Howard R. Smith, II and Leslie R. Smith's conduct in instituting litigation to enforce their agreements of sale with Defendant Caroline L. Smith 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 Defendant Caroline L. Smith held a good faith belief that the prior agreements of sale with Defendants Howard R. Smith, II and Leslie R. Smith expired prior to January 5, 2009, the Plaintiffs have not established that Defendant Caroline L. Smith 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 Defendants Howard R. Smith, II and Leslie R. Smith made any false or material misrepresentations to the Plaintiffs upon which they relied to their detriment.

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

1. Although Defendants Howard R. Smith, II and Leslie R. Smith's Counterclaim does not specifically set forth the basis therefor, the averments generally set forth claims for unjust enrichment and tortious 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 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, Defendants Howard R. Smith, II and Leslie R. Smith are not entitled to an award of punitive damages.

### **VERDICT**

**AND NOW**, to wit, this 16<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.

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 fifteen (15) 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. At the time of closing, the record costs of four hundred sixty-nine dollars (\$469.00) shall be deducted from the purchase price of the Property.

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.**