

**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

**MEMORANDUM OPINION**

Serfass, J. - March 28, 2013

Here before the Court is Defendants' appeal of our Order dated December 28, 2012, denying Defendants' motion for post-trial relief. For the reasons that follow, we respectfully recommend that our Order be affirmed.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs Lawrence M. McCullion and Pamela J. McCullion commenced an action on April 30, 2009 seeking specific performance of an agreement of sale concerning the real property situated at 387 East White Bear Drive, Summit Hill, Pennsylvania (hereinafter "the Property"), 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 Defendant Caroline L. Smith. 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 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 parties' proposed findings of fact, conclusions of law and legal memoranda, we entered a Decision and Verdict on March 16, 2012, for Plaintiffs and against Defendants on all counts except for Counts V, VI and VII of Plaintiffs' Complaint and Count VI of Defendants' Counterclaim. We ordered Defendants to transfer the subject property to Plaintiffs for the purchase price of eighty thousand dollars

(\$80,000.00) within fifteen (15) days of the date of our Decision and Verdict.

Plaintiffs and Defendants filed motions for post-trial relief. "Defendants' Motion for Post Trial Relief and to Stay the Order in Equity to Convey Real Property" was filed on March 26, 2012, and "Plaintiffs' Post Trial Motions" were filed on April 4, 2012. After oral argument held on August 22, 2012, and upon consideration of the briefs of the parties, we denied the parties' post-trial motions in our Order dated December 28, 2012. Defendants have appealed that Order.

#### **DISCUSSION**

In their "Concise Statement of Matters Complained of," Defendants allege that we erred in the following respects:

- I. By finding that Howard Smith's Agreement with Caroline L. Smith dated March 21, 2008 was no longer binding on Caroline L. Smith on January 5, 2009;
- II. By failing to find that Howard Smith's acceptance of the demand for a return of two thousand dollars (\$2,000) in down money rescinded a prior agreement of sale; and
- III. By awarding a remedy in equity to Plaintiffs and against Defendants.

We will address each of Defendants' contentions seriatim.

### **I. The March 21, 2008 Agreement of Sale**

Defendants argue that we erred in reaching our Conclusion of Law No. 7, which states that Defendants Howard R. Smith, II and Leslie R. Smith had abandoned prior agreements with Defendant Caroline L. Smith due to failure of consideration, and that Defendant Caroline L. Smith had effectuated a proper rescission of those agreements by conveying the Property to the Plaintiffs.

As set forth in the Findings of Fact in our Decision and Verdict, we found the relevant facts to be as follows: Defendants Howard R. Smith, II and Leslie R. Smith moved into the Property on or about June 6, 2005, and continued to reside therein with Defendant Caroline L. Smith throughout the course of this litigation. 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). There was no closing date set pursuant to that agreement. 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.

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). That agreement contained a "time is of the essence" clause and did not specify a closing date. However, Defendant Howard R. Smith, II was subsequently unable to tender the purchase price pursuant to that agreement or the handwritten May 22, 2007 agreement. Thereafter, Defendant Caroline L. Smith became upset with Defendant Howard R. Smith, II because he was not paying rent, property taxes or garbage bills to live in the Property.

Defendant Caroline L. Smith then contacted Plaintiff Lawrence M. McCullion on multiple occasions to discuss Plaintiffs' purchase of the Property. Defendant Caroline L. Smith decided to sell the Property to 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.

On or about January 5, 2009, Defendant Caroline L. Smith met with Plaintiff Lawrence M. McCullion at 118 East Ruddle Street in Coaldale, Pennsylvania. At this meeting, Caroline L. Smith executed an agreement of sale, pursuant to which the Property was to be conveyed to Plaintiffs. The parties to that

agreement did not discuss any of Defendants' prior agreements of sale regarding the Property. Caroline L. Smith executed the January 5, 2009 agreement of sale voluntarily and of her own free will. The agreement of sale 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. Plaintiff Lawrence M. McCullion tendered the down payment by check payable to Caroline L. Smith on January 5, 2009. Caroline L. Smith subsequently cashed the check and used the funds to pay various bills.

The essential terms which must be set forth in an agreement for the purchase of real estate 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, 900 (Pa. Super. 2000). Where a real estate contract specifically states that time is of the essence, the time for settlement "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).

Even if an agreement does not specifically state that time is of the essence, "the time for completion is not unlimited and must be reasonable under the circumstances." Id. Likewise, 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. Where a purchaser of real estate fails to tender payment and thus defaults on an agreement, the vendor thereof may elect either to rescind or enforce the contract. Davis v. Laurenzi, 397 A.2d 1, 2 (Pa. Super. 1978).

In the instant case, neither the May 22, 2007 agreement of sale nor the March 21, 2008 agreement of sale for the Property contained a settlement date; therefore, we must presume that each agreement was intended to be consummated within a reasonable amount of time. Further, the March 21, 2008 agreement of sale contained a "time is of the essence" clause, and Caroline L. Smith did not, through her conduct, treat the agreement as if it were still enforceable or act to extend the terms thereof. Instead, after the expiration of a reasonable amount of time within which neither Howard R. Smith, II, individually, nor Howard R. Smith, II and Leslie R. Smith, jointly, tendered the agreed-upon purchase price, Caroline L. Smith acted to rescind the contract by tendering the Property to Plaintiffs.

Because Howard R. Smith, II and Leslie R. Smith failed to tender the purchase price to Caroline L. Smith pursuant to either agreement before January 5, 2009, they did not perform on those agreements within a reasonable amount of time. Thus, they were in default on the agreements of sale, and Caroline L. Smith was within her rights to choose either to enforce or to rescind those agreements. In accordance with the foregoing, Caroline L. Smith was entitled to do so and the prior agreements were not binding on her at the time she executed the January 5, 2009 agreement with Plaintiffs.

## **II. Howard R. Smith's Return of Down Money**

Defendants argue next that Defendant Caroline L. Smith's agreement with Plaintiffs was not enforceable because Howard R. Smith, II returned two thousand dollars (\$2,000.00) in down money to Plaintiffs on April 1, 2009, thus canceling the agreement of sale.

We found that the relevant facts were as follows: At Caroline L. Smith's request, Attorney Joseph J. Velitsky sent Howard R. Smith, II a letter dated January 6, 2009 informing him that Caroline L. Smith was selling the Property to Plaintiffs and that he had to vacate said Property on or before March 1, 2009. Thereafter, despite the execution of the agreement with Plaintiffs, Caroline L. Smith transferred the Property to Howard R. Smith, II by deed dated March 12, 2009. Caroline L. Smith did



not notify Plaintiffs that she had transferred the Property to Howard R. Smith, II. Closing on the sale of the Property necessarily did not occur on April 1, 2009 because the Property had already been transferred to Howard R. Smith, II. Howard R. Smith, II returned the two thousand dollar (\$2,000) down payment which Plaintiffs had tendered on January 5, 2009 by check dated April 1, 2009. The down money was not returned from Caroline Smith's funds because Caroline L. Smith did not have any funds to return to Plaintiffs.

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). 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). In order for a valid contract to be replaced or altered, the four elements of a novation must be met: the displacement and extinction of a valid contract, the substitution for it of a valid new contract, either between the same parties or by the introduction of a new creditor or debtor, a sufficient legal consideration for the new contract, and the consent of the parties. Yoder v. T. F. Scholes, Inc., 404 Pa. 242, 245, (1961). Novation requires that there be a meeting of the minds of all parties to the contract as to the substitution

of a new agreement for the prior agreement. Peoples Nat. Bank of Ellwood City v. Weingartner, 33 A.2d 469 (Pa. Super. 1943), citing Wheatland Tube Co. v. McDowell & Co., 317 Pa. 295, 176 A. 217 (1934).

As discussed hereinabove, a valid contract for the sale of the Property was formed on January 5, 2009 between Plaintiffs and Caroline L. Smith. The parties mutually assented to the terms, to wit, the sale of the Property to Plaintiffs for eighty thousand dollars (\$80,000.00), with a two thousand dollar (\$2,000.00) down payment, and all parties had the capacity to form the contract. The evidence does not reflect that any of the elements for a novation of that contract were met in this case. Plaintiffs did not agree, by accepting a return of the down money after the Property had already been transferred to Howard R. Smith, II, that the pre-existing valid contract for Plaintiffs' purchase of the Property would be displaced or extinguished. There was no agreement or meeting of the minds as to the formation of any valid new contract whereby Howard R. Smith, II would purchase the Property. There was no consideration paid for the formation of any such contract. The transfer of the property to Howard R. Smith, II on March 12, 2009 took place without the consent or knowledge of Plaintiffs. Therefore, none of the elements for a novation were met, no new agreement for the transfer of the Property was formed, and the

January 5, 2009 agreement of sale was still in force on April 1, 2009. As a result, we submit that we did not err in failing to find that the return of Plaintiffs' down payment invalidated the January 5, 2009 agreement of sale.

### **III. Equitable Remedies**

Defendants argue finally that, for numerous reasons, no equitable relief should have been awarded to Plaintiffs. Many of Defendants' contentions in this regard have been addressed hereinabove. We submit that the remaining allegations are without merit, and that equitable relief was an appropriate remedy under the facts of this case.

Specific performance of a contract is a valid remedy where a real estate contract "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) This relief may be awarded "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). Nevertheless, an award of specific performance "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). Specifically, "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).

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). When such a trust is formed, "the sole responsibility of a constructive trustee is to surrender the property to the one on whose behalf the constructive trust is raised." Id.

Plaintiffs in the instant case had a valid and enforceable contract to purchase the Property. Between the execution of that contract on January 5, 2009 and the agreed-upon closing date on April 1, 2009, Caroline L. Smith breached the contract and transferred the Property to Howard R. Smith, II. We found that this action was contrary to Caroline L. Smith's duty as a constructive trustee and to Plaintiffs' equitable ownership of the Property. Caroline L. Smith's only obligation was to successfully surrender the Property to Plaintiffs upon Plaintiffs' tendering of the full purchase price on April 1, 2009. Because of Caroline L. Smith's transfer of the Property

before that date, she was unable to surrender the Property, thereby breaching her duty.

No adequate remedy at law was available to Plaintiffs, and they cannot simply purchase an identical property on the open market. Because their January 5, 2009 agreement for purchase of the Property was complete and certain, because Caroline L. Smith committed a clear breach of that agreement, and because Howard R. Smith, II had notice, prior to his acceptance of the transfer of the Property on March 12, 2009, that the January 5, 2009 agreement existed, Plaintiffs are clearly entitled to specific performance of the agreement. Therefore, we submit that our award of equitable relief was proper and that Defendants' appeal in this regard must be denied.

#### **CONCLUSION**

For the foregoing reasons, we submit that Defendants' appeal is without merit and we respectfully recommend that our Order dated December 28, 2012 be affirmed accordingly.

**BY THE COURT:**

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**Steven R. Serfass, J.**