

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>JANICE L. FOSTER and</b>	:	
<b>TODD W. FOSTER,</b>	:	
<b>Plaintiffs</b>	:	
	:	
<b>v.</b>	:	<b>No. 06-01,466</b>
	:	<b>CIVIL ACTION</b>
<b>NORTH CENTRAL REALTY, INC. and</b>	:	
<b>LEROY STOLTZFUS,</b>	:	
<b>Defendants</b>	:	<b>NON-JURY TRIAL</b>

**OPINION AND ORDER**

This matter is before the Court for non-jury trial disposition. Trial in this matter was held on June 18, 2007. The Plaintiffs are seeking the return of a \$20,000.00 deposit they made to the Defendant(s) for breach of contract, misrepresentation, unjust enrichment, attorney’s fees for misrepresentation and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (hereinafter “CPL”), and treble damages in the amount of \$60,000.00 for violations of the CPL. Conversely, the Defendants claim that the Plaintiff is guilty of breach of contract and is seeking specific performance and award of costs and attorneys fees. After a review of the evidence presented at the trial, the Court makes the following findings of fact.

***Findings of Fact***

1. The Plaintiffs are two adult individuals, residing within the Commonwealth, who were married April 3, 2006; the parties are currently separated.
2. Defendant Leroy Stoltzfus is an adult individual who, *inter alia*, is the President of Defendant North Central Realty, Inc.

3. Defendant North Central Realty, Inc. (hereinafter “North Central”) is a corporation incorporated under the laws of Pennsylvania; as of January 2006, President Leroy Stoltzfus is the sole shareholder in North Central.
4. Aware that the Plaintiff and her then fiancé were looking to purchase land, sometime in late 2005/2006, Defendant Leroy Stoltzfus discussed with Plaintiff Janice Foster a parcel of land in Brady Township that he, acting on behalf of Defendant North Central, intended to purchase at an auction in the ensuing months.
5. The land Defendant Stoltzfus discussed with the Plaintiffs was a large 23-acre plot consisting of a smaller rectangular plot to the north and a larger rectangular plot located southeast of the northern plot. The two plots were “connected” by a narrow strip of land running from the southeast corner of the northern plot to the northwest corner of the southern plot.
6. Defendant Stoltzfus, acting as a representative of North Central, personally showed the Plaintiffs the parcel of land at issue in late 2005/early 2006; he presented the parcel as a 10-acre plot surrounded on all sides by woodland - neither Defendant Stoltzfus nor Defendant North Central owned the land at issue at this time.
7. The Plaintiffs were interested in the size of the parcel and most importantly, the secluded nature of the parcel; Defendant Stoltzfus was aware of these particular interests.
8. The per acre market price for similar land in the area of the parcel at issue was around \$7,000.00; Defendant Stoltzfus, acting as a representative of

North Central, was offering the land at issue for about \$10,000.00 per acre.

Because of the nature of the land (i.e. the secluded nature), the Plaintiffs were willing to pay this amount.

9. On January 17, 2006 the Plaintiffs and Defendant North Central Realty, Inc. entered into a written agreement for the purchase of the parcel at issue (hereinafter, “the Agreement”).

10. The Agreement states, in relevant parts,

. . . Seller [North Central Realty, Inc.] agrees to sell and convey to Buyers [Janice Catherman<sup>1</sup> and Todd Foster], who agree to purchase a portion of real estate consisting of ten (10) acres more or less, or property acquired by North Central Realty, Inc. . . . more particularly bounded and described in Exhibit “A”. . .

. . .

Buyers shall cause the purchase price to be paid to Seller as follows

- (a) Twenty Thousand and 00/1000 Dollars (\$20,000.00) to the Seller upon the execution and delivery of this Agreement.
- (b) The balance of the purchase price i.e. Eighty Thousand and 00/100 Dollars (\$80,000.00) shall be paid to the Seller at the time of closing.

. . .

Buyers consent to the Seller’s use of the Twenty Thousand and 00/1000 Dollars (\$20,000.00) escrow deposit for the purpose of acquiring the property from the [original owners].

. . .

Condition Precedent

A. Seller and Buyers agree that Seller is to obtain a subdivision approval for the parcel of land with required conditions that are acceptable by the Buyers.

B. In the event that the terms and conditions of the subdivision approval are not acceptable to the Buyer, Buyer has the option to terminate this Agreement and each party agrees to release each other

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<sup>1</sup> The parties entered into the Agreement prior to the Plaintiffs’ marriage and Ms. Catherman’s taking of Mr. Foster’s surname.

from any and all claims, liabilities, etc. and the Buyer's deposit is to be returned.

11. Defendant North Central Realty, Inc. acquired the parcel of land at issue, as described in paragraph 5 *infra*, on or about February 4, 2006.
12. At some point prior to closing, Plaintiff Todd Foster visited the parcel and, based on the placement of surveying pins and flags, visited the municipal building where, after viewing the subdivision plan regarding the parcel at issue, learned that the parcel he had contracted to purchase was 8 acres not 10 and was not surrounded on all sides by woodlands.
13. Prior to the May 24, 2006 closing date, the Plaintiff informed Defendant Stoltzfus, acting as a representative of North Central, several times, that, based on the "condition precedent" in their Agreement, they would not be following through with the closing and therefore were entitled to the return of their \$20,000.00 deposit; the Defendant, acting as a representative of North Central, although aware of the Plaintiffs demands, has not, to date, returned the Plaintiffs' deposit monies.

***Conclusions of Law***

1. At all times relevant to the instant matter, Defendant Stoltzfus acted on behalf of Defendant North Central; accordingly, he is not personally liable for any alleged wrong acts of Defendant North Central.
2. Defendant Stoltzfus, acting as President of Defendant North Central did not misrepresent any information to the Plaintiffs.

3. Neither Defendant Stoltzfus nor Defendant North Central has been unjustly enriched.
4. Defendant Stoltzfus, acting as President of Defendant North Central, nor Defendant North Central have violated the CPL.
5. The Plaintiffs and Defendant North Central entered into a valid agreement for the purchase of land.
6. The Plaintiffs have not breached the Agreement between the parties.
7. The Defendants are not entitled to specific performance.
8. The Plaintiffs properly notified the Defendants, before the closing date, with a justifiable reason, under the condition precedent of the Agreement, to terminate the Agreement.
9. Defendant North Central is in breach of the Agreement between the parties.
10. Pursuant to the condition precedent in the Agreement, the Plaintiffs are entitled to the return of their deposit monies from the Defendant North Central.

***Discussion***

After consideration of the testimony presented at trial, it is clear to the Court that Defendant Leroy Stoltzfus, at all relevant times, was acting as a representative of North Central Realty, Inc. and not on his own behalf. In order to hold Defendant Stoltzfus personally liable as president and share stock holder of Defendant North Central, the Plaintiffs would have to allege and prove more than a mere assertion that “Defendant North Central Realty, Inc. is the alter ego of Defendant Stoltzfus, as [Defendant] Stoltzfus dominates and controls [Defendant] North Central to the degree that the corporate form is a sham.” The Court finds the Defendant North

Central is an unexceptional example of a closely held corporation. Although Defendant Stoltzfus acted on Defendant North Central's behalf, the Court does not find that this fact is evidence of a "corporate sham" but instead evidence of normal corporate dealings.

***Defendant North Central did breach the agreement between the parties***

The Plaintiffs argue that the Defendant failed to, under paragraph 4 of the Agreement (entitled "condition precedent"), "obtain a subdivision approval for the parcel of land with required conditions that were acceptable to them" and that as a result, they, as was their right to do so under that same provision of the Agreement, terminated the Agreement and are entitled to the return of their deposit monies. The Restatement 2d of Contract § 224 states that a "condition" (here, subdivision approval of the parcel with conditions acceptable to the buyers) denotes an event which qualifies a duty under a contract (here, the Plaintiff's duty to remit the remainder of the payment for the parcel). However, "[i]f a party fails to fulfill a condition precedent to the performance of the contract . . . the other party is excused from performance." *Atlantic LB, Inc. v. Vrbicek*, 2006 PA Super. 207, P22, 905 A.2d 552, 559 (Pa. Super. Ct. 2006).

Here, the Court finds credible the testimony from both Plaintiffs that the "required conditions that were acceptable to them," in regards to the parcel, were the acreage and the seclusion of the parcel; two characteristics that the Defendant will not be able to provide irrespective of whether the subdivision is ever approved. Because the Defendant cannot adhere to the instant condition precedent, the Plaintiffs are excused from performance under the Agreement and are, pursuant to paragraph 4(B) of the Agreement, return of their deposit monies. When the Defendant failed to, upon the Plaintiffs request, return the deposit monies, it was in breach of the agreement.

***Defendant Stoltzfus, acting on behalf of North Central, did not engage in misrepresentation***

The Plaintiffs, in their Trial Memorandum, correctly cite the elements for a misrepresentation claim: (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 justifiably relying upon it (5) resulting in damage/injury as a proximate cause of said reliance. *Bortz v. Noon*, 556 Pa. 489, 499, 729 A.2d 555, 560 (Pa. 1999); citations omitted; Restatement 2d of Torts § 525. The Plaintiffs allege that Defendant Stoltzfus, acting as a representative of Defendant North Central, knowingly represented that the land at issue was 10 acres and surrounded on all sides by woodland (i.e. that the land was secluded) when in actuality the parcel, as shown to them by Defendant Stoltzfus, was 8 acres and not entirely secluded. The Plaintiffs go on to allege that said representations were made with the intent of inducing them to rely, to their detriment, and consequently enter into an agreement to purchase the land from the Defendant. Unfortunately, the Plaintiffs have failed to, by clear and convincing evidence, prove the aforementioned elements. Specifically, the Court finds credible Defendant Stoltzfus's testimony that he estimated the parcel at issue was 10 acres and entirely surrounded by woodlands based on the tax information and photographs of the entire parcel he, as a representative for North Central, was purchasing (the parcel at issue was one section of a larger parcel being purchased by Defendant North Central; *see*, paragraph 5 under "Findings of Fact", *infra*). This fact is supported by the language in the Agreement which states "10 acres, more or less" and the inclusion of the condition precedent (i.e. the Court believes that the inclusion of the condition precedent in the Agreement is evidence that both parties contemplated the possibility that following the subdivision, the dimensions of the parcel at issue

may not be what the Plaintiffs were seeking). Therefore, because the Court believes that Defendant Stoltzfus did not intentionally or recklessly mislead the Plaintiffs as to the size and configuration of the land, the Plaintiffs cause of action for fraudulent misrepresentation must fail.

***Defendant North Central has not been unjustly enriched***

“[I]t has long been held in this Commonwealth that the doctrine of unjust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract, regardless of how ‘harsh the provisions of such contracts may seem in the light of subsequent happenings.’ *Third National & Trust Company of Scranton v. Lehigh Valley Coal Company*, 353 Pa. 185, 44 A.2d 571, 574 (Pa. 1945); see also, *Schott v. Westinghouse Electric Corporation*, 436 Pa. 279, 259 A.2d 443, 448 (Pa. 1969); *Wingert et al. v. T. W. Phillips Gas & Oil Company*, 398 Pa. 100, 157 A.2d 92, 94 (Pa. 1959) (the doctrine of unjust enrichment applies only to situations where there is no legal contract.); *Durham Terrace, Inc. v. Hellertown Borough Authority*, 394 Pa. 623, 148 A.2d 899, 904 (Pa. 1959).” *Wilson Area Sch. Dist. v. Skepton*, 586 Pa. 513, 520, 895 A.2d 1250, 1254 (Pa. 2006).

Here, the Court finds, and both parties, by virtue of their pleadings and testimony at trial, that there was a valid written agreement; accordingly, the theory of unjust enrichment is, based on the instant facts, inapplicable.

***Defendant North Central did not violate the CPL***

The CPL is to be liberally construed so as to effectuate the legislatures’ purpose of preventing and deterring unfair or deceptive business practices. *Commonwealth v. Monumental Properties*, 329 A.2d 812 (Pa. 1974). Case law tells us that the underlying foundation of the act is fraud prevention, *Id.*; see also, *Weinburg v. Sun Company, Inc.*, 777 A.2d 442 (Pa. 2001), however, both the Pennsylvania Superior Court and the Commonwealth court of Pennsylvania



have weighed in on the issue of the pleading requirements of fraud regarding causes of action under the CPL; specifically, both Courts have ruled that a plaintiff need not establish all of the elements of common law fraud in order to bring a cause of action under the CPL. *Toy v. Metropolitan Life Insurance Company*, 863 A.2d 1 (Pa. Super. Ct. 2004) and *Commonwealth v. Percudani I*, 844 A.2d 35 (Pa. Commw. Ct. 2004), respectively. Although no recent decision of the Supreme Court of Pennsylvania has clarified which common law elements of fraud a plaintiff must establish regarding the individual subsections of 201-2(4) of the CPL, the Pennsylvania Superior Court, in *Toy*, citing a previous Pennsylvania Supreme Court decision, states, “[n]othing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation.” *Toy*, 863 A.2d at 10 (Pa. Super. Ct. 2004) citing *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001). In other words, “to establish a private right of action under the [CPL], a plaintiff must demonstrate that he/she detrimentally relied upon the deceptive practice of the defendant and that the plaintiff suffered harm as a result of this reliance.” *Toy*, 863 A.2d at 9 (Pa. Super. Ct. 2004), citations omitted.

Here, the Court has previously stated that it does not believe the Defendants intentionally or recklessly misled the Plaintiffs; i.e. the Defendants did not deceive the Plaintiffs. Therefore, because the Plaintiffs cannot show a “deceptive practice,” they cannot succeed with a claim under the CPL.

***The Plaintiffs did not breach the agreement between the parties and the Defendants are not entitled to specific performance of the agreement***

The Defendants claim that the Plaintiffs, by not remitting full payment for the land on the closing date because of what the Defendant characterizes as illegitimate bases to terminate the

agreement, are in breach of the agreement and, as a result, the Defendants are entitled to specific performance or, in the alternative, liquidated damages in the amount of the down payment (\$20,000.00); the Court respectfully disagrees. The Court finds that the Plaintiffs, pursuant to paragraph 4 of the Agreement, had a justifiable reason (i.e. the parcel at issue was not and can never be as the Plaintiff's believed; specifically, 10 acres of completely secluded land), with which they provided the Defendants timely notice of, to terminate the Agreement thereby entitling them to a return of their deposit monies.

**VERDICT**

**AND NOW**, this \_\_\_\_\_ day of July 2007, the Court hereby finds in favor of the Plaintiffs and against Defendant North Central Realty, Inc. with respect to Count I of the Plaintiffs complaint for breach of contract in the amount of \$20,000.00. The Court finds against the Plaintiffs on the remaining counts in their Complaint and against the Defendants on both their claims for specific performance and damages for breach of contract.

By the Court,

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Nancy L. Butts, Judge

xc: Robin A. Read, Esq.  
Jason F. Poplaski, Esq.  
Judges  
Nancy L. Butts, Judge  
Laura R. Burd, Esq. (Law Clerk)  
Gary L. Weber, Esq. (Lycoming Reporter)

