IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MUNCY HARDWOODS, INC,	:	
Plaintiff	:	**No. 06-01506**
	:	
vs.	:	
	:	
WILLIAM L. DITTMAR, MICHAEL L. WORTHY, JAMES M. CORL, individually And trading as DITTMAR FORESTRY, INC.,JOHN A. HARKER, DANIEL E. CUMMINGS, JAMES T. EPLETT and ROBERT E. HARKER, JR.,	:	**Civil Action - Law**
Defendants	:	**Non-jury Verdict**

NONJURY VERDICT

FINDINGS OF FACT

1. Prior to August 27, 2004, William L. Dittmar (hereinafter "Dittmar") and James M. Corl (hereinafter "Corl") became owners, as tenants in common, of a parcel of real property situate in Fishing Creek Township, Columbia County, Pennsylvania, bearing tax parcel number 15-19-010-00,000 (hereinafter the "Premises"). Dittmar and Corl obtained title to the Premises by deed, a copy of which was introduced into evidence as Plaintiff's Exhibit 8A.

2. Dittmar and Corl transferred a 1/3 interest in the Premises to Michael L. Worthy (hereinafter "Worthy) by deed a copy of which was introduced into evidence as Plaintiff's Exhibit 8B.

3. On August 27, 2004, James M. Corl, as agent for himself and Worthy and Dittmar and Dittmar Forestry Incorporation, executed a Timber Sale Agreement with Muncy Hardwoods, Inc., a true and correct copy of which was introduced into evidence as Plaintiff's Exhibit 1 (hereinafter the "Timber Sale Agreement") (N.T. 19-20).

4. The real property described in the Timber Sale Agreement marked Plaintiff's Exhibit 1 is the same real property which is referred to in paragraph 1 of these Findings as the Premises.

5. The trees to be harvested pursuant to the terms of the Timber Sale Agreement were trees painted with orange paint. Those trees were marked by Corl and Dittmar. Corl prepared an inventory of those trees, a copy of which was introduced into evidence as Plaintiff's Exhibit 10 (N.T. 20).

6. Pursuant to the terms of the Timber Sale Agreement, Plaintiff paid to Worthy and Dittmar and Corl the sum of $85,000.00 (N.T. 23).

7. The Timber Sale Agreement states:

> A. The SELLER agrees to the following:
> 1. To guarantee title to the forest products covered by this agreement and to defend it against all claims at SELLERS expense and any claimed inaccuracy of the description of lot lines as described to the PURCHASER and to indemnify the PURCHASER against any losses incurred by the PURCHASER as a result of such inaccuracies.

8. Prior to March 28, 2005, Harker observed a sign posted by the real estate office of Jack Gaughen advertising the availability for purchase of real property. Harker contacted Jack Gaughen Real Estate and learned that the real property which was available for sale was the Premises (N.T. 85-89).

9. Harker initially offered $265,000 for the Premises.

10. After Harker was informed the Premises was subject to a conservation easement and a timber contract, Harker reduced the offer to $240,000. The reduction in the offer was primarily, if not exclusively, due to the timber contract.

11. All of Harker's negotiations with regard to the purchase of the Premises were on his own behalf and as an authorized representative of co-defendants Daniel E. Cummings and James T. Eplett and Robert E. Harker, Jr. (N.T. 90-93).

12. Dittmar and Worthy and Corl as sellers of the Premises and Harker and Daniel E. Cummings and James T. Eplett and Robert E. Harker, Jr., as buyers of the Premises entered into a written Agreement of Sale introduced into evidence as Plaintiff's Exhibit 5. In connection with negotiations and execution of documents related to the sale and purchase of the Premises, Harker was the authorized representative of all four of the purchasers, and Worthy was the authorized representative of all three of the sellers (N.T. 90-93).

13. At the time that Harker signed Plaintiff's Exhibit 5, he knew of the existence of an outstanding timber sale contract, but he had not received a copy of Exhibit 1 (N.T.107-109).

14. Worthy executed an Addendum to the Agreement of Sale in the form introduced into evidence as Plaintiff's Exhibit 6. Harker counter-signed the Addendum, as introduced into evidence as Plaintiff's Exhibit 7. After Harker counter-signed the Addendum, he wrote "No re-entry" on his copy, which was not the copy he returned to the sellers (N.T.119-123 and 99-100).

15. The agreed upon language of the Addendum states:

> "Timber rights are reserved on property
> as per contract dated
> 1 time only
> (8/31/06)"

16. The Timber Sale Agreement was dated August 27, 2004, but paragraph B.2.b provided that Plaintiff was to "cut and remove said timber before 8/31/06."

17. William L. Dittmar and Michael L. Worthy and James M. Corl transferred the Premises to John A. Harker (hereinafter "Harker") and Daniel E. Cummings and James T. Eplett and

Robert E. Harker, Jr., by deed introduced into evidence as Plaintiff's Exhibit 8.

18. Plaintiff did not receive any notice of the sale of the Premises from Dittmar and Worthy and Corl to Harker and Cummings and Eplett and Harker, Jr. (N.T. 58).

19. Muncy Hardwoods, Inc. began the cut after the Premises were transferred to Harker.

20. In the fall of 2005, Tyrone Lauer spoke with John Harker about the timber cut.

21. Tyrone Lauer, a principal of Plaintiff, told John Harker that Muncy Hardwoods, Inc. had finished the cut for 2005 and would return in the spring of 2006 to complete the contract.

22. At that time, John Harker never voiced any objection to Tyrone Lauer regarding Muncy Hardwoods, Inc. completing the contract in 2006.

23. In the spring of 2006, Muncy Hardwoods, Inc. advised the Harker Defendants that Muncy Hardwoods, Inc. wanted to complete the cut.

24. The Harker Defendants refused Muncy Hardwoods, Inc.'s request to finish the cut.

25. The remaining orange-painted trees at the Premises have a value of $46,439.14. (N.T. 46.)

26. Plaintiff incurred expert witness fees in the amount of $1,500 and attorney fees and costs in the amount of $13, 696. 54.

CONCLUSIONS OF LAW

1. William L. Dittmar, Michael L. Worthy, and James M. Corl, individually and trading as Dittmar Forestry breached paragraph A.1. of the Timber Sale Agreement by failing to guarantee title to the forestry products.

2. As a result of this breach, Plaintiff sustained damages of $46,439.14, for the value of the remaining timber that they could not harvest.

3. Defendants Dittmar, Worthy, Corl and Dittmar Forestry are not responsible for

expenses and attorney fees because no third party made any claim against Plaintiff.

4. John Harker, individually and as representative of Daniel E. Cummings, James T. Eplett and Robert E. Harker, Jr., breached the terms of the Addendum when he refused to allow Plaintiff access to the Premises to harvest the remaining orange-painted trees in the spring of 2006.

5. As a result of Harker's breach, Defendants Dittmar, Worthy, Corl and Dittmar Forestry sustained damages in the amount of $46, 439.14.

DISCUSSION

There were several legal issues and credibility determinations that factored into the Court's findings of fact and conclusions of law. The first such issue related to Plaintiff's claim for attorney fees and expenses. The Court slightly reduced the amount of attorney fees claimed by Plaintiff for two reasons: (1) there were a few entries for mailing and faxing that the Court felt should have been performed by and billed at the rate of support staff; and (2) a response and brief to the Harker Defendants' motion in limine was unnecessary as it clearly was not a motion in limine but rather an untimely summary judgment motion, which the Court summarily denied. Although the Court did not award these items to Plaintiff, it made a factual finding regarding their amount in the event this decision is appealed.

The Court did not award these items to Plaintiff because it found that the contract language contemplated a claim by a third party against Plaintiff. Initially, the Court notes the Timber Sale Agreement was a form contract printed on Plaintiff's letterhead. From this one can infer that Plaintiff drafted the agreement; thus, any ambiguities must be construed against Plaintiff. Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 588 Pa. 470, 480-81, 905 A.2d 462, 468 (2006); Shovel Transfer & Storage, Inc. v. PLCB, 559 Pa. 56, 67, 739 A.2d 133,

139 (1999). The Timber Sale Agreement stated that the sellers agreed to guarantee title to the forest products covered by the agreement and to **defend** it against all claims at sellers' expense and any claimed inaccuracy of the description of lot lines as described to the PURCHASER and **to indemnify the PURCHASER against any losses incurred by the PURCHASER as a result of such inaccuracies**"(emphasis added). The Court found that this language was intended to cover claims made by third parties against Plaintiff in the event Plaintiff cut trees that it believed were on the Premises based on the sellers' description of the Premisis, but were actually on the land of an adjoining landowner. That is not the situation in this case. Here, the sellers (Worthy, Dittmar, Corl and Dittmar Forestry) sold the property subject to the Timber Sale Agreement. Plaintiff is prosecuting an action against the sellers because Plaintiff was prohibited from harvesting all the timber products and against the buyers of the property (Harker, Cummings, Eplett and Harker), who refused to let them on the property in May, 2006.

The other legal issue in this case involved the interpretation of the Addendum to the Agreement of Sale that transferred the Premises from Worthy, Ditmar, and Corl (the Dittmar Defendants) to Harker, Cummings, Eplett and Harker (the Harker Defendants). This issue centered on the meaning of the phrase "1 time only" in the Addendum. The Harker Defendants claimed the phrase meant one continuous cut by Plaintiff, i.e., once Plaintiff removed its equipment from the property it could not come back onto the property. The Dittmar Defendants contended that this phrase simply meant the property was subject only to this one contract and Plaintiff could not come back onto the property years later to perform another similar cut.

Several factors went into the Court finding in favor of the Dittmar Defendants and

against the Harker Defendants. First, the Court considered the credibility determination between Tyrone Lauer and John Harker regarding a conversation in the fall of 2005 about the Plaintiff returning to the property in the spring of 2006 to finish the cut. Tyrone Lauer testified that he had a conversation with John Harker where he told Harker the loggers would return in the spring of 2006 to complete the cut and Harker never voiced any objection to them returning. Harker testified that no such conversation took place and Lauer was lying. The Court found Lauer's testimony credible and did not believe Harker. Lauer was straight-forward in his testimony and did not have any apparent reason to lie. Furthermore, Harker prepared a timeline that was introduced as Plaintiff's Exhibit 11, which contained entries for 5/10/06 and 5/11/06. The 5/10/06 entry stated: "No word from loggers since 10/20/05." The 5/11/06 entry said: "Loggers called wanting to get back on property." If Harker did not have the conversation to which Lauer testified, there was no reason for the first entry, as Harker would not have expected to hear from the loggers at all after 10/20/05.

The second factor that contributed to the Court's finding against the Harker Defendants was the fact that Harker negotiated a drop in the price paid for the Premises due to the timber contract. Harker tried to claim at trial that the price change was due to a conservation easement; however, Harker did not mention the conservation easement when he was questioned about the price change at his deposition. Furthermore, it is apparent from the evidence as a whole that the conservation easement, including exhibit Plaintiff's Exhibit 4, that Harker received further information about the conservation easement and thereafter it was not a problem or factor.

The final credibility determination that factored in the Court's decision dealt with the testimony of Harker as compared to Worthy, Lisa Fraker (the Dittmar Defendants' realtor)

and Reba Pace (the Harker Defendants' realtor). Harker testified that he wanted the language '1 time only' inserted in the addendum so that the loggers could only enter for one continuous cut and once they left they would not be permitted to re-enter the property. Harker hoped that this language would reduce the length of the Timber Sale Agreement so the Harker Defendants could begin hunting on the property as soon as possible. In his timeline (Plaintiff's Exhibit 11), Harker wrote the following entry: "4/14/05- signed addendum to one time only for loggers to cut so that we could start to use our land for hunting purposes. Realtor was under same impression as us that once loggers started they would stay until completion." Unfortunately, no one else's testimony supported Harker's. Reba Pace testified that she knew Harker and his friends were concerned about the length of the timber contract and hunting on the property, but she didn't have any part of any discussion about the loggers coming in, doing their job and getting out. Worthy and Lisa Fraker both testified that the reason the one time only language was inserted into the Addendum was because Harker was concerned that the loggers had the right to come back onto the property fifteen or twenty years later and again cut off the larger diameter trees.

Under the circumstances of this case, Worthy and Fraker's testimony made more sense. Harker knew that the property was subject to a timber contract, but he never asked for or saw the actual Timber Sale Agreement. It would not make sense for Worthy and Fraker to agree to 'shorten' the Timber Sale Agreement when such a clause could subject them to liability to Plaintiff and the whole purpose of the Addendum was to protect them from such a possibility by making sure that the Harker Defendants took the property subject to the Timber Sale Agreement. Harker's interpretation also would render meaningless the inclusion of the date the contract expired, 8/31/06, because the only way Plaintiff could avail

itself of the full term of the contract would be to harvest the trees throughout the winter. Given Lauer's testimony that the land was steep and you do not work steep ground in the winter (N.T. 181), this scenario would be highly unreasonable and impractical.

ORDER

AND NOW, this ___ day of November 2007, after a nonjury trial held September 14, 2007 and October 25, 2007, it is ORDERED and DIRECTED as follows:

The Court finds in favor of Plaintiff Muncy Hardwoods and against Defendants William L. Dittmar, James M. Corl, Michael L. Worthy and Dittmar Forestry, Inc. in the amount of $46,439.14.

The Court finds in favor of Defendants William L. Dittmar, James M. Corl, Michael L. Worthy and Dittmar Forestry, Inc. and against Defendants John A. Harker, Daniel E. Cummings, James T. Eplett and Robert E. Harker, Jr. in the amount of $46,439.14.

By The Court,

_____
Kenneth D. Brown,
President Judge

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