IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

MICHAEL LANDER and DAVID STINE	:	NO. 07-00368
	:	
v.	:	
	:	
	:	CIVIL ACTION - LAW
DOROTHY DANGLE, formerly,	:	
DOROTHY FINK	:	

OPINION

Plaintiff instituted the above captioned matter with the filing of a two (2) count Complaint against Defendant. The Complaint arose out of a land transaction entered into by the parties. Plaintiff asserts that Defendant is obligated to maintain the access road to Plaintiff's property in accordance with a certain standard. Plaintiff sought a declaratory judgment that "Defendant is obligated to effectuate specified improvement, so that the roads meet a minimum standard of adequacy for their intended purpose." Plaintiff also asserted that "Defendant must complete the improvements in order to fulfill the implied promise made to Plaintiffs that the lots purchased by Plaintiff, expressly bounded by and served by streets created by Defendant, will in fact be served by streets suitable for their intended purpose." Defendant filed Preliminary Objections to Plaintiff's Complaint which were overruled. Defendant then filed a Motion in Limine to Preclude Expert Testimony. Oral argument was held and an Order was entered on September 11, 2008 denying Defendant's Motion in Limine and ordering Defendant to file a Motion for Summary

Judgment within 10 days of the order. Defendant filed a Motion for Summary Judgment on September 22, 2008. Oral argument on Defendant's Summary Judgment Motion was held on November 24, 2008. This Opinion concerns that motion.

DISCUSION

Defendant asserts that she is entitled to summary judgment as there are no genuine issues of material fact. Plaintiff argues that the submission of an affidavit on behalf of Mr. and Mrs. Stine creates a genuine issue of material fact. The affidavit avers that: (1) Dorothy Dangle verbally and specifically told us, regarding the interior roads in the Development where we bought a lot, that she intended to build up the roads to Township specifications and have them taken over by the Township; (2) Dorothy Dangle did not do that, and the roads have no paving or essential stormwater management facilities; and (3) The Fink Drive ices up in winter and sometimes cannot even be used.

Summary Judgment may be properly granted "…when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Rauch v. Mike-Mayer, 783 A.2d 815, 821 (Pa. Super. 2001). The movant bears the burden of proving that there are no genuine issues of material fact. Id. In determining a motion for summary judgment, the court must examine the record "in the light most favorable to the non-moving party, accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences." Godlewski v. Pars Mfg. Co., 597 A.2d 106, 107 (Pa. Super. 1991). Summary judgment may be properly entered if the evidentiary record "either (1) shows

that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense." Rauch at 823-24.

Plaintiff's affidavit faces insurmountable legal hurdles that cause it to be insufficient to create a genuine issue of material fact. The affidavit in question fails to state when and under what circumstances Dorothy Dangle allegedly made assertions regarding building up the roads to Township specifications. This Court must then assume that the alleged assertions were made either prior to or after the entering into of agreement for the sale of land between Plaintiff and Defendant. If the alleged assertions were made prior to the agreement, the Doctrine of Merger applies. The Pennsylvania Supreme Court in Elderkin restated the well-settled Doctrine of Merger which holds that "all warranties and representations in connection with a sale or other transaction made prior to or contemporaneous with a deed are merged into the deed and that unless therein expressly provided for, they are forever lost." Elderkin at 118.447 Pa. 118, 288 A.2d 771 (Pa. 1972). *Citing to* Dick v. McWilliams, 291 Pa. 165, 139 Atl. 745 (1927); Stoever v. Gowen, 280 Pa. 424, 124 Atl. 684 (1924); Dobkin v. Landsberg, 273 Pa. 174, 116 Atl. 814 (1922). Therefore, if the alleged assertions took place prior to the agreement, they would then be merged into the agreement. Because the agreement did not provide for the building up of roads to Township specifications those alleged assertions are forever lost.

In the alternative, this Court could consider that the alleged assertions took place after the Plaintiff and Defendant entered into the agreement. If that were the case, there would be a lack of consideration to establish that a contract was indeed entered into. Without consideration, there can be no contract, and without a contract, there can be no

legal remedy for Defendant's failure to execute on its promise. Therefore this Court finds that there is no genuine issue of material fact.

Now that the Court has found that there is no genuine issue of material fact, it must determine whether Defendant is entitled to Summary Judgment as a matter of law. Rauch at 821.

Defendant argues that Plaintiff's have failed to demonstrate how they are entitled to the relief they are seeking. Plaintiff argues that there is an implied warranty in the private road access that is part of a home lot sale. Plaintiff cites to Elderkin to support this proposition. Elderkin, 447 Pa. at 118. In that case, the parties contracted that Buildor-Vendor would provide a water supply that would be by "individual (private) system". After several tests, the purchasers discovered the water system was contaminated. In finding that the Buildor-Vendor breached the Warranty of Habitability, the Court stated, "…it goes without saying that a potable water supply is essential to any functional living unit; without drinkable water, the house cannot be used for the purpose intended." Id. at 777.

This Court is unwilling to establish precedent for the concept that an access road allegedly in need of repair violates an Implied Warranty of Habitability in a home. In Plaintiff's affidavit they allege "The Fink Drive ices up in winter and **sometimes** cannot even be used." (Emphasis Added) There are countless numbers of individuals who live in higher elevations or atop steep inclined driveways that, come winter, suffer from the same inconvenience that the Plaintiffs allege. To find that a difficult and even sometimes impossible traversing of an access road somehow prohibits one from enjoying the purposes for which their home is intended would strain the logic of an Implied Warranty of

Habitability. This Court finds absolutely no correlation between an individual being deprived of potable water, without which they could not survive, and an individual being compelled to traverse an icy access road.

Plaintiff further argues that references to "Township Road" and "Proposed Township Road" are additional warranties of meeting township standards. Defendant argues that he is under no obligation to improve the roads in question as the Township did not require him to do so.

When Defendant sought to have the subdivision which created Plaintiff's property approved by the Township, the Township approved the subdivision without restrictions or requirements as to the maintenance, repair or improvement of the roads in question. When the Plaintiff and Defendant entered into agreement, the parties themselves did not agree to any restrictions or requirements as to the maintenance, repair or improvement of the roads in question. The only evidence to the contrary is a signed affidavit regarding statements which this Court has already determined to have merged into the agreement or in the alternative statements which failed to create an enforceable contract. This Court will not hold Defendants to a legal responsibility which was not imposed by the laws of the Commonwealth nor created by the agreement of the parties. Recognition of a new legal theory needs to come from our appellate courts, not this Court. Therefore the Court finds Plaintiff's argument to be without merit and finds Defendant has met his burden of proving he is entitled to Summary Judgment as a matter of law.

O R D E R

AND NOW, this __ of November, 2008, it is hereby ordered and directed that Defendant's Motion for Summary Judgment is hereby GRANTED and Plaintiff's Complaint is hereby DISMISSED.

BY THE COURT,

_____
Judge Richard A. Gray

cc: Marc S. Drier, Esquire
J. Michael Wiley, Esquire
Gary Weber, Esquire