IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

THE PARK HOME, Plaintiff	:	NO. 06-01,101
	:	CIVIL ACTION - EQUITY
vs.	:	
COUNTY OF LYCOMING and LYCOMING COMMUNITY CARE, INC., Defendants	:	Motion for Summary Judgment

OPINION AND ORDER

Before the Court is the Motion for Summary Judgment filed by Defendant Lycoming Community Care, Inc. (hereinafter "LLC") on March 7, 2008. Argument on the motion was heard May 2, 2008.

In a series of transactions in August 2002, real estate was sold by Defendant Lycoming County to Defendant LCC and then both that real estate and the improvements on the real estate[1] were sold by LCC to Plaintiff. Plaintiff now seeks rescission of the transactions, reformation of the deed, and/or unspecified damages arising out of the transactions because it is unable to obtain financing for expansion due to a reverter clause in the deed. Plaintiff claims that the reverter clause constitutes a breach of a warranty of marketability, and also claims that none of the parties comprehended at the time of closing that the reverter clause would prevent financing[2] and thus they operated under a mutual mistake of fact justifying rescission of the contracts. The claim for damages is pursued under an indemnification clause and is dependent on a finding of breach of warranty.

In its motion for summary judgment, LCC contends there was no warranty of marketability in the Real Estate Purchase and Sale Agreement, and thus there can be no breach of such a warranty, and that rescission is not a proper remedy under the circumstances of this case as a matter of law.

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[1] An assisted living facility known as "The Meadows" had been constructed on the real estate while it was being leased from the County by LCC.

[2] It is clear that all parties were aware of the reverter clause.

With respect to the warranty of marketability, the Court agrees with LCC that such did not survive the closing, and thus may not support Plaintiff's claim for its breach. In Paragraph 4.1 of the Real Estate Purchase and Sale Agreement, LCC gives various warranties to Plaintiff "liability for which shall survive the Closing" but none of those are with respect to the marketability of the title to be conveyed. Rather, that issue is addressed in Paragraph 3, which provides that Seller shall convey to buyer "marketable and insurable fee simple title …, free and clear of all liens and encumbrances whatsoever except [nine listed exceptions]… and such other restrictions, …as may be acceptable to the Buyer in its sole discretion. … In the event that title is not good, marketable and insurable, as aforesaid, the Buyer's exclusive remedy shall be, at the sole option of the Buyer, either (i) to take such title as the Seller can give, with an agreed to reduction in the Purchase Price, or (ii) to terminate this Agreement, whereupon there shall be no further liability or obligation on either of the parties hereto and this Agreement shall be null and void." Thus, LCC made no warranty of marketability which survived the closing and, as a matter of law, is entitled to judgment on Plaintiff's claim for a breach of such warranty.

With respect to the remedy of rescission, such is to be granted only where the parties to the contract can be placed in their former positions with regard to the subject matter of the contract. Sullivan v. Allegheny Ford Truck Sales, Inc., 423 A.2d 1292 (Pa. Super. 1980). Here, it is undisputed that Plaintiff has modified the premises, and the Court finds that the modifications are such that placing the parties in their former positions is not possible.[3] Further, the law requires one to act quickly after discovering facts which he believes entitles him to rescission of his bargain, and just for that reason; that is, to ensure that the parties may indeed be placed back into their former positions. As was stated by the Court in Fichera v, Gording,

> When a party discovers facts which warrant rescission of his contract, it is his duty to act promptly, and in case he elects to rescind, to notify the other party without delay, or within a reasonable time. If possible, the rescission should be made while the parties can still be restored to their original positions.

[3] The evidence indicates Plaintiff spent approximately $500,000 in making improvements to the property.

Fichera v. Gording, 227 A.2d 642, 643-44 (Pa. 1967) (quoting 8 Pennsylvania Law Encyclopedia §258, with approval). Here, it cannot be disputed by Plaintiff that it was aware of a potential problem with financing because of the reverter clause even before it closed on the transaction.[4] Yet, Plaintiff went through with the transaction and then did not file the instant suit until 2006. It cannot be seriously argued that Plaintiff was "prompt" in bringing the issue before the Court.

It should be noted that not only is rescission not a proper remedy due to delay, but, even more importantly to this Court, because it cannot be said that the parties were operating under a mutual mistake of fact. First, in light of George Golden's deposition testimony that before the closing he had already investigated the possibility of financing and had been told by several lending institutions that they would not finance the property because of the reverter clause, and that he had conveyed that information to other members of the Board, Plaintiff cannot claim it operated under a mistake of fact.[5] Further, as a misconception which avoids a contract must necessarily be a mutual one, it must be of a fact which entered into the contemplation of both parties as a condition of their assent. Holmes v. Cameron, 110 A. 81 (Pa.1920). It cannot be said that LCC would not have entered into the Agreement of Sale and closed on the transaction if it had known that Plaintiff would not be able to obtain bank financing in the future and, of course, Plaintiff has produced no evidence to support such a proposition.

Finally, LCC contends it cannot be made to reform the deed as it can give no better title than that which it received. This issue is moot, however, as Plaintiff's claim for

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[4] In his deposition on July 12, 2007, George Golden, a member of Plaintiff's Board of Directors, testified that between May 8, 2002, and August 2002, "the bank I talked to said they could not lend based on that clause." Deposition of George Golden at p. 14.

[5] Indeed, the deposition testimony of George Golden and of Robert McKernan, Sr. makes it clear that the Board knew of the problem with bank financing, but chose to finance the purchase itself through other means, and hoped to have the reverter clause removed after the closing in order to then finance the expansion project. *See*, for example, Deposition of George Golden at p. 24: "I guess my feeling was we couldn't do any immediate borrowing, but it was hoped that, in my opinion, that the County would subrogate and allow us to borrow so that we can go ahead and build a facility, that they would not stand in our way and prevent us from doing it"; and George Golden deposition at p. 42: "everyone was aware that we couldn't use the facility for borrowing" … "we weren't concerned about it at the time" … "because we can get short-term financing and get the deal done. I think we stated earlier that we were hoping that language would be changed to allow us – to put a deed restriction or something to protect themselves and still allow us to pursue our dream of a facility for the elderly out there." Also see Deposition of Robert McKernan, Sr. at p. 36: ""I probably persuaded the Board to move along with the reverter clause, because the Commissioners, I thought, in good faith, would say, well, they're doing what we want them to do, we'll remove the reverter clause."

reformation depends on its proving a breach of warranty and, as has already been stated, that cannot be done.

ORDER

AND NOW, this 23rd day of June 2008, for the foregoing reasons, LCC's motion for summary judgment is hereby GRANTED and Plaintiff's claims against LCC are hereby DISMISSED.

BY THE COURT,

Dudley N. Anderson, Judge

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