

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PAUL VAN HORN and HELEN VAN HORN,
Plaintiffs

vs.

CANDACE NEARHOOF, RICHARD NEARHOOF,
BROOKE NEARHOOF WALTERS, GEORGE
WALTERS and BROCK NEARHOOF,
Defendants

vs.

PAULA VAN HORN MOSER and JEROME F. MOSER,
Additional Defendants

: NO. 13 – 02,279
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: CIVIL ACTION - LAW
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: Motion for Summary Judgment
: Motion in Limine

OPINION AND ORDER

Before the court are Defendants’ Motion for Summary Judgment and alternative Motion in Limine, filed April 11, 2014. Argument on the motions was heard May 6, 2014.

In their Amended Complaint, Plaintiffs, who are the parents of Defendant Candace Nearhoof and Additional Defendant Paula Moser, and the grandparents of Defendants Brooke Walters and Brock Nearhoof, seek to enforce an alleged oral promise to pay a monthly sum of money to them, rescission of deeds, an accounting under a power of attorney granted to Defendant Candace Nearhoof, and support pursuant to Section 4603 of the Domestic Relations Code.¹ Plaintiffs allege generally that they transferred all of their real and some of their personal property to all Defendants as an estate planning or asset protection plan, with the understanding that the defendants would take care of them and financially assist them in their retirement years. Plaintiffs allege specifically that the transfers to their daughters were made based on a promise from their daughters that they would pay their parents \$700 per month plus certain agreed upon expenses. They also allege that the transfer to their granddaughter of two building lots was made based on her promise to pay for one of the two building lots. They allege that they transferred their home to their grandson and reserved a life estate, and that they

¹ 23 Pa.C.S. Section 4603.

have asked him to re-convey the property to them, but that he has refused to do so. Allegations of fraud and undue influence are included, as is an allegation that Defendant Candace Nearhoof has retained, pursuant to the power of attorney held by her, sums that should have been transferred to Plaintiffs. Claims are made for breach of contract, promissory estoppel, fraud, support, undue influence, and an accounting.

In their motion for summary judgment, Defendants contend they are entitled to judgment as a matter of law on all claims except for the claim for support under the Domestic Relations Code. Defendants rely on the doctrine of merger, the statute of frauds, the statute of limitations, and, in some cases, merely a lack of evidence. In their motion in limine, which is to be addressed only if summary judgment is not entered in favor of Defendants, Defendants seek to preclude oral testimony of the alleged agreements based on the parole evidence rule.

Initially, the court will address the claims made against Brooke and Brock, Plaintiffs' grandchildren. In his deposition, Plaintiff Paul Van Horn testified that when he told Brooke he was going to transfer to her a building lot, she asked for two and promised to pay for one of them. He admitted, however, that no price was ever mentioned, let alone set, and the lots were transferred without further discussion of the matter. He also testified that the transfer to Brock of the residence was made without expectation of anything in return. It is clear, therefore, that no contract or promise can be established, that the claims against the grandchildren thus cannot stand as a matter of law, and that Defendants Brooke Walters and Brock Nearhoof are entitled to judgment in their favor.

As noted above, Plaintiffs claim they transferred certain real property to Defendant Candace Nearhoof and Additional Defendant Paula Moser based on their oral promise to pay monthly sums to Plaintiffs. While written deeds have been executed, they contain no reference to any promise to pay monthly sums, and there was never any written agreement respecting the alleged promise to pay. Defendants argue that because the deeds contain no reference to the agreement, enforcement of that agreement is barred by the doctrine of merger. The court does not agree. The doctrine of merger, "normally applied to warranties of title, 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 v. Gaster, 288 A.2d 771, 774 (Pa. 1972)(citations omitted). The promise to pay, however, appears to the court to fall within the “corollary to the doctrine of merger” that “delivery of the deed does not foreclose inquiry into those matters not intended to be controlled by the deed or which are collateral to the deed.” Id. The price, or any promise of compensation or consideration, is not a matter controlled by the deed.² The cases cited by Defendants in support of application of the doctrine are inapposite: In Pennsylvania Electric Company v. Waltman, 670 A.2d 1165 (Pa. Super. 1995), the Court applied the doctrine to prevent contradiction of a deed description by language in an agreement of sale, and in Perrige v. Horning, 654 A.2d 1183,1187 (Pa. Super. 1995), the Court actually noted that “an agreement of sale is not merged as to matters not to be consummated by the deed, or which are collateral to it, such as future use of an easement ... or enforcement of a restrictive covenant.” The doctrine of merger does not bar Plaintiffs’ claims.

Defendants also argue that the alleged promise to pay monthly sums is not enforceable under the Statute of Frauds, 33 P.S. Section 1, which renders “oral contracts regarding the sale of real estate unenforceable”. Defendants’ Brief at 13. An oral promise to pay the price *is* enforceable, however, *after* its bargained-for equivalent, the transfer of land, has been executed. *See* Corbin on Contracts, Vol. 4, Section 17.20, and Freed v. Ritchey, 8 A. 626 (Pa. 1887). Here, the deeds have been executed and delivered; the statute of frauds thus does not bar Plaintiffs’ claims, as long as they can establish the terms of the alleged promise by “full, complete, satisfactory and indubitable proof”. Tetlow's Estate, 321 Pa. 305 (1936). At this juncture, whether they will succeed at trial is not the issue; Plaintiffs have offered sufficient proof to take the matter to a fact-finder.³

² *See* Corbin on Contracts, Volume 6, Section 587 (“A deed of conveyance is seldom intended to be an ‘integration’ of the contract between vendor and purchaser. As a matter of course, parol testimony is admissible for the purpose of interpretation of the words of such a deed just as in the case of an integrated contract.”).

³ Plaintiff Paul Van Horn testified (in his deposition) that he remembered a conversation about payments and that although he could not say when that conversation took place, he would not have transferred the properties without the understanding that payments would be made. Additional Defendant Paula Moser testified (by way of deposition and affidavit) that prior to the time of the execution of the deeds, she and Defendant Candace Nearhoof promised to pay their parents \$700 each month for the remainder of their lives. Plaintiffs also produced copies of checks showing that monthly \$700 payments began within two months of execution of the deeds.

With respect to the claim for promissory estoppel, such does not appear to pertain in this case.⁴ The concept of promissory estoppel is used to enforce a promise which would otherwise be unenforceable for lack of consideration, where one who justifiably relied on the promise changes his position to his detriment. *See Crouse v. Cyclops Industries*, 704 A.2d 1090 (Pa. Super. 1997). If as Plaintiffs contend, the promise to pay was made before the property was transferred, the transfer serves as consideration for the promise to pay and promissory estoppel does not apply. If it is found that the promise to pay was not made until after the transfer, there could have been no reliance on the promise in making the transfer and thus promissory estoppel does not apply. There is also the possibility that it will be found that no promise was ever made, in which case promissory estoppel also does not apply. In light of this reasoning, the court will not address Defendants' arguments that the claim is barred by the doctrine of merger and the statute of frauds.

The request for rescission based on claims of fraud and undue influence also fail to survive summary judgment. Plaintiffs have offered no evidence whatsoever of undue influence or fraud. Instead, Plaintiffs testified that the transfers were made pursuant to their desire to avoid estate taxes and health care or nursing home costs. They offered no evidence that any of the defendants exercised any influence over them or perpetrated any fraud. In any event, as Defendants point out, the last check to Plaintiffs was issued in May 2011. The claim for fraud is thus barred by the two year statute of limitations as it was not made until September 2013. 42 Pa.C.S. Section 5524(7).

Finally, Defendants seek summary judgment on the claim for an accounting. The statute of limitations applicable to that claim is six years. *See Ebbert v. Plymouth Oil Company*, 34 A.2d 493 (Pa. 1950)(The action for an accounting at law being on the same plane, in practice, as an action in assumpsit, it is subject to the same six-year limitation). Therefore, Defendants are entitled to summary judgment on the claim with respect to any accounting for the period up to September 11, 2007. Since an accounting is provided for by

⁴ The theory was pled in the alternative.

statute, 20 Pa.C.S. Section 5610, no trial need be held, and the court will order an accounting for the period subsequent to September 11, 2007.⁵

Because the court is not entering summary judgment on all claims, the motion in limine must be addressed. By way of that motion, Defendants seek to preclude any oral testimony of the alleged agreements based on the parole evidence rule. The parole evidence rule is a substantive rule of contract law which has been described as follows: "Where the alleged prior or contemporaneous oral representations or agreements concern a subject which is specifically dealt with in the written contract, and the written contract covers or purports to cover the entire agreement of the parties, the law is now clearly and well settled that in the absence of fraud, accident or mistake the alleged oral representations or agreements are merged in or superseded by the subsequent written contract, and parole evidence to vary, modify or supersede the written contract is inadmissible in evidence." Myers v. McHenry, 580 A.2d 860, 863 (1990) (quoting LeDonne v. Kessler, 389 A.2d 1123,1126-27 (1978); *see also* Gianni v. R. Russel & Co., 126 A. 791 (Pa. 1924). The court finds this rule completely inapplicable to the present situation. Here, there is no written contract which covers the agreement of the parties. The parole evidence rule does not preclude the introduction of oral testimony to prove an oral agreement. *See* Corbin on Contracts, Volume 6, Section 588 (The "parole evidence rule," in whatever form it is stated, never purports to be applicable unless the "contract" has been reduced to "writing.")

Accordingly, for the foregoing reasons, the court enters the following:

ORDER

AND NOW, this day of May 2014, Defendants' motion for summary judgment is hereby granted with respect to all counts as to Defendants Brooke Nearhoof Walters, George Walters and Brock Nearhoof, and judgment is entered in favor of those Defendants and against Plaintiffs on all counts. As to Defendants Candace Nearhoof and

⁵ It is noted that the claim for accounting was addressed in part by way of a Motion to Compel an Accounting filed by Plaintiffs on January 28, 2014. In response to that motion, the Honorable Richard A. Gray entered a pre-trial Order on April 9, 2014. This court's Order is not meant to require any duplication of relief provided by Judge Gray's Order.

Richard Nearhoof, Defendants' motion for summary judgment is hereby granted with respect to Counts 2, 3, and 4. With respect to Count 1, the claim is hereby placed on this court's October 2014 trial term, together with the Third-Party Complaint and the Defendants' cross-claim against the Additional Defendants. A separate Scheduling Order will be issued.

Count 5 is held in abeyance pending resolution of Count 1.

Under Count 6, Defendant Candace Nearhoof shall provide the requested accounting, from September 11, 2007, within sixty (60) days of this date.

The Motion in Limine is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Christopher Williams, Esq.
William Carlucci, Esq.
Kristine Waltz, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson