

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

FIDELITY NATIONAL TITLE	:	
INSURANCE COMPANY and	:	
ALDI, INC. (PENNSYLVANIA), a	:	
PENNSYLVANIA CORPORATION	:	NO.: 23-00701
Plaintiffs	:	
v.	:	
	:	
DMS REALTY, INC., DAVID M. SHRIN	:	CIVIL ACTION
a/k/a DAVID N. SHIRN, AND DAVID A.	:	
SHIRN, SR., and MAXINE A. SHIRN	:	
and LEIDHECKER ABSTRACTING, INC.	:	

Opinion and Order

This matter earlier came before the Court on September 14, 2023, on the Preliminary Objections filed by DMS Realty, David Shirn, and Maxine Shirn (hereinafter collectively the “Defendants”, for purposes of this Opinion). Preliminarily, the Court notes that this matter appears to involve the same questions of law and fact, and to arise out of the same transaction, which gave birth to other litigation pending in this Court, to docket numbers 23-00818 and 23-00584. At least one of those matters has been the subject of a recusal of all Lycoming County judges, due to the involvement of one party who is not a party to this action. That distinction notwithstanding, judicial economy and the need to avoid inconsistent results both suggest that the matters should be consolidated pursuant to Rule 213 of the Pennsylvania Rules of Civil Procedure. That Rule permits consolidation by the Court, or upon motion of any party. Given the recusal issue mentioned above, the Court will direct the Plaintiff to proceed with an appropriate motion.

Background

The gravamen of the Complaint appears to be Plaintiffs’ assertion that one or more of the Defendants defrauded one or more of the Plaintiffs, by closing on a real estate

transaction without disclosing the existence of a mortgage lien on the subject real property. Further, the Plaintiffs assert their entitlement of the benefit of certain “boilerplate” title warranties which are contained “upstream” in the chain of title.

DMS Realty, David Shirn, and Maxine Shirn filed Preliminary Objections on August 1, 2023, in four (4) Counts. At Count I, Defendants assert that Plaintiffs are obligated to attach both the written real estate agreement of sale and a title chain examination to the Complaint. At Count II, Defendants assert that Plaintiffs should be precluded from proceeding on both legal claims and equitable claims, within the same Complaint. At Count III, Defendants claim that Plaintiffs lack standing to pursue a claim under the Uniform Voidable Transactions Act (hereinafter “UVTA”), because Plaintiffs are not “creditors” of the Defendants, as defined in the UVTA. At Count IV, Defendants claim that Plaintiffs cannot assert claims against David Shirn, or Maxine Shirn (hereinafter collectively “Shirn”), because the underlying real estate transaction involved a transfer of title from Defendant DMS to Plaintiff Aldi, Inc. The Court will address Defendants’ claims in that order.

Questions Presented

1. Whether Defendants’ Preliminary Objection seeking to strike the Complaint should be granted, based upon Plaintiffs’ failure to attach the written real estate agreement of sale and a title chain examination to the Complaint.
2. Whether Defendants’ Preliminary Objection seeking to strike Count V of the Complaint should be granted, based upon the fact that Plaintiffs are proceeding on both legal claims and equitable claims, within the same Complaint.

3. Whether Defendants' Preliminary Objection seeking to strike Count VI of the Complaint should be granted, based upon Defendants' assertion that Plaintiffs are not "creditors" of the Defendants, as defined in the UVTA.
4. Whether Defendants' Preliminary Objection seeking to strike Count VIII of the Complaint should be granted, based upon fact that the underlying real estate transaction involved only a transfer of title from Defendant DMS to Plaintiff Aldi.

Answers

1. Defendants' Preliminary Objection seeking to strike the Complaint will not be granted because Plaintiffs did not attach the written real estate agreement of sale and a title chain examination to the Complaint, since it is not clear that Plaintiffs' claims are based upon a breach of the agreement of sale.
2. Defendants' Preliminary Objection seeking to strike Count V of the Complaint will not be granted, based upon the fact that Rule 1020 (c) of the Pennsylvania Rules of Civil Procedure expressly permits Plaintiffs to assert claims in the alternative.
3. Plaintiffs will be directed to file an Amended Complaint, setting forth the material facts upon which their claim under the UVTA is based.
4. Defendants' Preliminary Objection seeking to strike Count VIII of the Complaint will not be granted, since Defendants' claim is on the merits.

Discussion

1. Defendants' Preliminary Objection seeking to strike the Complaint will not be granted because Plaintiffs did not attach the written real estate agreement of sale and a title chain examination to the Complaint, since it is not clear that Plaintiffs' claims are based upon a breach of the agreement of sale.

Rule 1019(h) of the Pennsylvania Rules of Civil Procedure requires that a plaintiff state if the agreement upon which a claim is based is oral or in writing. If in writing, Rule 1019 (i) requires that the writing be attached. Count VIII of the Complaint is based upon written warranties in the chain of title. The subject deeds are attached to the Complaint. The Complaint does not contain any count alleging breach of contract of the written real estate agreement of sale. Like the real estate agreement of sale, documents in the chain of title are relevant to the litigation, but are not truly documents upon which Plaintiffs' claims are based. While those documents need not be attached to the Complaint, Defendants are certainly free to demand that Plaintiffs produce copies, pursuant to Rule 4009.1.

2. Defendants' Preliminary Objection seeking to strike Count V of the Complaint will not be granted, based upon the fact that Rule 1020 (c) of the Pennsylvania Rules of Civil Procedure expressly permits Plaintiffs to assert claims in the alternative.

Although the separate action of equity has been abolished under the unified judicial system, the procedural aspect of the pre-existing objection of the existence of a full, complete, and adequate remedy at law has been preserved under Rule 1028(a)(8). The existence of that defense notwithstanding, a plaintiff is permitted to plead inconsistent claims in the alternative, pursuant to Rule 1020(c). For over seventy (70) years, it has been the settled law of this Commonwealth that a plaintiff is permitted to plead alternative, inconsistent claims.

Though it is apparent the averments in appellant's petition are inconsistent and conflicting there is no basis for holding that the petition is defective. Under Pa.R.C.P. 1020(c), 12 P.S. Appendix, pleading in the alternative is permissible. See *Betta v. Smith*, 368 Pa. 33, 35, 81 A.2d 538. And in *Martin v. Wilson*, 371 Pa. 529, 534, 92 A.2d 193, 195, it is stated by Mr. Chief Justice Horace Stern: 'But the objection to such inconsistency in pleading has now been overcome by Pa.R.C.P. 1020(c), which provides that 'Causes of action and defenses may be pleaded in the alternative.' Therefore, insofar as the dismissal of appellant's petition was based on the inconsistencies in the averments of his petition we do not concur in the decision of the court below.

Baron v. Bernstein, 175 Pa.Super. 608, 106 A.2d 668, 669 (1954).

3. Although Plaintiffs claims under the UVTA are dubious, the Court will permit Plaintiffs one opportunity to replead those claims.

The Court begins with an analysis of the legal test for preliminary objections in the nature of a demurrer:

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, *Savitz v. Weinstein*, 395 Pa. 173, 149 A.2d 110 (1959); *March v. Banus*, 395 Pa. 629, 151 A.2d 612 (1959), and every inference fairly deducible from those facts, *Hoffman v. Misericordia Hospital of Philadelphia*, 439 Pa. 501, 267 A.2d 867 (1970); *Troop v. Franklin Savings Trust*, 291 Pa. 18, 139 A. 492 (1927). The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer. *Savitz v. Weinstein*, *supra*.

Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. *Schott v. Westinghouse Electric Corp.*, 436 Pa. 279, 259 A.2d 443 (1969); *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965); *Savitz v. Weinstein*, *supra*; ****829** *London v. Kingsley*, 368 Pa. 109, 81 A.2d 870 (1951); *Waldman v. Shoemaker*, 367 Pa. 587, 80 A.2d 776 (1951). **If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.** *Packler v. State Employment Retirement Board*, 470 Pa. 368, 371, 368 A.2d 673, 675 (1977); *see also, Schott v. Westinghouse Electric Corp.*, *supra*, 436 Pa. at 291, 259 A.2d at 449 (emphasis added).

Mudd v. Hoffman Homes for Youth, Inc., 374 Pa.Super. 543 A.2d 1092, 1093–94 (Pa. Super. 1988) (quoting *County of Allegheny v. Commonwealth*, 490 A.2d 402, 408 (Pa. 1985)) (*emphasis added*).

The UVTA (12 Pa.C.S. Sections 5101-5114) provides that a creditor (defined as one who has a “claim”) is permitted to seek to reverse any transfer (defined as “disposing of an asset”) by any debtor (defined as “a person that is liable on a claim”) if the transfer was not for reasonably equivalent value, and the transfer was made at a time when the debtor was insolvent, or the transfer had that effect.

Simply put, the Act is intended to provide relief to a creditor who has an existing financial claim against an insolvent debtor, where the debtor has “given away” any asset which would have otherwise been available to the creditor, for collection of the debt. Such are not the facts of this case. The Complaint is devoid of any allegations of material fact upon which the Court can base the conclusion that Plaintiffs had any claim against the Defendants which preceded the subject real estate transaction, or that the Defendants were insolvent, or that the transaction made them insolvent, or that the Defendants made any transfer for less than reasonably equivalent value. On the contrary, the allegations set forth in Count VI of the Complaint suggest that the Plaintiff are merely “re-stating” their fraud claim asserted in Count II, in the “costume” of the UVTA.

The dubious nature of Count VI notwithstanding, the Court will permit Plaintiffs to file an Amended Complaint. Plaintiffs shall either delete their claim under the UVTA, or set forth material facts in support of that claim, which meet the language of that Act.

4. Defendants' Preliminary Objection seeking to strike Count VIII of the Complaint will not be granted, since Defendants' claim is on the merits.

Defendants assert at Count IV of their Preliminary Objections that, while the deed from DMS to Plaintiffs contained a warranty of title, the Shirn Defendants are not personally obligated that warranty. Plaintiffs respond that the Shirn Defendants made similar warranties in deeds "upstream" in the chain of title, and that Plaintiffs are entitled to the benefit of those warranties pursuant to 21 Pa.C.S. Section 6. That Section provides as follows:

A covenant or agreement by the grantor or grantors in any deed or instrument in writing for conveying or releasing land that, he, they, or it "will warrant specially the property hereby conveyed," shall have the same effect as if the grantor or grantors had covenanted that he or they, his or their heirs and personal representatives or successors, will forever warrant and defend the said property, and every part thereof, unto the said grantee, his heirs, personal representatives and assigns, against the lawful claims and demands of the grantor or grantors, and all persons claiming or to claim by, through, or under him or them.

Plaintiffs allege at Paragraph 97 of the Complaint that the Shirn Defendants warranted title to their grantees in the "upstream" deeds attached to the Complaint. Plaintiffs allege at Paragraph 98 of the Complaint that Plaintiff Aldi is the assignee the rights of the Shirn grantees, and this entitled to assert warranty claims pursuant to 21 Pa.C.S. Section 6. For the purpose of testing the legal sufficiency of that claim, the Court is required to assume the accuracy of Plaintiff's well-pleaded facts. *Savitz v. Weinstein*, 395 Pa. 173, 149 A.2d 110 (1959); *March v. Banus*, 395 Pa. 629, 151 A.2d 612 (1959). While Plaintiffs may not eventually prevail on all the claims asserted at Count VIII, potential defenses on the merits of those claims are not the proper subject for preliminary objection.

ORDER

And now, this 20th day of September, 2023, it is hereby Ordered as follows:

1. The Preliminary Objections filed by Defendants DMS Realty, David Shirn, and Maxine Shirn on August 1, 2023, are granted in part and denied in part. Plaintiffs are directed to file an Amended Complaint within twenty (20) days of the filing of this Order. The Amended Complaint will either delete the claim under the Uniform Voidable Transactions Act, or will allege sufficient material facts to support that claim, as distinguished from the fraud claim asserted at Count II.
2. The remaining Preliminary Objections are dismissed.
3. The parties are Ordered and directed to consider whether this matter is appropriate for consolidation with the cases pending under docket numbers 23-00818 and 23-00584. If so, one or more of the parties should file a motion under Rule 213 of the Pennsylvania Rules of Civil Procedure, within twenty (20) days of the filing of this Order, which motion would be filed and noticed to all parties in all of the actions.

By the Court,

Hon. William P. Carlucci, Judge

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