

*Equity - Rescission of Contract - Parole Evidence Rule - Misrepresentations
of Real Estate - Time of Performance*

1. Parole evidence is admissible to show that a contract was induced by fraud and misrepresentation as to material facts affecting the consideration for the contract.
2. A complaint seeking rescission of a contract need only allege that the sellers made a misrepresentation of a past or existing fact that is material to the transaction.
3. Impossibility of performance by one party can give rise to a right of recovery for the other party even though the time for performance under the contract has not arisen.
4. In order for impossibility of performance to be a ground for relief, the impossibility must arise subsequent to the contract.

David S. Dickey, Esq., Attorney for Plaintiffs

Robert D. Myers, Esq., Attorney for Defendants

OPINION AND ORDER

Eppinger, P.J., September 12, 1977:

Lester and Shirley Shank (buyers), brought this action in equity to rescind a contract for the sale of real estate, alleging that Eugene and Elsie Bricker (sellers), misrepresented the suitability of the property for real estate purposes, and are not able to deliver title, in accordance with the agreement of sale. The sellers have filed preliminary objections, in the nature of a demurrer to the complaint.

It is the rule that a demurrer should be sustained only in cases that are clear and free from doubt. *Adams v. Speckman*, 385 Pa. 305, 122 A.2d 685 (1956). Likewise, judgment should not be entered on the basis of the pleadings if, by amendment, the plaintiff might state a better cause of action. Thus, if any doubt exists, judgment should not be entered. *Tide Water Associated Oil Co. v. Kay*, 168 Pa. Super. 263, 77 A.2d 754 (1951).

I. PAROL EVIDENCE RULE

The sellers' first ground for their demurrer is that the buyers are barred by the parol evidence rule from introducing evidence of sellers' alleged oral misrepresentations concerning the suitability of the property for an on-lot sewage disposal system. Buyers claim that they were fraudulently induced to enter into the contract by these misrepresentations. The sellers respond that the statements were true at the time they were made and that a subsequent change in regulations led to a revocation of the sewage disposal system permit which had been obtained. The buyers do not challenge the correctness of the sellers' explication of the parol evidence rule, but argue that the rule does not apply to this case.

In *LaCourse v. Kiesel*, 366 Pa. 385, 390-391, 77 A.2d 877 (1951), the plaintiffs sued to rescind an agreement for the sale of real estate, on the ground that the defendant misrepresented the nature of the zoning restrictions. The court held that the evidence of the misrepresentations was not inadmissible because of the parol evidence rule. The court distinguished the parol evidence principle as expressed in *Gianni v. Russell and Co., Inc.*, 281 Pa. 320, 126 A.2d 791 (1924), stating that in *LaCourse*, the parol evidence was not introduced for the purpose of varying or altering the terms of the written agreement but for cancelling the entire agreement. Thus parol evidence was admissible to show that the contract was induced by fraud and misrepresentation as to material facts affecting the consideration for the contract. See also *Suraci v. Ball*, 160 Pa. Super. 353, 51 A.2d 404 (1947); *Myers v. Rubin*, 399 Pa. 363, 160 A.2d 599 (1960); and *Phillips v. Eckert*, 81 York Leg. Rec. 25 (Com. Pl. 1967).

In *Clement Martin, Inc. v. Gussey*, 191 Pa. Super. 464, 157 A.2d 412 (1959): "A misrepresentation is material when it is of such a character that if it had not been made, the transaction would not have been entered into." It would be difficult to say, as a matter of law, that a representation about the availability of a sewage disposal system for property intended to be used for residential purposes is not material. Since the effect of such oral representations, if proved, would be to show that the contract was induced by a misrepresentation of a material fact, the parol evidence rule does not bar the admission of evidence of those representations.

II. IS AN ALLEGATION THAT SELLER KNEW MISREPRESENTATIONS WERE FALSE REQUIRED?

The sellers also argue that the complaint is defective, because it contains no allegations that they knew the representations were false or that the representations were omitted from the written agreement by fraud, accident, or mistake. There is, however, no support for either of these arguments.

In Pennsylvania it is a rule of pleading that fraud must be alleged with particularity. Rule 1010(b) of the Pa. R.C.P. All of the cases cited by the sellers to support their position deal with instances where the evidence of fraud was introduced to modify or alter a contract term. Those cases, as has been shown, do not apply when the evidence is introduced to show that the entire contract is void because it was induced by fraud. Only when a plaintiff seeks to modify a term of the written agreement must he allege that the term was omitted from the agreement by fraud or mistake. *Suraci v. Ball*, 160 Pa. Super. 349, 51 A.2d 404 (1947).

Even an innocent misrepresentation may give rise to a right to rescind the contract. All that is necessary is that the buyers allege and prove that the sellers made a misrepresentation of a past or existing fact that is material to the transaction. *LaCourse v. Kiesel*, supra; *Merritz v. Circelli*, 361 Pa. 239, 242, 64 A.2d 796 (1949); *Dunsmore v. Cirville*, 34 D. & C.2d 377, 34 (Com. Pl. Montgomery 1964); *Watchman v. Derran Food Plan*, 71 Dauphin 121 (Com. Pl. 1957).

To plead misrepresentation the buyers must allege that the representations were made, that they concerned a material fact, and that they were false. The sellers argue that any representations that were made were not false when made and became false only after the sewage disposal system permit was revoked as a result of a change in regulations. This argument is sound. Buyers now contend that the property was not suited to a sewage disposal system of the type represented even before the change in the regulations; that it could never have been installed on the premises. If this had been alleged we believe the complaint would be sufficient to withstand a demurrer, but the buyers omitted this. This defect, however, can be cured by amendment.

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SHERIFF'S SALES Cont'd

By virtue of a certain writ of Execution Nos. D.S.B. 1977-526 and D.S.B. 1977-527 issued out of the Court of Common Pleas of Franklin County, Pa., and to me directed, I will sell at public outcry Palace Restaurant, 24 East Baltimore Street, Greencastle, Pa. on Monday the 17th day of October A.D. 1977 at 7:00 P.M. o'clock prevailing time the following described property:

RESTAURANT EQUIPMENT

Tables (12), Chairs (46), High Chairs (2), Bun PourOMATIC Coffee Maker, Magic Whirlpool Ice Maker, Gold-N-Chef Cooler & Water Dispenser, Stainless Steel Stand, Westlock Electric Clock, Air Suspension Speaker (2), Frigidaire Refrigerator, Norge Refrigerator, Raetone Stainless Steel Cooler, French Fry Cutter, Hamburger Paddle Press, Fry Master French Fryer, Cecilware Broiler & Griddle Model HDB 2031, South Bend Gas Stove (6 Burners & Grill), Kelvinator Freezer, Stainless Steel Sink, Toster (2), Cutting Board, Glob Slicing Machine Model 150, Enter Prize Grinder, Food Warmer, Metal Shelving (13 Sets), Assortment of Restaurant Plates, Cups, Bowls; Silverware, Pots & Pans; Assortment of Can Goods.

Seized and taken in execution as the personal property of David R. Carbaugh, 24 East Baltimore Street, Greencastle, Pennsylvania, under judgement Nos. D.S.B. 1977-526 and D.S.B. 1977-527, together with any and all other personal property belonging to the above named defendant in or around the said premises.

Terms Cash Terms Cash Terms Cash

NOTICE is hereby given that all claims to the above listed property, or any part thereof, must be filed with the Sheriff of Franklin County, Pennsylvania, before the sale as above fixed; and that all claims to the proceeds from said sale must be filed with the said Sheriff before the time fixed for distribution hereafter; and that a Sheriff's schedule of distribution of said proceeds will be filed in his office on October 20, 1977; and that distribution will be made in accordance with said schedule unless exceptions are filed within ten (10) days thereafter.

Seized and taken in execution as the property of David H. Carbaugh, 24 East Baltimore Street, Greencastle, Pennsylvania.

Sheriff's Office, Chambersburg, Pa.
September 15, A.D., 1977

FRANK H. BENDER, Sheriff

(10-7)

"Men meet, mountains never."

— Poor Richard's Almanack

III. TIME FOR PERFORMANCE

As a third ground for their demurrer, the buyers argue that there can be no cancellation of the contract, because the time for performance by the sellers has not arrived. The contract provides that the sellers are obligated to deliver good title, in accordance with the agreement of sale, only after the buyers have paid all of the installments they owe to the sellers. However, the buyers allege that the sellers will not be able to perform when the time comes. The sellers' argument about time is not ripe for the delivery of the title to the real estate, as a matter of logic cannot apply to the buyers' allegation of fraud.

In Pennsylvania, impossibility of performance by one party of its contractual obligation can give rise to a right of recovery for the other party. When one party has completely or partially performed his obligation before the impossibility arose, that party may be entitled to quasi-contractual recovery. *West v. Peoples First National Bank and Trust Co.*, 378 Pa. 275, 106 A.2d 427 (1954); see also, *Burkus v. Henshall*, 386 Pa. 478, 126 A.2d 722 (1956); *Restatement, Contracts*, Sect. 458. Furthermore, in *West v. Peoples First National Bank and Trust Co.*, the court held that the term impossibility included both strict impossibility and "... impracticability because of extreme and unreasonable difficulty, expense, or loss involved." *Id.*, at 282. See *Restatement, Contracts*, Sect. 454.

If the buyers are able to establish that the sellers will not be able to perform their obligation at the proper time, the buyers would be entitled to a quasi-contractual remedy. Here the buyers have alleged that the sellers will not be able to perform, but have not alleged specifically the basis for that impossibility. Whether the impossibility arose from a pre-existing unsuitability of the property for residential purposes or whether it arose from the change in regulations or from some other source is relevant to ascertaining the buyers' rights, since impossibility as a ground for relief must be subsequent to the contract. See *West v. Peoples First National Bank and Trust Co.*, supra. To maintain any cause of action on this ground, the plaintiffs must correct this defect in an amended complaint.

CONCLUSION

Since the buyers have not stated legal causes of action in their complaint, the demurrer must be sustained. The complaint, however, may be amended to correct the defects and leave will be granted to file an amended one.

ORDER OF COURT

NOW, September 12, 1977, the demurrer is sustained. The plaintiffs (buyers) are granted twenty (20) days from this date to file an amended complaint, if they are able as stated to be necessary in the opinion or suffer non pros. Exceptions granted to both parties.

IN RE: CONDEMNATION BY THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, OF SCENIC STRIPS ADJACENT TO LEGISLATIVE ROUTE 799, SECTION 1-S AND LEGISLATIVE ROUTE 799, SECTION 1-A-A, IN ANTRIM TOWNSHIP, C. P. Franklin County Branch, No. 3 February Term, 1974

Eminent Domain - Declaration of Taking - Scenic Easement - Base Fee - Statutory Construction Act

1. The Eminent Domain Code requires that notice be given to the condemnees including their right to challenge the condemnor's right to condemn the property by preliminary objections to be filed within thirty days of the notice.
2. The holder of a base fee, another term for a conditioned or determinable fee, has a complete right to possession and present enjoyment of property for the purpose for which it was taken, but there is a possibility of reversion to the previous owner should the purpose no longer exist.
3. Statutes granting eminent domain power are to be construed strictly and against the party given the power, with the power to be exercised only to the extent necessary to achieve the purpose for which the authority was granted and the condemnation instituted.
4. Unless the statute expressly provides that a fee simple absolute must be taken only an easement is acquired by the condemnor.

5. The power to exercise eminent domain authority is not presumed to exist unless it is given by legislative action or by necessary implication.

6. The State Highway law, Act of 1945, P.L. 1242, as amended, 36 P.S. Sect. 670-413.1 does not give the Secretary of the Pennsylvania Department of Transportation the power to condemn a "Scenic easement."

John C. Janos, Assistant Attorney General, Department of Transportation, Office of Chief Counsel, Attorney for the Commonwealth

J. Glenn Benedict, Esq., Attorney for Defendants

OPINION AND ORDER

Heard before Eppinger, P.J., Keller, J.

Opinion by Eppinger, P.J., September 26, 1977:

The Commonwealth purports to condemn a *scenic easement* on lands of Robert L. and Norma Grove (The Groves), under the authority of the State Highway Law, the Act of 1945, P.L. 1242, as amended sec. 413, 36 P.S. sec. 670-413.1, ¹. The Groves have filed a petition to set aside the Declaration of Taking with "final order." The matter was presented to the Court following the filing of an answer to this petition.

Where there is a petition to set aside an order, which is in effect a petition to strike, the Court may on its own motion

1. "The secretary is hereby authorized to make a part of the establishment, construction, or reconstruction of State highways on the Federal-Aid Highway System, roadside and landscape development and scenic enhancement, including such sanitary and other non-commercial facilities as may be reasonably necessary to provide for the suitable accommodation of the public, and also including land that will be necessary for the restoration, preservation and enhancement of areas within and adjacent to such highways not to exceed one thousand (1,000) feet from right of way line. Any such roadside landscape and scenic developments may be undertaken as separate projects from highway construction or reconstruction where the secretary deems it proper, and the secretary may acquire property by gift or purchase not to exceed one thousand (1,000) feet from the right of way line and by eminent domain in base fee not to exceed five hundred (500) feet from the right of way line. . . ."