

*Equity - Specific Performance - Vendor*

1. Generally, a vendor of real estate does not have a right to specific performance because an award of money damages will make the vendor whole.
2. Where a vendor seeks more than the purchase price, such as the delivery of a mortgage and note, specific performance is an appropriate remedy.
3. Where vendee guts the interior of a vendor's dwelling before repudiating an agreement of sale rendering proof of damages by vendor almost impossible, specific performance is justified.

*Thomas J. Finucane, Esquire, Counsel for Plaintiffs*

*H. Anthony Adams, Esquire, Counsel for Defendants*

OPINION AND DECREE

KELLER, J., October 21, 1985:

This action in equity was commenced by the filing of a complaint on January 17, 1985, and service of the same by the deputized sheriff of Cumberland County on January 22, 1985. Preliminary objections were filed on behalf of the defendants and then withdrawn by counsel for the defendants. An answer was filed on May 1, 1985. A Pre-Trial Conference was held pursuant to Local Rule of Court 212.1 on June 24, 1985, and a Pre-Trial Conference Order entered in which the Court noted that this was an action by the plaintiff seeking specific performance of a contract between the plaintiffs as vendors and the defendants as vendees for the sale of certain real estate located in Franklin County. The order noted that at the time the parties entered into the written agreement, the defendants tendered a down payment check in the amount of \$1,000 and the plaintiffs agreed to accept their mortgage for the remaining \$10,000 of the purchase price at the time of settlement. The defendants stopped payment on the check and refused to go forward with the sale/purchase.

The Pre-Trial Conference Order specifically noted that the defendants contended the damages suffered by the plaintiffs could readily be liquidated and reduced to money judgment, and the plaintiffs were therefore not entitled to specific performance. To the contrary the plaintiffs contended money damages would not fully compensate them because of the difficulty in proving the loss as a result of extensive damage done to the house by the defendants, the difficulty and expense of proving the difference between contract price and market value and because of the difficulty in immediately converting the property to money to permit the plaintiffs to invest the damages recoverable in other assets. Counsel for the parties were ordered to exchange and submit to the Court memoranda of law on the issue whether the plaintiffs were entitled to a decree of specific performance or were limited to money damages under the circumstances of the case. Trial was scheduled to commence at 9:30 a.m. on August 19, 1985. Counsel did submit memoranda of law as ordered.

Trial was held as scheduled. At the inception of the trial, counsel for the plaintiffs presented a motion to amend the prayer of the complaint in manner following:

"Wherefore, Plaintiffs request your Honorable Court to (a) grant specific performance of the contract, including ordering defendants to pay the sum of \$1,000 plus interest at 6% on \$11,000 from June 9, 1984 to settlement, and order the execution of the mortgage and note in the form attached hereto, settlement to be held at such time as the Court may order, at which time the Plaintiffs would contemporaneously tender a deed to Defendants for the land, and (b) order such other relief at (sic) the Court may deem appropriate."

Counsel for the defendants advised the Court that he was familiar with the proposed amendment and in response to the Court's inquiry indicated he had no objection to allowance of the same subject, however, to his continued contention that as a matter of law the plaintiffs were not entitled to specific performance. The Court, therefore, granted the plaintiffs' motion for leave to amend.

The trial consisted of the testimony of plaintiff, Terry G. Gonder, and defendant, Catherine Arlene Burns, who was called as on cross-examination. At the conclusion of the trial the Court entered an Adjudication and Decree Nisi in favor of the plaintiffs

granting the specific performance prayed for by the plaintiffs and directing the execution and delivery of the mortgage, note, and the deed and the payments as provided in the Decree Nisi on or before September 16, 1985, unless the defendants filed appropriate post-trial motions.

Post-trial motions for the defendants were filed by defense counsel on August 29, 1985, and alleged as grounds for post-trial relief:

“4. The Adjudication and Decree Nisi are in error in ordering defendants to fulfill the terms of the real estate contract without ordering the plaintiffs to fulfill all conditions precedent in the said contract, namely, the delivery of a mobile home placement permit.

5. The findings of fact (6A through 6F) are in error in that no testimony was presented demonstrating or leading to the conclusion that the damage was caused by defendants.

6. The Court was in error in concluding that the value of such damage would be difficult to ascertain in as much as there was no testimony on the value of such damage nor the plaintiff encountering any difficulty in valuing the damage. The record presents no testimony from which the Court could draw such conclusion.

7. The conclusion of the Court and the Decree Nisi are contrary to how (sic) in as much as the plaintiff had a full and complete remedy at law and the equity action was without jurisdiction.

8. Counsel for defendant requested at the conclusion of plaintiffs' case that the matter be dismissed for want of jurisdiction since plaintiffs' evidence demonstrated no basis for specific performance. Said request was denied and should have been granted.

9. Defendant's counsel requested at the conclusion of plaintiffs' case for certification of the matter to the law side of the court since plaintiff had failed to present any evidence which would demonstrate that plaintiff did not have a full and adequate remedy at law. Said request was denied and should have been granted.

10. Defendant requests that the record of the testimony of Terry G. Gonder and Catherine A. Burns as they relate to damage to the property be transcribed.

11. The Court's Decree Nisi is not justified by the record.



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12. The Court's failure to certify this matter to the law violates defendant's constitutional right to a jury trial."

Briefs were exchanged and arguments heard on October 3, 1985. The matter is now ripe for disposition.

Preliminarily, it should be noted that counsel for the defendant complied with Pa. R.C.P. 227.3 by requesting in paragraph 10 of the post-trial motion the transcription of the testimony of Mr. Gonder and Mrs. Burns as it related to damage to the property. However, the defendants failed to comply with Pa. R.J.A. No. 5000.5 by delivering a copy of the formal request for transcript to the court reporter who took the testimony at the trial. We have been advised that the court reporter took it upon herself to inquire of counsel for the defendant whether she should proceed with transcription, and advised of the deposit which would be required as a condition precedent to starting the transcription as provided by Pa. R.J.A. No. 5000.6. No response was ever received by the court reporter to the inquiry, and no deposit was ever made. Therefore, defendant's failure to comply with the applicable Rules of Judicial Administration have deprived counsel and the Court of an official record of the evidence introduced, and the Court must and will rely upon its own notes in determining the evidentiary questions raised by the post trial motions.

In paragraph 4 of the post trial motions, supra, the defendants contend the Court erred in ordering them to comply with the terms and conditions of the real estate contract because the Court failed to order the plaintiffs to fulfill the condition precedent of delivering a mobile home placement permit.

We find no merit in this contention on two separate grounds.

In the first instance the defendants failed to plead in their answer the existence of the alleged condition precedent specifically and with particularity as required by Pa. R.C.P. 1019(c). Furthermore, neither our memory nor our trial notes indicate that the issue of the existence of a condition precedent was ever raised at trial. Pa. R.C.P. 227.1 provides inter alia:

(b) Post trial relief may not be granted unless the grounds therefor,

(1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offers of proof or other appropriate method at trial; and

(2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

The note directly following Pa. R.C.P. 227.1(b)(1) provides:

“Note: If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief.”

It is, therefore, our opinion that the defendants are not entitled to any consideration being given their contention concerning the condition precedent because it was never raised at pre-trial or at trial and the post-trial motion has to state how the grounds were asserted as required by the applicable rules.

Secondly, based on the facts in the case and the inaction of the defendants no condition precedent, in fact, existed. The purchase offer executed by the defendant on June 9, 1984 included as a term “this offer is subject to approval of mobile home permit”. The offer made by the defendants was accepted by the plaintiffs. The defendant, Catherine Arlene Burns, testified that she and her husband intended to burn the house under the supervision of Franklin Fire Company No. 4 after they had removed the fixtures and things of value from the house, and they were then going to put a mobile home on the property. The house was not burned according to the defendants’ plan and the defendants admitted in their answer to paragraph 4 of the plaintiffs’ complaint that on or about June 22, 1984 they stopped payment on the downpayment check in the amount of \$1,000 and stated that they would not go through with the agreed purchase of the land. There was no evidence that the defendants had ever made application for a mobile home permit.

Clearly, application for the mobile home permit had to be made by the defendants as the individuals who planned to install the mobile home on the real estate, and who would have the



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**DESHONG:** First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Ralph R. Deshong, late of Chambersburg, Franklin County, Pennsylvania, deceased.

**GARNER:** First and final account, statement of proposed distribution and notice to the creditors of Citizens National Bank and Trust Company, Executor of the Estate of Kathryn E. Garner, late of Guilford Township, Franklin County, Pennsylvania, deceased.

**GOETZ:** First and final account, statement of proposed distribution and notice to the creditors of Valley Bank and Trust Company and Charles E. Goetz, Co-Executors of the Estate of Edward F. Goetz, Jr., a/k/a E. F. Goetz, late of Guilford Township, Franklin County, Pennsylvania, deceased.

**GORMAN:** First and final account, statement of proposed distribution and notice to the creditors of Millard A. Ullman, Executor of the Estate of Joseph C. Gorman, late of Waynesboro, Franklin County, Pennsylvania, deceased.

Robert J. Woods  
Clerk of Orphans' Court  
Franklin County, Pennsylvania

6-6, 6-13, 6-20, 6-27

## FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, the intention to file, with the Department of State of the Commonwealth of Pennsylvania, on June 18, 1986, an application for a certificate for the conducting of a business under the assumed or fictitious name of Hair Styling Emporium, with its principal place of business at 4395 Buchanan Trail East, Zullinger, PA 17272. The names and addresses of the persons owning or interested in said business are: Mary Lou Statler, 136 N. Allison St., Greencastle, PA 17225, and Brenda L. Woodring, 136 N. Allison St., Greencastle, PA 17225.

Dennis A. Zeger  
32 E. Seminary St.  
Mercersburg, PA 17236

6-27-86

## DISCIPLINARY BOARD NOTICE

John M. Elliott, Esq., Chairman of The Disciplinary Board of the Supreme Court of Pennsylvania, announces the selection of Deborah A. Cackowski, Esq., of Philadelphia, as Chief Disciplinary Counsel to be effective July 1, 1986.

Ms. Cackowski has been Assistant Disciplinary Counsel since 1975. She has served as counsel-in-charge of the Philadelphia District I Office and also as Acting Deputy Chief Disciplinary Counsel for the past five months.

It is with reluctance and regret that The Disciplinary Board accepted the resignation of Albert M. Nichols, Esq., who served as Chief Disciplinary Counsel since 1985.

6-27-86

information necessary to complete such an application form. Had they made application and been refused, they would have had a defense to this proceeding. Having failed to make application it is a spurious issue and without merit.

In post-trial motions 5 and 6 the defendants complain of the absence of evidence justifying the conclusion that the damage was done by them, and that the value of the damage would be difficult to ascertain.

According to our notes plaintiff, Terry G. Gonder, identified nine photographs of the house and the condition of its interior which were admitted in evidence. He testified that the light fixtures and breaker panel box were missing, and the closets were torn out of the bedrooms and thrown to the right of the house. He also testified that prior to Christmas 1983, the house had been rented for \$150.00 per month and he visited it after the tenants moved out and nothing was torn up at that time. Defendant, Catherine Arlene Burns, examined the nine exhibits admitted in evidence; testified that the damage wasn't done until after the agreement was signed; that Mr. Sipes, the real estate agent, had given them permission to remove a pump and they had had to remove the bathroom floor and tub to remove the pump. She did not testify that any of the conditions referred to by Mr. Gonder or shown in the nine photographs had not been done by the defendants. As previously noted she testified that they were going to burn the house after they removed the fixtures and things of value from it. Under these circumstances, we are satisfied that we were justified in concluding that the defendants essentially gutted the home before stopping payment on their check and attempting to disavow their contract.

Nothing in our notes suggests that any testimony was introduced as to the dollar value of the damage done to the plaintiffs' house. However, the total devastation of the interior of the building as established by the exhibits led us to the conclusion which we believe to be realistic that any evidence of the value of the house before the execution of the contract of sale, and after the defendants' demolition activity would have been totally speculative and of highly questionable admissibility. In addition, the cost to the plaintiff of hiring an expert witness to mentally reconstruct the dwelling in its former condition, and assign a value to it,

would, in our judgment, be exorbitant in the light of the fact that the total contract price was \$11,000 with the plaintiff accepting financing of \$10,000 from the defendants.

Parenthetically it should be noted that any evidence as to the cost of repairing the dwelling would have been inadmissible on the grounds that that is not the proper measure of damages. In addition, evidence of the cost of such repair would no doubt have been subject to the objection that the property had been improved.

We, therefore, find no merit in motions 5 and 6.

Post-trial motions 7, 8 and 9 all assert the defendants' contention that the plaintiffs had a full and complete remedy at law for damages and, therefore, were not entitled to proceed on the equity side of the court for specific performance, and the Court erred in granting the prayer for specific performance.

We recognize that the general rule of law in Pennsylvania is that the vendor of real estate does not have a right to a decree of specific performance because generally the award of money damages will make the vendor whole and thus he has an adequate remedy at law.

In *Trachtenburg v. Sibarco Stations, Inc.*, 477 Pa. 517, 522, 523, 384 A.2d 1209 (1978), the Supreme Court of Pennsylvania concluded that the legal remedy available to the appellees was adequate and put them in as good position as if appellant had honored the contract, and remanded the case to the trial court for trial on the law side. In discussing the availability or lack of availability of specific performance as a remedy to a vendor for breach of an agreement to sell real estate, the Supreme Court stated:

... , in limited situations, specific performance might be available to a seller who could show that the legal remedies were not sufficient to put the seller in the same position as if the buyer had not breached the contract. Although at least one early case intimated that specific enforcement was available to a seller as a matter of course so long as good title could be conveyed, *Moss v. Hanson*, 17 Pa. 379, 382 (1851), *Kauffman's Appeal*, supra, 55 Pa. 383 (1867), established the rule that where the action for specific performance is simply to recover the purchase price, and nothing in the circumstances of the case require the aid of chancery to give effect

to the contract, equity will not entertain it. See also *Heights Land Co. v. Swengel's Estate*, supra, 319 Pa. 298, 179 A.431 (1935); *Dorff v. Schmunk*, 197 Pa. 298, 47 A. 113 (1900); *Dech's Appeal*, 57 Pa. 467 (1868). *The outstanding example of a situation where a seller would be entitled to specific performance is Finley v. Aiken, 1 Grant, Cas. 83 (Pa. 1855). In Finley, the vendee was contractually bound, as part of the transaction, to deliver bonds and a mortgage in order to secure deferred payments. Specific performance was granted because the seller sought more than the purchase price (delivery of a mortgage), and the contract stood "in need of the specific relief which a court of equity only can furnish."* *Kauffman's Appeal*, supra, 55 Pa. at 306. Although *Finley* was distinguished in *Kauffman's Appeal*, we have expressly limited *Finley* to its particular facts, *Dorff v. Schmunk*, 198 Pa. 298, 47 A. 113 (1900), and our research does not disclose a single case in this Commonwealth since *Finley* in 1855 in which a vendor's equitable bill to specifically enforce a real estate contract was entertained. (italics ours)

In our judgment the facts of the case at bar precisely fit within the limited exception described by the Supreme Court, and require the special relief only available in a court of equity. Furthermore, it is our opinion that the action of the defendants in gutting the plaintiff's dwelling before repudiating the contract and rendering the proof of damage done virtually impossible exacerbated the circumstances and provides additional justification for specific performance.

Post-trial motion 12 raises the issue of violating the defendants' constitutional rights to a jury trial. This issue was not raised in pre-trial proceeding or at trial. In addition, motion 12 fails to state how the grounds were asserted in pre-trial proceedings or at trial. Therefore, the paragraph is in violation of Pa. R.C.P. 227.1(b)(1)(2) and does not constitute a ground for post-trial relief. Our discussion regarding post-trial motion 4 and the applicability of Pa. R.C.P. 227.1(b) is equally applicable here and is incorporated herein by reference thereto.

#### DECREE

NOW, this 21st day of October, 1985, the defendants' post-trial motions are dismissed.

IT IS ORDERED AND DECREED THAT:

A. Joseph P. Burns and Catherine A. Burns, his wife, shall pay to Terry G. Gonder and Bonnie S. Gonder, his wife, the sum of \$1,000 plus interest at 6% from June 9, 1984 to date of payment.

B. Joseph P. Burns and Catherine A. Burns, his wife, shall execute a mortgage and note in favor of Terry G. Gonder and Bonnie S. Gonder in the form attached to this Decree.

C. Joseph P. Burns and Catherine A. Burns, his wife, shall pay interest on \$10,000 from July 15, 1984 until date of payment at the rate of 6%.

D. Terry G. Gonder and Bonnie S. Gonder, his wife, shall execute a deed with covenants of general warranty conveying the real estate they agreed to sell and the defendants agreed to purchase from the plaintiffs.

The execution and delivery of the mortgage and note and the deed and the payments all above set forth shall take place on or before November 22, 1985.

Exceptions are granted the defendants.



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