Michael T. Fordyce and Darlene C. Fordyce, husband and wife, Plaintiffs, v. John D. Helman, Darrell Brechbill and Ronald Newcomer, Individually and t/a/d/b/a Chambersburg Development Company, a General Partnership, Defendants, Franklin County Branch, Civil Action - Law No.: A.D. 1997-309, Jury Trial Demanded

Fordyce v. Helman

Real Estate Transaction -- Breach of Warranty -- Fraud -- Attorney Fees -- Rescission

1. A special warranty is an express covenant that the grantor is seized of an indefeasible estate in fee simple, freed from encumbrances done or suffered from the grantor.

2. Where a right of way encumbers the property at the time of conveyance, the seller has a cause of action against the buyer for breach of warranty.

3. The general rule that a buyer has constructive notice of recorded encumbrances does not preclude a cause of action for breach of warranty, but may limit the plaintiff's recovery.

4. A purchaser is not bound to search the record for the title of the seller; the buyer has the right to rely on the warranty made by the seller even where the encumbrance is visible and notorious.

5. Fraud is a misrepresentation of material fact upon which a party relies to his injury.

6. Fraud is generally characterized by: (1) a knowingly false misrepresentation; (2) a concealment calculated to deceive; or (3) a non-privileged failure to disclose a material fact.

7. Fraud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture.

8. Allegations of fraud must be pled with particularity, and must consist of more than legal conclusions.

9. In determine whether fraud has been pled with the required particularity, the court examines the complaint as a whole.

10. In order to plead fraud with sufficient particularity, the pleadings must adequately explain the nature of the claim to the opposing party so as to permit the preparation of a defense, and the pleadings must be sufficient to convince the court that the averments are not merely subterfuge.

11. The plaintiff alleging fraud must set forth the exact statements or actions which allegedly constitute fraudulent misrepresentation, but the plaintiff is not required to plead evidence in the complaint, and therefore, need not allege all of the factual details underlying the claim of fraud.

12. An actionable claim for fraud may be based upon the omission of a material fact.

13. The word "fraud" is a generic term which embraces a great variety of actionable wrongs. The fraud may be actual or constructive, accordingly as it is knowingly or innocently made, and where it is made by one having means of knowledge at hand, he cannot be heard to say he did not know what he should have known.

14. Where the seller of real estate failed to disclose to the buyer the existence of a right-of-way which prevented the seller from building on the property, buyer's demurrer to the buyer's fraud claim will be denied.

15. Mere silence is not sufficient to establish a cause of action for fraud unless there is a duty to speak.

16. If the fact concealed is particularly within the defendant's knowledge and of such nature that the other party is justified in assuming its non existence, there is a duty to disclose.

17. Even is the misrepresentation is innocently made, it is actionable if it relates to a matter material to the transaction.

18. Under our legal system, litigants are responsible for paying their own attorney fees unless there is statutory allowance for such fees, an agreement by the parties or some other established exception.

19. There is no established exception to permit the recovery of attorney fees in an action for fraud.

20. Rescission, an equitable rather than a legal remedy, is appropriate only under extraordinary circumstances when the complaining party has suffered a breach of such a fundamental nature that it affects the very essence of the contract and serves to defeat the object of the parties.

21. An equity court, once it has assumed jurisdiction, can award damages in addition to any equitable remedy in order to insure a just result.

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OPINION

Herman, J., January 7, 1998:

A. Factual Background

The above-captioned case comes before this Court on preliminary objections. The underlying claim arises out a real estate transaction between Michael and Darlene Fordyce (hereafter "Plaintiffs") and defendants John D. Helman, Darrell Brechbill and Ronald Newcomer, the principal owners of a general partnership doing business under the name Chambersburg Development Company (collectively referred to as "Defendants").

On December 20, 1995, following extensive negotiations, Plaintiffs paid defendants $225,000 to purchase a 1.016 acre parcel of land located at the intersection of Wayne and Garber Roads in Guilford Township, Franklin County ("Property"). Plaintiffs assert the property was to be used for the building of a double drive-through

fast food restaurant, and that they made their purpose clear to Defendants in the course of the negotiations leading to the transaction of December 20, 1995. Plaintiffs claim that Defendants led them to the mistaken belief that their proposed use of the land was feasible, while in fact, unknown to Plaintiffs, a fifty-foot right-of-way existed which precluded the construction of the planned project. It is the contention of Plaintiffs that Defendants withheld the information regarding the right-of-way in order to induce Plaintiffs' purchase of the land, and in reliance of incomplete information, they bought a piece of property which is now useless to them.

On June 30, 1997, Plaintiffs filed a Complaint alleging fraud or misrepresentation and breach of warranty against Defendants. They seek rescission of the real estate transfer and money damages well in excess of $25,000 together with pre-judgment interest, attorney fees and costs. Defendants filed preliminary objections seeking a demurrer on the breach of warranty count, a motion to strike certain portions of the complaint and a motion for a more specific pleading.

B. Discussion

The test for preliminary objections which would result in the dismissal of a cause of action is whether it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief. *Bower v. Bower*, 531 Pa. 54, 611 A.2d 181 (1992). In the review of preliminary objections, facts that are well pleaded, material and relevant will be considered as true, together with such reasonable inferences as may be drawn from such facts. *Mellon Bank v. Fabinyi*, 437 Pa. Super. 559, 650 A.2d 895 (1994). Any doubt as to the sufficiency of the pleading must be resolved in the plaintiff's favor. *MacGregor v. Medig, Inc.*, 395 Pa. Super. 221, 576 A.2d 1123 (1990). In consideration of these principles, we will address the preliminary objections in order.

1. Demurrer on Breach of Warranty Count

Defendants contend that Plaintiffs have failed to state a cause of action in breach of warranty because, according to Defendants, failure to reveal a public road right-of-way of record does not constitute a breach of a deed warranty. In their brief, they argue that

there is no law in Pennsylvania that requires deeds to contain mention of rights of way. (Defendant's brief, p. 1).

Plaintiffs argue that the special warranty contained in the deed to the property in question gives the Plaintiffs as purchasers a cause of action if the seller has caused an encumbrance to affect the property, and the encumbrance exists at the time of the transfer of the deed. (Plaintiffs' brief, p. 10). They assert that the right-of-way at issue is an encumbrance which was granted by these defendants to Guilford Township, and its mere existence at the time of the conveyance is a breach of the special warranty on the deed. (Id.)

The deed to the property contains language of special warranty.[1] The characteristics of a special warranty are discussed in the case of *Leh v. Burke*, 231 Pa. Super. 98, 331 A.2d 755 (1974) in the following fashion:

> Under this [special] warranty, the grantor agrees to defend the title to the property against any adverse claimant with a superior interest in the land claiming through the grantor. The warranty is not breached by the existence of liens or encumbrances on the property since it protects only the title. The grantee is protected against encumbrances created or allowed by the grantor by the expression 'grant and convey' contained in the deed. By statute, this language creates an express covenant '[t]hat the grantor was seized of an indefeasible estate in fee simple, freed from encumbrances done or suffered from the grantor...' 'This covenant is breached if there is an existing encumbrance created by the grantor at the time the deed is delivered.' Therefore, in order to recover against [the] grantor under the warranty in [the] deed, [the] grantees must show that [grantor] caused or allowed a lien or encumbrance to burden the land at the time of the transfer.

Leh v. Burke, 231 Pa. Super. 98, 110-111, 331 A.2d 755, 762 (1974) (citations omitted).

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[1] The penultimate paragraph on the deed reads as follows: "AND the said Grantors will warrant specially the property hereby conveyed." (Complaint, Exh. A). Based on the review of the parties' positions, there appears to be no dispute that the covenant involved is a special warranty.

Under the authority of *Leh*, the purchasers in the case *sub judice* will have a cause of action if they can show that the encumbrance of which they complain was created or allowed by the seller, and it burdened the land at the time of the transfer. Initially, it is important to note that the "grant and convey" language referred to in the above-quoted excerpt is part of the deed in the instant case. (Complaint, Exh. A). Second, it is equally important to point out that the right-of-way which encumbers the plaintiffs' property was created by the defendants inasmuch as they granted the easement to Guilford Township in April of 1993. (Complaint, Exh. D). Finally, it is undisputed that the right-of-way encumbered the property at the time of the transfer in December, 1995. These facts, and the reasonable inferences drawn therefrom, compel us to the conclusion that Plaintiffs have stated a valid cause of action for breach of warranty, and therefore, the preliminary objections in form of a demurrer to Count 2 must be overruled. In other words, it is not clear, at this stage, that the plaintiffs will be unable to prove facts legally sufficient to establish their right to relief.

In their preliminary objections, Defendants seem to suggest that Plaintiffs have no right to relief because the right-of-way was properly recorded, and they had no duty to mention the easement on the deed. Defendants appear to rely on the general rule that purchasers have constructive notice of all recorded encumbrances and are responsible for examining the title prior to conveyance. Act of April 24, 1931, P.L. 48, No. 40, § 2, 21 P.S. § 357; *Wood v. Evnitzsky*, 369 Pa. 123, 85 A.2d 24 (1951). However, this rule does not preclude a viable cause of action, but rather may function to limit the plaintiffs' recovery. *Wood, supra*. Further, although a party is chargeable with knowledge of that which can be readily discovered, there is an exception where fraud is alleged, as is the case in the instant matter. *See, Marian Bank v. International Harvester Credit Corp.*, 550 F.Supp. 456 (E.D. Pa. 1982), *affirmed Appeal of International Harvester Credit Corp.*, 725 F.2d 668. Moreover, a purchaser is not bound to search the record for the title of the seller; the buyer has a right to rely on the warranty made by the seller even where the encumbrance is visible and notorious. *Graybill v. Hassel*, 51 Lanc. Rev. 461 (C.P. 1949); *LaCourse v. Kiesel*, 366 Pa. 385, 77 A.2d 877 (1951).

2. Motion to Strike

In addition to seeking a demurrer on the breach of warranty count, Defendants have moved to strike certain claims and demands from the Complaint. They seek to strike the plaintiffs' allegations of fraud, their demand for attorney fees and their demand for a jury trial. We will address these motions to strike *seriatim*.

a. Allegations of Fraud

Allegations of fraud must be pled with particularity, and must consist of more than legal conclusions. Pa.R.C.P. No. 1019(b); *Bash v. Bell Telephone Co. of Pennsylvania*, 411 Pa. Super. 347, 601 A.2d 825 (1992). In determining whether fraud has been pled with the required particularity, the court examines the complaint as a whole. *Com. by Zimmerman v. Bell Telephone Co. of Pennsylvania*, 121 Pa. Cmwlth. 642, 551 A.2d 602 (1988). In order to plead fraud with sufficient particularity, the pleadings must adequately explain the nature of the claim to the opposing party so as to permit the preparation of a defense, and the pleadings must be sufficient to convince the court that the averments are not merely subterfuge. *Martin v. Lancaster Battery Co., Inc.*, 530 Pa. 11, 606 A.2d 444 (1992). The plaintiff alleging fraud must set forth the exact statements or actions which allegedly constitute fraudulent misrepresentation. *McClellan v. Health Maintenance Organization of Pennsylvania*, 413 Pa. Super. 128, 604 A.2d 1053 (1992), *allocatur denied* 532 Pa. 664, 616 A.2d 985. However, the plaintiff is not required to plead evidence in the complaint, and therefore, need not allege all of the factual details underlying the claim of fraud. *Maleski by Taylor v. DP Realty Trust*, 653 A.2d 54 (Pa. Cmwlth. 1994).

In the instant case, Plaintiffs have alleged that, prior to the purchase of the land, the parties had engaged in negotiations which took place over a period of several months in the fall of 1995. Plaintiffs communicated to Defendants their intentions to build a double drive-through fast food restaurant on the premises. Defendants allegedly demonstrated to Plaintiffs how the restaurant envisioned by the plaintiffs could be built on the property and provided an estimate for the construction of the same. Plaintiffs further allege that the defendants failed to reveal the existence of a fifty-foot right-of-way which the defendants had granted to Guilford Township in 1993. They contend that the existence of this easement

makes their plan for a restaurant unworkable and that because they relied on the defendants' representations regarding the property, they have suffered a significant financial loss.

In our view, the allegations set forth in the Complaint are sufficient to state a viable cause of action for fraud or misrepresentation. Fraud is a misrepresentation of material fact upon which a party relies to his injury. *Greenwood v. Kadoich*, 239 Pa. Super. 372, 357 A.2d 604 (1976). An actionable claim of fraud may be based upon the omission of a material fact. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974). If true, the assertions of the Complaint would entitle Plaintiffs to the remedies available under a fraud cause of action. In making the decision to purchase the property, Plaintiffs relied on Defendants' representations that the restaurant which Plaintiffs were planning to construct would be a feasible project. It turned out that the restaurant that the Plaintiffs had conceived was not workable and the Plaintiffs suffered a loss as a result. Plaintiffs did not get the benefit of their bargain. All these facts and inferences lead us to conclude that the allegations in the complaint are sufficient to state a cause of action for fraud, and for this reason, the defendants' motion to strike the fraud allegations must be denied.

Defendants contend that the motion to strike the fraud allegations should be granted because when a party alleges fraud, it must set forth the exact statements or actions which the party alleges constitute the fraud. In this case, the plaintiffs have specifically set forth the actions which they believe constituted fraud. Accepting as true the well-pleaded facts in the Complaint, it is apparent that Defendants represented that a drive-through restaurant could be built on the premises. At the same time, they knew a fifty-foot right-of-way encumbered the property making the construction of the drive-through impossible under the proposed plan. Defendants discussed with Plaintiff how the project would be economically feasible and they offered an estimate of the construction costs. Furthermore, Defendants failed to disclose the existence of an encumbrance which would have caused Plaintiff to reconsider the deal. These actions could amount to fraud if all the elements are proven. Fraud consists of anything calculated to deceive, whether by single act or combination, or by **suppression of truth**, or **suggestion of what is false**, whether by direct falsehood or by **innuendo**, by speech or

silence, word of mouth, or look or gesture. *Pittsburgh Live, Inc. v. Sevov*, 419 Pa. Super. 423, 615 A.2d 438 (1992) (emphasis added).

Fraud is generally characterized by: (1) a knowingly false misrepresentation; (2) a concealment calculated to deceive; or (3) a non-privileged failure to disclose a material fact. *Boyle v. Odell*, 413 Pa. Super. 562, 605 A.2d 1260 (1992), *citing DeJoseph v. Zambelli*, 392 Pa. 24, 139 A.2d 644 (1958). As Justice Ladner eloquently explained in *LaCourse*, *supra*:

> The word "fraud" is a generic term which embraces a great variety of actionable wrongs... the fraud may be actual or constructive, accordingly as it is knowingly or innocently made, and where... it is made by one having means of knowledge at hand, he cannot be heard to say he did not know what he should have known. Misrepresentation under such circumstances is fraud in law as well as in equity.

LaCourse, 366 Pa. 385 at 391, 77 A.2d 877 at 881. Even if the defendants were to argue that there was no fraudulent concealment because they did not intend to deceive the plaintiffs, the facts presented by the Complaint are sufficient to state a cause of action for fraud. There is no evidence at this point that Defendants engaged in intentional conduct, but we do not need to decide that there was an intent to deceive at this stage of the proceedings.

Defendants seem to suggest that because they failed to disclose the existence of the right-of-way, they should not be made to answer to a fraud claim against them. Although it is true that mere silence is not sufficient to establish a cause of action in fraud, this is only so if there is no duty to speak. *Smith v. Renaut*, 387 Pa. Super. 299, 564 A.2d 188 (1989). The information which Defendants failed to disclose was material to the transaction and they had a duty to make Plaintiffs aware of it.[2] Furthermore, if the fact concealed is particularly within the knowledge of one party and of such nature that the other party is justified in assuming its non existence, there is a duty to disclose. *Fox's Foods, Inc., v. Kmart Corp.*, 870 F. Supp. 599 (M.D. Pa. 1994). In the instant case, the existence of the encumbrance was

[2] A misrepresentation is material when it is of such character that if it had not been made, the transaction would not have been entered into. *DeJoseph v. Zambelli*, 392 Pa. 24, 139 A.2d 644 (1958).

particularly within the defendants' knowledge because they had granted the right-of-way to the township two years prior to the transaction at issue. Moreover, even if the misrepresentation is innocently made, it is actionable if it relates to a matter material to the transaction. *Bortz v. Noon*, 698 A.2d 1311 (Pa. Super. 1997). For these reasons, the motion to strike the fraud allegations from the Complaint must be denied.

b. Claim for Attorney Fees

Under our legal system, litigants are responsible for paying their own attorney fees. This general rule applies unless there is a statutory allowance for such fees, an agreement by the parties or some other established exception. *Corace v. Balint*, 418 Pa. 262, 210 A.2d 882 (1965). In this case, Plaintiffs have failed to show that there is statutory allowance or an agreement of the parties for the payment of attorney fees. Additionally, there is no established exception to permit recovery of attorney fees in an action for fraud. *Shanks v. Alderson*, 399 Pa. Super. 485, 582 A.2d 883 (1990), *allocatur denied* 528 Pa. 638, 598 A.2d 994. Based on the foregoing, Defendants motion to strike Plaintiffs' claim for attorney fees will be granted.

c. Demand for a Jury Trial

The Court is intrigued by the defendants' motion to strike the plaintiffs' jury demand. The plaintiffs are proceeding with an action at law seeking damages they claim to have suffered as a result of the defendants' actions or omissions, and therefore, the plaintiffs are entitled to have a jury hear their case. What makes this case interesting is that Plaintiffs also have asked for rescission of the December 20, 1995 real estate transfer. "Rescission, an equitable rather than a legal remedy, is appropriate only under extraordinary circumstances when the complaining party has suffered a breach of such a fundamental and material nature that it affects the very essence of the contract and serves to defeat the object of the parties." *Castle v. Cohen*, 676 F. Supp. 620, 627 (E.D. Pa. 1987), *affirmed in part, remanded in part* 840 F.2d 173. This begs the question whether the law side of the court can grant the rescission requested by Plaintiffs.

We know that an equity court, once it has assumed jurisdiction, can award damages in addition to any equitable remedy in order to

insure a just result. *Solomon v. Cedar Acres East, Inc.*, 455 Pa. 496, 317 A.2d 283 (1974). It is not at all clear, however, whether a court at law can grant equitable relief, such as the rescission the plaintiffs seek in this action, in addition to the monetary damages it has the power to grant. Fortunately, we do not have to decide the issue at this early stage of the proceedings. It is sufficient to say that the plaintiffs have stated a good cause of action at law for rescission and damages where they are alleging misrepresentation. *See*, *Baker v. Keefer*, 15 Cumb. L.J. 25 (1964). Therefore, the defendant's motion to strike the jury demand will be denied.

It is important to note that Plaintiffs' reliance on *Conley-Irwin Corp. v. Reiter*, 413 Pa. 213, 196 A.2d 300 (1964) in support of their position is somewhat tenuous. The Supreme Court in *Conley-Irwin* reviewed a decision by the Allegheny County Common Pleas Court in an equity action, and commented that the plaintiff in that case had an adequate remedy at law. The portions of the case which were quoted by Plaintiffs in their brief are mere *dicta* and their precedential value is questionable. To the extent that this *dicta* is useful, it addresses the issue of jurisdiction of the equity courts, and not whether a plaintiff has a right to a jury trial when he seeks equitable relief in an action at law. This question may be deserving of further examination at a more advanced stage of this litigation when more information is available and when the plaintiffs have a better idea of exactly what they want this Court to do with their claims. Plaintiffs would be well advised to study the discussions regarding election of remedies in *Roberts v. Estate of Barbagallo*, 366 Pa. Super. 559, 531 A.2d 1125 (1987) and *Boyle v. Odell*, *supra*. These cases seem to suggest that rescission and damages are inconsistent remedies and plaintiff must elect one over the other.

3. Motion for a More Specific Complaint

Defendants argue that Plaintiffs should be compelled to file a more specific complaint with regards to the allegations of fraud. They contend that Plaintiffs should be more specific about how the alleged fraud occurred, what misrepresentations of material fact were made, when they were made, and by whom and to whom these misrepresentations were made. For the reasons set forth in section B(2)(a) of this opinion, the defendants' motion for a more specific complaint will be denied.

To acquiesce to the request for the type of detailed information regarding the alleged fraud sought by the defendants would amount to requiring Plaintiffs to plead evidence. *See*, *Maleski*, *supra*. This we will not do. It is enough for the plaintiffs to plead sufficient facts to convince the Court that the opposing parties know what they are defending against, and that the averments are not merely subterfuge. *Martin*, *supra*. As we discussed above, the plaintiffs have complied with these requirements. Any further information which the defendants require in preparation for a defense of their position will have to be obtained through the process of discovery.

For the reasons stated herein an appropriate Order of Court will be entered as part of this Opinion.

ORDER OF COURT

NOW this 7th day of January, 1998, upon consideration of the Preliminary Objections referred to in the Opinion attached hereto and incorporated herein, of the briefs submitted, and of oral argument presented,

IT IS HEREBY ORDERED AND DECREED that the Preliminary Objections are granted in part and denied in part consistent with the Opinion filed herewith.