

KROMM AND WIFE VS. P & W EXCAVATING COMPANY, ET AL., C.P. Fulton County Branch, Civ. Ac. Eq., No. 87 of 1992-C

*Pleading--Demurrer--Motion for More Specific Complaint--Unfair Trade Practices and Consumer Protection Law (Act of 1968, P.L. 1224, 73 P.S. §§201-1--201-9)--Personal Liability of Corporate Officers Thereunder, or the "Participating Theory"--Deceptive Trade Practices under §201-2[4] [xvii] thereof--Declaratory Judgments Act (42 Pa. C.S. §§7531-7541)--Act 6 (41 P.S. §§101, et seq.), Claim for Attorney's Fees and Costs under §503 thereof--Interpretation of Statutory Provisions Defining Residential Mortgages as Including Installment Land Sale Contracts under Act 6--Estoppel--Definition of Fraud--Pa. R.C.P. 1019(f), on Specificity Requirements in Pleading Damages--General Damages and Special Damages.*

1. In ruling on a demurrer, the Court must accept as true all well-pleading facts, as well as all inferences reasonably deducible therefrom.
2. A demurrer may be sustained only where it is clear that the law will permit no recovery based on the facts as averred.
3. Where any doubt exists as to whether a demurrer should be sustained, that doubt should be resolved in favor of overruling the objection.
4. If there is positive proof that an individual corporate officer has personally engaged in conduct which constitutes an unfair and deceptive trade practice, it is possible that he may properly be held personally liable for his actions under the Unfair Trade Practices and Consumer Protection Law (Act of 1968, P.L. 1224, 73 P.S. §201-1--201-9).
5. Declaratory relief under the Declaratory Judgments Act (42 Pa. C.S. §§7531-7541), is not rendered unavailable, by the mere availability of a final decision, through use of some other proceeding.
6. An award of Attorney's fees and costs pursuant to §503 of Act 6 (which Act concerns interest rates on residential mortgages, and related other subjects) (41 P.S. §§101, et seq., at §503), is mandatory, if Act 6 is applicable to the situation.
7. An installment land sale contract, such as that involved in this action, has been held to be a residential mortgage, subject to the protections of Act 6, citing *Anderson Constructing Co. V. Daugherty*, 274 Pa. Super. 13, 417 A2d 1227 (1979), and *In Re Rowe*, 110 B.R. 712, 720 (Bankruptcy, E.D. of Pa. 1990).

8. Among the protections of Act 6 is the requirement of specific written notice prior to mortgage foreclosure or acceleration of the maturity of any residential mortgage obligation.
9. The termination of an installment land sale contract would be substantively comparable to a foreclosure action.
10. Estoppel occurs where an individual, by his acts, representations, or silence when he ought to speak out, intentionally or by culpable negligence induces another to believe that certain facts exist and the other rightfully relies and acts on such belief, so that prejudice will result if the former is allowed to deny the existence of such facts.
11. Under the Consumer Protection Law, an unfair act or practice includes "[e]ngaging in any other fraudulent conduct which creates likelihood of confusion or of misunderstanding" (73 P.S. §201-2[4] [xvii]).
12. It has been held that all that is required for acts or practices to be deceptive or unfair is a showing that the acts and practices are capable of being interpreted in a misleading way, citing *Commonwealth ex rel. Zimmerman v. Nickel*, 26 Pa. D&C3d 115, 120 (C.P. Mercer 1983).
13. Fraud consists of anything calculated to deceive, whether by single act, or a combination, or by suppression of truth, or a suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, or word of mouth, or look or gesture.
14. Pa. R.C.P. 1019(f) requires that items of special damage must be specifically stated, but this rule does not apply to general damages.
15. General damages are those which are the usual and ordinary consequence of the wrong done.
16. A more specific pleading is not required where the objecting party has as much or better access to the knowledge than does the pleader.

*Carolyn L. Carter, Esq.*, Attorney for Plaintiffs  
*James M. Schall*, Attorney for Defendants

OPINION AND ORDER

KAYE, J., October 15, 1992:

Willard C. Kromm and Betty J. Kromm (hereinafter "Plaintiffs") have filed a five-count complaint against P & W Excavating Company and Frank Plessinger (hereinafter "Defendants") in which they pursue a variety of remedies, each of which relates to their claim of entitlement to a deed for certain property

improved by a residence located in Fulton County, Pennsylvania. Plaintiffs seek relief in the following forms: 1/ a declaratory judgment regarding their rights under a 1975 Agreement of Sale for the property issue; 2/ an action to quiet title; 3/ relief on the basis of estoppel; 4/ treble damages for violation of the Unfair Trade Practices and Consumer Protection Law;<sup>1</sup> and 5/ actual and punitive damages for fraud. Defendants have raised preliminary objections to the complaint in the form of multiple demurrers and a motion for a more specific complaint. Argument on the preliminary objections was conducted on August 4, 1992 and briefs have been received from counsel for both parties. The matter, consequently, now is ripe for disposition.

Before addressing the preliminary objections, we believe that a review of the factual allegations set forth in Plaintiffs' complaint will facilitate our subsequent analysis of the issues presented. Plaintiffs allege that they executed an agreement of sale for the purchase of their home from P & W Excavating Company on June 28, 1975. The principal amount of \$7,308.88, with interest set at the rate of eight (8%) percent per annum, was to be paid over a ten year period in monthly installments of \$88.69. Plaintiffs made payments on the home for a number of years, at a reduced monthly rate of \$62.00 between 1976 and 1983.

On April 2, 1985, counsel for Defendants informed Plaintiffs that they were behind on their payments and requested that they pay \$50.00 immediately and resume regular monthly payments. Plaintiffs fully complied with this request. Plaintiffs, nevertheless, received another letter from Defendants' counsel, dated June 16, 1986, indicating Defendants' opinion that Plaintiffs were in default on the agreement of sale and that they would retain all monies on account as liquidated damages. The letter further indicated that an action in ejectment would be initiated unless Plaintiffs surrendered the agreement of sale and agreed to lease the premises for \$100.00 per month. Plaintiffs responded to this correspondence through their own counsel who informed Defendants that they believed they had complied with Defendants' requirements to renew monthly payments, that they would continue to do so and that they would "expect Mr. Plessinger to

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<sup>1</sup> Act of December 17, 1968, P.L. 1224, 73 P.S. §§201-1-201-9.

abide by the agreement by conveying title to the property to Mr. and Mrs. Kromm" after the unpaid balance was satisfied. (Complaint, Exhibit D. ) Defendants responded to this communication, on July 8, 1986, by reiterating their intent to pursue an eviction proceeding unless the Plaintiffs surrendered the agreement of sale and executed a lease for the premises. This was the last communication received by Plaintiffs from Defendants.

Plaintiffs' counsel sent yet another letter on July 11, 1986, rejecting Defendants' proposal for the execution of a lease and reaffirming the Plaintiffs' view that the agreement of sale remained in full force and effect. Plaintiffs agreed to increase their monthly payments to \$100.00

"so as to accelerate transfer of the property by deed from Mr. Plessinger to Mr. Kromm, pursuant to the parties' sales agreement. In no way should the \$100 payments be construed as rental payments, since Mr. Kromm is offering simply to increase the payments under the contract to \$100 per month as a good faith effort to resolve this matter." (Complaint, Exhibit F.)

Plaintiffs made monthly payments of \$100.00 through September 4, 1991, during which time Defendants accepted such payments without comment. Plaintiffs neither surrendered the agreement of sale nor signed a lease during this period. On September 4, 1991, Plaintiffs requested the deed to the property based on their calculation that the balance on the installment land sale contract had been fully paid. Defendants responded by refusing to convey title and claiming that Plaintiffs had occupied the premises as tenants since approximately August, 1986.

We will now turn to a consideration of the demurrers which have been raised by the Defendants. In ruling on a demurrer, the Court must accept as true all well-pleaded facts, as well as all inferences reasonably deducible therefrom. A demurrer may be sustained only where it is clear that the law will permit no recovery based on the facts as averred. Where any doubt exists as to whether a demurrer should be sustained, that doubt should be resolved in favor of overruling the objection. *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974).

The first contention presented by counsel for Defendants is that none of the five causes of action set forth in the complaint

may properly be brought against Defendant Frank Plessinger in his individual capacity. Mr. Plessinger is described in the complaint as "the president and principal" of P & W Excavating Company. (Complaint at Para. 3.) We note at the outset that Plaintiffs concede that their declaratory judgment, quiet title and etoppel counts lie solely against the corporate Defendant, P & W Excavating Company. Plaintiffs argue, however, that their consumer protection and fraud claims sound in tort and that their allegations of individual acts by Mr. Plessinger in connection with those claims justify his inclusion in the suit in his individual capacity. We agree.

"The law of Pennsylvania has long recognized that personal liability can be found against a corporate officer who actually participates in the wrongful, injury-producing act." *Amabile v. Auto Kleen Car Wash*, 249 Pa. Super. 240, 250, 376 A.2d 247, 252 (1977). Under the "participation theory", liability may be imposed on a corporate officer where "the record establishes the individual's participation in the tortious activity." *Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 621, 470 A.2d 86, 90 (1983). Thus, liability is imposed by virtue of the individual's actions, rather than his status as a business owner or officer. It bears noting that personal liability may exist

"even though the agent or officer derived no personal benefit, but acted on behalf, and in the name of, the corporation and the corporation alone was enriched by the act." *Sbonberger v. Oswell*, 365 Pa. Super. 481, 485, 530 A.2d 112, 114 (1987).

We observe that the "participation theory" was applied in the case of *Moy v. Schreiber Deed Security Co.*, 370 Pa. Super. 97, 535 A.2d 1168 (1988) to deny the demurrer of a corporate officer being sued in his individual capacity in a private action pursuant to the Unfair Trade Practices and Consumer Protection Law. The Court held that

"[i]f there is positive proof that the appellee in the case at bar has personally engaged in conduct which constitutes an unfair and deceptive trade practice, it is possible that he may properly be held liable for his actions under the Unfair Trade Practices and Consumer Protection Law." *Id.* at 103, 535 A.2d at 1171.

A review of the factual averments set forth in Plaintiffs' complaint, which we must regard as true for purposes of our ruling at this stage, reveals that specific allegations of personal participation by Defendant Frank Plessinger in the activities which provide the basis for this suit are, indeed, asserted. Paragraph 3 of the complaint states as follows:

Defendant Frank Plessinger is the president and principal of Defendant P & W Excavating Co. At all times relevant hereto Defendant Plessinger *directed and participated in the actions* of Defendant P & W Excavating Co. described herein.

(Emphasis added.)

In addition, Paragraph 13 of the complaint refers to a letter to Plaintiffs from Defendants' counsel, dated July 8, 1986, wherein Mr. Plessinger's direct involvement in the dispute is documented. The letter from counsel states, pertinently, as follows:

Mr. Plessinger has instructed me to pursue the remedies outlined in my letter to Mr. Kromm dated June 16, 1986 [referring to a potential ejection action]. As also stated in that letter Mr. Plessinger is willing to let Mr. Kromm remain on the premises as a tenant, but not as a purchaser.

(Complaint, Exhibit E.)

We conclude that these allegations of individual participation by Mr. Plessinger in tortious activities require our denial of his demurrer as to the counts for fraud and consumer protection violations. We will, however, sustain the demurrer as to the first, second and third counts of the complaint in accord with the concession of counsel for Plaintiffs. Thus, Mr. Plessinger will remain as a Defendant in his individual capacity only as to the fourth and fifth counts of the complaint.

The next demurrer relates to Plaintiffs' claim for declaratory relief. Defendant P & W Excavating Company contends that the declaratory relief requested is redundant in that the same relief is requested in other counts of the complaint. It is argued that declaratory relief should not be available "where a final decision could be made just as easily as in an ordinary proceeding." (Defendants' brief at 2.) This argument is directly contradicted by the language in the Declaratory Judgments Act, (DJA) 42 Pa. C.S. §§7531-7541.

Section 7537 of the DJA, 42 Pa. C.S. §7537 provides that "the existence of an alternative remedy shall not be a ground for the refusal to proceed under this subchapter." Section 7541 of the DJA, 42 Pa. C.S. §7541, specifically addresses the effect of alternative remedies by stating that "the remedy provided by this subchapter shall be additional and cumulative to all other available remedies..." Moreover, it is recognized that the DJA is to be liberally construed and offers a broadened range of availability of declaratory relief, as compared to prior legislation on the subject. *Meyers v. Department of Revenue*, 55 Pa.Cmwth. 509, 423 A.2d 1101 (1980).

Our own reading of the complaint in this matter leads us to disagree with the Defendants' characterization of the relief sought in the declaratory judgment count as redundant of other claims for relief. In fact, we find that the relief requested differs substantially from that contained in the other counts of the complaint. Specifically, Plaintiffs request an interpretation as to the continued viability of their 1975 installment land sale contract, particularly in view of the requirements of Sections 403 (c) and 404 of the Act of January 30, 1974, P.L. 13, No. 6, as amended, 41 P.S. §§403(c) and 404. (Hereinafter referred to as "Act 6"). Thus, based on the legal theories espoused in Plaintiffs' claim for declaratory relief and on the liberal construction to be accorded the DJA, we conclude that Plaintiffs are entitled to pursue their claim for declaratory relief in this matter.

Defendant has further demurred to that part of Plaintiffs' requested declaratory relief in which they seek attorney's fees and costs pursuant to Section 503 of Act 6, 41 P.S. §503. The apparent basis for this contention is Plaintiffs' alleged failure to assert the type of action on the part of Defendants which would bring this matter within the purview of Act 6. Assuming Act 6 is applicable and has been violated by Defendants, an award of costs and attorney's fees appears to be mandatory under Section 503.

The substantive portion of Act 6 with which we are here concerned <sup>2</sup> requires specific written notice prior to mortgage

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<sup>2</sup> Section 403 of Act 6, 41 P.S. §403.

foreclosure or acceleration of the maturity of any residential mortgage obligation. Defendant contends that it never commenced a foreclosure action or acceleration of a mortgage obligation, but rather, simply regarded the Plaintiffs to be in breach of the installment land sale contract and "elected to retain the hand money and all monies paid on account as liquidated damages." (Defendants' brief at 3).

We believe, however, that Plaintiffs' complaint adequately sets forth allegations which, if proven on the merits, would support the conclusion that the notice and cure provisions of Act 6 have been violated by Defendants. Critical to our analysis is the fact that an installment land sale contract, such as that alleged to have been executed by the parties to this action, has been held to constitute a "residential mortgage" subject to the protections of Act 6. *Anderson Contracting Co. v. Daugherty*, 274 Pa. Super. 13, 417 A.2d 1227 (1979). Furthermore, we agree with the statement of the Bankruptcy Court in *In Re Rowe*, 110 B.R. 712, 720 (Bkrcty. E.D. Pa. 1990) that

"[i]n an ... installment-land sale transaction, termination is comparable to and, if anything, more final in forfeiting the obligor's right to possession of the premises than is the acceleration of a mortgage."

Thus, we find no merit to the contention of Defendant that its attempted unilateral termination of the installment land sale contract in this case renders the notice and cure provisions of Act 6 inapplicable because its termination did not, technically, constitute a foreclosure or acceleration of a mortgage. Clearly, the termination of an installment land sale contract would be substantively comparable to a foreclosure action. We, accordingly, conclude that the Plaintiffs' pleadings are sufficient to state a claim that Act 6 has been violated by the Defendant. As stated previously, if a violation of Act 6 is ultimately found to exist on the merits of the case, an award of attorney's fees and costs would appear to be mandatory under Section 503 of Act 6. Defendants' demurrer on this point must, therefore, be dismissed.

Defendants next contend that Plaintiffs have failed to state a cause of action for estoppel. The rationale for this contention is

that Plaintiffs could not have reasonably expected that their monthly payments, made subsequent to Defendants' correspondence indicating its view that the installment land sale contract was in default, would be applied to reduce the amount due on the contract. Plaintiffs argue that Defendants' alleged silence while accepting monthly payments from 1986 through 1991, with notice that Plaintiffs intended such payments to be applied to reduce the amount due on the installment land sale contract, serves to state a case of estoppel. Plaintiffs further note that Defendants' proposal to regard them as tenants was conditioned on their surrender of the agreement of sale and execution of a lease, neither of which conditions ever occurred. Finally, Plaintiffs allege that they made repeated inquiries regarding the balance due on the contract during the period between 1986 and 1991, with no response forthcoming from Defendants constitutes intentional or negligent acts which induced Plaintiffs to believe that the agreement of sale remained in effect.

Estoppel occurs where an individual, by his acts, representations, or silence when he ought to speak out, intentionally or by culpable negligence induces another to believe that certain facts exist and the other rightfully relies and acts on such belief, so that prejudice will result if the former is allowed to deny the existence of such facts. *Straup v. Times Herald*, 283 Pa.Super. 58, 423 A.2d 713 (1980). The elements of estoppel are as follows:

"(1) misleading words, conduct or silence by the party against whom the estoppel is asserted, (2) unambiguous proof of reasonable reliance on the misrepresentation by the party seeking to assert the estoppel, and (3) no duty of inquiry on the party seeking to assert estoppel" *Stolarick v. Stolarick*, 241 Pa.Super. 498, 509, 363 A.2d 793, 799 (1976).

We find that an application of these legal principles to the facts asserted by Plaintiffs demonstrates that a cause of action for estoppel has been stated. Accepting the truth of the facts asserted by the Plaintiffs, there was clearly an unresolved dispute between the parties as to the continued viability of the installment land sale contract as early as 1985 or 1986. We think that Defendants' silent acceptance of payments during the period of time subsequent to 1986 could have reasonably induced Plaintiffs to believe that the contract remained in effect, particularly given the

status of the correspondence which had evidently occurred between the parties. The basis for Plaintiffs' allegations of resulting prejudice are obvious. In sum, we conclude that the allegations set forth in the complaint are fully adequate to withstand defendants' challenge by demurrer.

Defendants' fifth demurrer is to Plaintiffs' claim that the Consumer Protection Law has been violated. Specifically, Defendants contend that the complaint fails to include allegations which would constitute proscribed behavior under the Consumer Protection Law. Plaintiffs rely on Section 2 (4) (xvii) of the Consumer Protection Law, 73 P.S. §201-2(4) (xvii) to support their contention that Defendants' actions fall within the ambit of the statute. That section defines an unfair act or practice to include "[e]ngaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding." Again, the parties' disagreement seems to center on their differing interpretations of the correspondence which occurred between them during 1985 and 1986. Defendants contend that their letters adequately informed Plaintiffs that they would be regarded as tenants rather than purchasers and that none of their conduct created a likelihood of confusion or misunderstanding. Plaintiffs counter that Defendants' silent acceptance of their payments during the period from 1986 through 1991, while allowing Plaintiffs to believe that such payments would be applied to reduce the balance due under the agreement of sale, constitute fraudulent conduct since Defendants at all times intended to repudiate the contract and retain the monies collected from Plaintiffs without conveying the property at issue.

We first observe that the Consumer Protection Law applies to both the sale or leasing of real property. Section 2(3) of the Law, 73 P.S. §201-2(3); *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974). Moreover, the statute's fundamental purpose is the prevention of fraud and it must be liberally construed to effect this purpose. *Id.* It has been held that

"[a]n act or practice is deceptive or unfair if it has the capacity or tendency to deceive . . . Actual injury as a result of the deception is not required, deception itself being the evil designed to be prevented . . . Neither the intention to deceive nor actual deception need by [sic] proved . . . All that is required is a showing that the acts and practices are capable of being interpreted in a

*misleading way.*" *Commonwealth ex rel Zimmerman v. Nickel*, 26 Pa. D&C 3d 115, 120 (C.P. Mercer 1983) Citations omitted; emphasis added).

We believe that an application of these legal standards to the factual averments in this matter necessitates the conclusion that a cause of action under the Consumer Protection Law has been stated. Plaintiffs clearly allege that Defendants' actions, or failure to act, were misleading and caused them confusion and apparent misunderstanding. We will, accordingly, deny Defendants' fifth demurrer.

Defendants' final two demurrers both relate to Plaintiffs' action for fraud, and essentially follow the same line of reasoning as that previously recited. In short, Defendants argue that they have made no misrepresentations, or in the alternative, that if a misrepresentation was made, Plaintiffs could not reasonably rely thereon due to the letters from Defendants the contents of which have been discussed above. Defendants further contend that Plaintiffs have suffered no damage, since the "Corporation was due the monies paid to it by the Plaintiffs whether the Argeement was an Installment Sales Contract or a Lease." (Defendants' brief at 5.)

"Fraud consists of anything calculated to deceive, whether by single act, or a combination, or by suppression of truth, or a suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, or word of mouth, or look or gesture." *Mancini v. Morrow*, 312 Pa. Super. 192, 202, 458 A.2d 580, 584 (1983), quoting *Frowen v. Blank*, 493 Pa. 137, 143, 425 A.2d 412, 415 (1981).

Granting Plaintiffs the benefit of any reasonable inferences which may be deduced from their pleadings, as we are required to do when ruling on a demurrer, we must conclude that an action for fraud has been adequately stated. Viewed from Plaintiff's perspective, Defendants' silence while accepting monthly payments from 1986 through 1991 could be reasonably interpreted as an indication that the sales agreement remained in effect. Moreover, their complete failure to respond to Plaintiffs' inquiries regarding the balance outstanding on the contract could be construed as evidencing an intent to deceive Plaintiffs' . . . ding the status of the contract. Finally, we find Plaintiffs' claim for damages to be supported by their position that they

have at no time intended any monies to flow to Defendants in the form of rent. To the extent that Defendants refuse to acknowledge their payments as being made pursuant to the contract, Plaintiffs claim to have been damaged. We will, accordingly, deny Defendants' demurrers to Plaintiffs' action for fraud.

The final matter for our consideration is Defendants' motion for a more specific complaint. Defendants contend that Plaintiffs have alleged special damages, which must be specifically stated pursuant to Pa. R.C.P. No. 1019 (f). In contrast to special damages, which depend upon special circumstances, general damages have been defined as "those which are the usual and ordinary consequence of the wrong done." *Magdule v. Feather*, 44 Pa. D&C 2d 192, 194 (C.P. Lebanon 1968). We believe that Plaintiffs' prayer for damages is general and, thus, not subject to the dictates of Rule 1019(f). Furthermore, a more specific pleading is not required where the objecting party has as much or better access to the knowledge than does the pleader. *Paz v. Department of Corrections*, 135 Pa. Cmwlth. 162, 580 A.2d 452 (1990). Since the damages sought relate to payments made by Plaintiffs to Defendants for the subject property, we see no reason to require a more specific pleading. The motion will be denied and the attached order entered.

#### ORDER OF COURT

NOW, this 15th day of October, 1992, the preliminary objection of defendant Frank Plessinger in the nature of a demurrer is sustained in part and denied in part. Mr. Plessinger is ordered to be dismissed as a defendant with respect to the First, Second, and Third Counts of the complaint and will remain as a defendant in his individual capacity with respect to the Fourth and Fifth Counts of the Complaint. The remaining preliminary objections in the nature of demurrers and a motion for a more specific pleading are denied for the reasons set forth in the foregoing opinion.

Plaintiff is granted twenty (20) days to file an Amended Complaint in conformity herewith.