LEGAL NOTICES, cont.

Business Corporation Law of the Commonwealth of Pennsylvania.

Thomas J. Finucane, Esquire
WINGERD AND LONG
14 North Main Street
Chambersburg, PA 17201

5/12/95

NOTICE

NOTICE IS HEREBY GIVEN, that Articles of Incorporation were filed with the Department of State, of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on March 10, 1995, for the purpose of obtaining a certificate of incorporation. The name of the corporation organized under the Commonwealth of Pennsylvania Corporation Law of 1988, Act of December 21, 1988, (P.L. 1444, No. 177), 15 Pa. C.S. Section 1101, et seq., is W & W EXPRESS, INC., 1035 Leidig Drive, Chambersburg, PA 17201. The name and addresses of the person owning or interested in said corporation is Edgar D. Wenger, 1035 Leidig Drive, Chambersburg, PA 17201. The purpose for which the corporation has been organized is to engage in any lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

ROTZ & STONESIFER, P.C.
1112 Kennebec Drive
Chambersburg, PA 17201

5/12/95

OTHER LEGAL NOTICES

IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY - PENNSYLVANIA ORPHANS' COURT DIVISION, No.

IN RE: TELESHIA NICHOLE TEETER
Minor Child

NOTICE OF HEARING ON PETITION FOR TERMINATION OF PARENTAL RIGHTS

IN RE: Adoption of Teleshia Nichole Teeter, a minor, No. in the Orphans' Court Division of the Court of Common Pleas of Cambria County, Pennsylvania.

To the father of Teleshia Nichole Teeter, a minor, born on the 19th day of March, 1986, in Waynesboro, Franklin County, Pennsylvania.

LEGAL NOTICES, cont.

Take notice that a Petition has been presented in the aforesaid Court at the above number and year, praying for the termination of your parental rights in said child, and the Court has fixed the 30th day of May, 1995 at 1:15 o'clock p. m. prevailing time, as the time, and the Judge's Chambers, Room 202 227 Franklin Street, Johnstown, Pennsylvania, as the place for hearing said Petition, when and where you may appear and show cause, if any you have, why said prayer should not be granted.

McKenrick & McKenrick
By: */s/ Bruce F. McKenrick*
Bruce F. McKenrick, Esquire
Attorney for Petitioners

5/12,5/19,5/26/95

MID-ATLANTIC LAND, INC. V. DOROTHY A. BRANT AND LENORE M. WOLFE, C.P. Fulton County Branch, No. 42 of 1994-C

Action in Equity-Defendants seeking to strike ***lis pendens*** *alleging that plaintiff is not entitled to specific performance, that the application of the doctrine in this instance would be harsh or arbitrary, and to strike would not result in prejudice to the plaintiff.*

1. The purpose of a *lis pendens* is to put third parties on notice that any interest they mat acquire in the affected property during the pending litigation is subject to the result of such action.

2. A *lis pendens* is not an actual lien on the property.

3. *Lis pendens* is a product of common law and is not a statutory right.

4. A court must balance the equities to determine whether the application of the doctrine of *lis pendens* is harsh or arbitrary and whether the cancellation would result in prejudice.

5. A court may look to the potential success of the underlying action in a petition to strike *lis pendens* in determining whether to grant such a petition.

6. A remedy of specific performance will only be granted when the party requesting it is entitled to such relief, there is no other adequate remedy at law, and the court believes that justice so requires such relief.

7. Unconscionability is a defensive contractual remedy which serves to relieve a party from an unfair contract or unfair provision of a contract.

8. The unconscionability of a contract is a question of law for the court to answer.

9. The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.

10. The party claiming unconscionability must have lacked a meaningful choice in accepting the challenged provision, and the challenged provision must "unreasonably favor" the party asserting it.

11. Defendants lacked a meaningful choice in accepting the contract as they were not learned in real estate matters or the legal ramifications of contract law and its terms as plaintiff was, defendant Brant was experiencing economic hardships which necessitated a speedy sale and defendants were only given one day to accept the contract, and many of the terms in the contract unreasonably favored plaintiff's position; therefore, the contract would not be binding.

12. A tract of unimproved real estate which was recently timbered; which has no known coal, gas, or other minerals in or on it; and which is very similar to those lands surrounding it is not unique.

13. When plaintiff filed a suit for monetary damages in this action, it has demonstrated that there are other remedies at law which are available and which would be adequate.

Richard E. Freeburn, Esquire, Attorney for Plaintiff
Timothy W. Misner, Esquire, Attorney for Defendant

OPINION AND ORDER

WALKER, P.J., February 17, 1995

FINDINGS OF FACT

Plaintiff, Mid-Atlantic Land, Inc., and defendants, Dorothy Brant and Lenore Wolfe, entered into an agreement of sale for real estate located in Licking Creek Township, Fulton County, Pennsylvania containing approximately 301 acres on September 3, 1992. Pursuant to the sales agreement, plaintiff was required to make an initial deposit in the sum of three thousand ($3,000) dollars. Plaintiff was also required to make non-refundable payments of three hundred ($300) dollars each to defendant Brant every thirty (30) days for a total of four thousand ($4,000) dollars beginning thirty (30) days after plaintiff received a recorded written right-of-way and easement agreement acceptable to it. A condition of the sale was this obligation to obtain a right-of-way acceptable to the plaintiff in the plaintiff's sole discretion.

Settlement was to occur when whichever of the following came first:

> A. 30 days after the BUYER acknowledges in writing to SELLER that SELLER has provided BUYER with a recorded written Right-of-Way & Easement Agreement acceptable to BUYER; as referenced herein; and BUYER has completed all of the following: survey; testing; inspections; identifications and studies; obtained all permits and approvals; and satisfied all contingencies; all as referenced herein or;
>
> B. within 180 days after the date that BUYER acknowledges in writing to SELLER that SELLER has provided BUYER with a recorded written Right-of-Way and Easement Agreement acceptable to BUYER.

Defendants were able to obtain a right-of-way and easement agreement which provided for ingress, egress and regress, including vehicular traffic, but which did not provide for the extension of utilities. This agreement was recorded on July 8, 1993 in the Fulton County Record Book 200, Page 314. Mr. Hall, President of Mid-Atlantic Land, Inc., was given a copy of the right-of-way and easement agreement but found it unacceptable. Defendant Wolfe informed Mr. Hall that this was the only agreement that defendants could obtain and that he could either accept the agreement as is or cancel the deal.

Defendant Wolfe then testified that Mr. Hall called her some time in early August of 1993 and represented to her that the right-of-way agreement was acceptable. Defendants, through counsel, sent a letter to Mid-Atlantic Land on August 18, 1993 asking that Mr. Hall confirm, in writing, that the right-of-way was acceptable. Mr. Hall testified that he never received that particular letter. Therefore, Mr. Hall never confirmed in writing the acceptability of the right-of-way in writing.

On February 18, 1994, defendants' counsel forwarded a letter to plaintiff by certified mail informing plaintiff that the monies paid thus far would be retained by defendants as liquidated damages due to plaintiff's default of the agreement. This letter never reached its destination, as it was returned to defendants' counsel with a note that plaintiff's forwarding order had expired. Mr. Hall testified that he received other mail at that same address at that time and could not understand why he did not receive the February 18, 1993 letter from defendants' counsel. Nonetheless, four (4) days after the February 18, 1993 letter and six (6) days after signing a real estate sales agreement with another party concerning the Licking Creek property, defendants' counsel received a letter from Mr. Hall requesting settlement on March 28, 1994. Defendants responded to this letter on March 4, 1994 informing plaintiff that settlement would not be occurring due to plaintiff's failure to fulfill its obligation under the sales agreement dated September 23, 1992.

Plaintiff claims it never received the February 18, 1993 letter from defendant's counsel informing plaintiff that it was in default. Coincidentally, plaintiff commenced its action for specific performance twelve days after this letter was sent, yet two days before a second letter informing plaintiff that it was in default was sent by defendant's counsel. Plaintiff also filed its *lis pendens* against the real estate covered by that same agreement at that time. Defendants answered plaintiff's complaint and filed new matter and a counterclaim to which plaintiff filed a reply. Then on or about June 15, 1994, plaintiff commenced an action in law against the defendants and Bill Wolfe seeking monetary damages which plaintiff claims are lost profit and out-of-pocket expenses resulting from defendants' failure to follow through with settlement. Defendants filed a petition to strike *lis pendens* on August 22, 1994. As a result of this petition, a hearing was held before this court on November 30, 1994. After hearing the evidence presented on November 30, 1994 and after receiving briefs from the respective parties, this matter is now ripe for disposition.

DISCUSSION

The purpose of *lis pendens* is to put third parties on notice that any interest they may acquire in the affected property during the pending litigation is subject to the result of such action. *United States National Bank in Johnstown v. Johnson,* 506 Pa. 622, 627, 487 A.2d 809, 812 (1985). It is not an actual lien on the property. *Id.* at 627. *Lis pendens* is a product of common law and is not a statutory right. *Rosen v. Rittenhouse Towers*, 334 Pa.Super. 124, 129, 482 A.2d 1113, 1116 (1984) (citing *Dorsch v. Jenkins*, 243 Pa.Super. 300, 365 A.2d 861 (1976); *Woods v. Peckich*, 473 Pa. 226, 373 A.2d 1345 (1977); *Dice v. Bender*, 383 Pa. 94, 117 A.2d 725 (1955)). Therefore, the court must balance the equities to determine whether the application of the doctrine is harsh or arbitrary and whether the cancellation would result in prejudice. *Rosen* at 129-30; *Dice* at 98; *McCahill v. Roberts*, 421 Pa. 233, 219 A.2d 306 (1966).

The underlying action in this petition to strike *lis pendens* is for specific performance. This action for specific performance entails a real estate sales agreement. As the court in *Rosen,* this court feels compelled to review that agreement in order to determine whether

plaintiff would be entitled to specific performance. The remedy of specific performance will only be granted when the party requesting it is entitled to such relief; there is no other adequate remedy at law, and the court believes that justice so requires such relief. *Cimina v. Bronich,* 517 Pa. 378, 537 A.2d 1355 (1988).

"Unconscionability is a defensive contractual remedy which serves to relieve a party from an unfair contract or unfair provision of a contract." *Wagner v. Estate of Rummel*, 391 Pa.Super. 555, 561 571 A.2d 1055, 1058 (1990) alloc. denied 588 A.2d 510. The unconscionability of a contract is a question of law for the court to answer. *Bishop v. Washington*, 331 Pa.Super. 387, 399, 480 A.2d 1088, 1094 (1984) (citing *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F.Supp. 807, 810 (E.D.Pa. 1981) aff'd 676 F.2d 688 (3rd Cir. 1982); 13 Pa.C.S.A.Section 2302).

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may:

> (1) refuse to enforce the contract;
>
> (2) enforce the remainder of the contract without the unconscionable clause; or
>
> (3) so limit the application of any unconscionable clause as to avoid any unconscionable result.

13 Pa.C.S.A. § 2302(a)

"The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." 13 Pa.C.S.A. §2302 Comment #1. For a contract or term to be unconscionable, the party claiming unconscionability must have lacked a meaningful choice in accepting the challenged provision, and the challenged provision must "unreasonably favor" the party asserting it. *Witmer v. Exxon Corp.*, 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981); *Denlinger v. Denlinger*, 415 Pa.Super. 164, 177, 608 A.2d 1061 1068 (1992); *Wagner* at 562.

After reviewing the sales agreement between plaintiff and defendants, the court is very concerned about several aspects of that contract. Specifically, when the court cites several provisions in the agreement which, when taken together, it finds disturbing. Defendants are residents of a rural farming community located among the mountains of Pennsylvania; defendants testified that they were not well versed in legal matters as they relate to real estate and essentially were unsophisticated regarding real estate deals. Plaintiff, on the other hand, is a suburban real estate company in the business of buying and selling land and is well versed in many of the legal facets involved in real estate deals. The agreement signed by the parties was prepared by plaintiff, and defendants were only given one day in which to accept the agreement. Defendants also testified about the urgency in which they needed to sell the property due to defendant Brant's limited income as compared to her monthly expenses. The area of most concern to the court involves the provisions which dictate that plaintiff has "sole discretion" in terms of what it determines is "acceptable." These provisions allow plaintiff to hold out indefinitely with no risk of payment until it finds a buyer. In essence, paragraph 10 of the sales agreement, which incorporates paragraph 17 and paragraph 24, gives plaintiff an indefinite amount of time in which to settle on the property. Plaintiff is not compelled to begin any payments or to hold settlement until approving, in its sole discretion, a right-of-way in writing.

The court feels that defendants lacked a meaningful choice in accepting the contract. Defendants were not learned in real estate matters nor the legal ramifications of contract law and its terms. Defendant Brant's economic hardships necessitated a speedy sale, and defendants were only given one day to accept the contract. Moreover, many of the terms in the contract unreasonably favor plaintiff's position. This court feels that plaintiff has imposed unreasonable terms on defendants and has taken advantage of defendants and their position. Consequently, this court believes that the sales agreement in question would not be binding on defendants as the court deems it unconscionable.

Even had this court found the sales agreement to be binding upon the parties, this court still believes that plaintiff would not be entitled to specific performance. As stated before, the remedy of specific

performance will only be granted when the party requesting it is entitled to such relief, there is no other adequate remedy at law, and the court believes that justice so requires such relief. *Cimina v. Bronich*, 517 Pa. 378, 537 A.2d 1355 (1988). The real estate in question is an unimproved tract of land which was timbered approximately four years ago. This land is very similar to those lands surrounding it. Bill Wolfe testified that to his knowledge there is no coal, gas, or other minerals in or on the property, although it would be good for hunting purposes. This court does not feel that this particular tract of land is unique or special which would entitle plaintiff to specific performance. Additionally, plaintiff has shown, by filing a suit for monetary damages, that there are other remedies at law which would be available and which would be adequate. Therefore, it is this court's opinion that plaintiff would be unsuccessful in its quest for specific performance. Likewise, although Mr. Hall now claims that he wants the land for his own use, this court feels that this is an untruth as he is in the business of selling land, he had a buyer for the land in February, and because this court feels that Mr. Hall lacks credibility. Consequently, this court does not feel that the remedy of specific performance is required to effect justice in this case.

CONCLUSION

As the court feels that plaintiff would be unsuccessful in its quest for specific performance and because to do otherwise would exact greater financial hardships upon defendant Brant, the court is granting defendant' petition to strike *lis pendens*.

An order lifting a *lis pendens* during the course of an equity action fixes neither rights, duties, nor liabilities between the *parties*, puts no one out of court, and does not terminate the underlying litigation by prohibiting parties from proceeding with the action. Accordingly, the requisite 'finality' is not present when a *lis pendens* is lifted and the order, therefore, is interlocutory. *United States National Bank in Johnstown* at 627-628.

Neither party will be irreparably harmed by the lifting of the *lis pendens*. Plaintiff initially alleged monetary damages indicating that another remedy exists in this case. Furthermore, defendants will be required to deposit into an escrow account an amount which would cover the damages in the event that plaintiff wins its case.

ORDER OF COURT

February 17, 1995, the court orders that plaintiff's *lis pendens* is dismissed and defendants may proceed to sell the property. At settlement for the property the defendants shall be required to deposit the sum of thirty thousand ($30,000) dollars in the name of their attorney, Timothy Misner, in a federally insured interest bearing account until further order of court.